



Monday, October 25
4:30pm-6:00pm

403 - The Landlord (or Tenant) Wants Us to Sign What?

Linda Madway

Vice President and Associate General Counsel
Charming Shoppes, Inc.

William Peltin

General Counsel
Ridge Property Trust

Stacy Siegal

Vice President and General Counsel
rue21

Faculty Biographies

Linda Madway

Linda Madway is vice president and associate general counsel of Charming Shoppes, Inc., a retail company located in Bensalem, Pennsylvania, which owns the Lane Bryant, Fashion Bug, and Catherines store chains. Her areas of practice include real estate, general corporate, technology and import matters. Since joining the company, Ms. Madway has negotiated hundreds of store leases as well as leases for office, warehouse and distribution center locations.

Prior to joining Charming Shoppes, Ms. Madway was a real estate associate at Saul Ewing LLP, a Philadelphia law firm. Her practice at Saul Ewing included retail, office and industrial leasing, sales and purchases of commercial properties and real estate lending. Ms. Madway also taught business law at Immaculata College in Immaculata, Pennsylvania.

Ms. Madway is currently the president of CSI Charities, Inc., created by Charming Shoppes to support children's charities. Ms. Madway served on ACC's DELVACCA Board for many years and was chapter president. She was a member of the Community Advisory Committee appointed by the Lower Merion Board of School Directors, and a volunteer with other groups including PALS for Life, an organization that provides companion animal programs.

Ms. Madway received a BA summa cum laude from the University of Pennsylvania and a JD cum laude from Villanova University School of Law, where she was a Case and Comment Editor for the Villanova Law Review and a member of the Order of the Coif.

William Peltin

William J. Peltin currently serves as the executive vice president and general counsel of Ridge Property Trust ("Ridge"). Ridge is a private REIT specializing in the development of "state of the art" warehouse, distribution, and manufacturing facilities throughout the United States and Mexico. At Ridge, Mr. Peltin is responsible for the implementation and management of all legal matters relating to Ridge's ongoing day-to-day acquisition, development, construction, financing, and ownership activities, as well as all corporate legal matters relating to the operation of Ridge and its joint venture relationships.

Mr. Peltin began his legal career as an associate in the real estate group at Rudnick & Wolfe (now DLA Piper) and then moved to the real estate group at Gardner, Carton & Douglas (now Drinker Beadle), where he was elected partner. He left Gardner, Carton to join Ridge Realty Group, LLC (a client and predecessor to Ridge) as general counsel and a principal. Up until joining Ridge, he was a partner with the Chicago law firm of Fox, Hefter, Swibel, Levin & Carroll.

Mr. Peltin received his JD from the University of Wisconsin Law School where he served as an associate editor of the Wisconsin Law Review. Mr. Peltin received his BS with honors from the University of Illinois.

Stacy Siegal

Stacy Siegal is currently the vice president, general counsel, and corporate secretary of rue21, Inc., a fast growing retailer with over 600 stores in 44 states. Ms. Siegal joined rue21 as real estate counsel, and her responsibilities include managing the negotiation and execution of all of the Company's leases, as well as handling litigation management, corporate governance, and human resources matters.

Ms. Siegal started her legal career as a law clerk to the Hon. Larnzell Martin Jr. in Prince George's County, MD, and then worked as an associate at Feldman, Tucker in Washington, D.C. Ms. Siegal joined GNC in Pittsburgh, PA as corporate counsel doing primarily real estate work, a position she held until she left to raise her three children and do consulting work for local boards and retail companies in the Pittsburgh area.

Ms. Siegal is currently a member of the Pennsylvania Bar and an inactive member of the Maryland Bar. She is also a member of the NRF's General Counsel's Forum, the Society for Human Resource Management, and of course, ACC.

Ms. Siegal received a BA from Lehigh University and her JD from the George Washington University of Law in Washington, D.C.

I. “During Term Issues”/Documents

A. From Landlord

1. Requirements of Landlord’s Lender. Landlord’s lender has a significant interest in the property that is being leased and therefore will impose on its borrower (being the Landlord) various requirements with respect to leasing matters. The Landlord will, in turn, include these requirements in its lease with the Tenant.

a. SNDA

(i) Lease Clause; What does it mean and why is it there?

- Provides for Tenant to agree to subordination of Lease to lien of mortgage, as well as any renewals, replacements, supplements, amendments, modifications and extensions.
- Provides for attornment (i.e. recognition of Lender as Landlord) upon foreclosure or deed-in-lieu of foreclosure.
- Includes limitations on Lender’s liability/responsibility.
- Standard requirement imposed by mortgage lenders.
- Creates contractual privity between Lender and Tenant.

(ii) Typical Tenant Concerns; the Tenant’s general concern is that it does not want to execute a document with the Landlord’s lender that could serve to increase the scope of the Tenant’s obligations under the Lease and/or expand the Landlord’s (being the successor Landlord) rights under the Lease.

- Do not want to agree to additional representations and warranties.
- Do not want to agree to additional reporting requirements.
- Do not want to agree to additional indemnification obligations (e.g. environmental matters).

b. Estoppel Certificate

- (i) Lease Clause; What does it mean and why is it there?
 - Provides for Tenant to confirm salient provisions of the Lease, specific dates and absence of defaults, for the benefit of the Lender.
 - Standard requirement imposed by mortgage lenders.
 - Creates contractual privity between Lender and Tenant; information will be relied upon by Lender.

- (ii) Typical Tenant Concerns
 - Need to be accurate as to lease information; creating potential liability to a new party arising out of contractual privity.
 - Do not want to provide more information than what is required by the Lease.
 - Similar concerns to SNDA; do not want to expand obligations and/or rights since this may create an opportunity to expand representations and warranties, indemnifications and other similar matters.

2. Landlord Confirmations

a. Memorandum of Lease

- (i) Lease Clause; What does it mean and why is it there?
 - Serves to confirm Commencement Date and Expiration Date; particularly important if Commencement Date is not a fixed date (e.g. if Landlord is building out spaces).
 - Provides record notice of Lease and certain critical provisions; intended to be a summary only.
 - Rent and other potentially confidential information would never typically be included in a Memorandum of Lease.

- Landlord may oppose filing of Memorandum of Lease; concerns include difficulty in having it removed of record.
- (ii) Typical Tenant Concerns
 - Need to be accurate and address any dispute as to dates since this will be a binding document; also, do not want to create any inconsistencies between the Lease and the Memorandum of Lease.
 - Do not want to place on the public record more than minimum amount necessary (goes to issue of not disclosing in the public record confidential information).
 - Make certain that document does get recorded. (Tenant is usually more interested in it being recorded than Landlord.)
- b. Estoppel Certificate
 - (i) Lease Clause: What does it mean and why is it there?
 - Similar to requirement of Lender estoppel certificate, but this is for the benefit of the Landlord (or the Landlord's purchaser, etc.).
 - Intended to address current status of the Lease and provide the applicable parties with important information regarding the Lease, including the Tenant's (and the Landlord's) performance of their respective obligations.
 - (ii) Typical Tenant Concerns-same as Lender estoppel certificate; but the impact of missing information/inaccuracy can be potentially more significant.
- c. Verification of Insurance Requirements. Typically, a simple letter from the Landlord requesting the required certificate of insurance (naming Landlord, etc.).
 - (i) Lease Clause: What does it mean and why is it there?

- Establishes obligation on the part of the Tenant to provide evidence of insurance coverages required under the Lease.
 - Landlord has economic interest in making certain that Tenant maintains requisite insurance coverage for (a) liability; (b) personal property; and (c) business interruption; requirements of business interruption and personal property insurance may be negotiable, while liability coverage generally is not.
- (ii) Typical Tenant Concerns
- Specific requirements should have been negotiated as part of the Lease (not really the correct stage in the process to discuss insurance requirements).
 - Compliance with requirement/processing of request (do not want to create a covenant default).
- d. Expense Reconciliations. This would typically take the form of a letter from Landlord's property manager setting forth the amount of any deficiency (or surplus) for the year, as well any readjustment going forward.
- (i) Lease Clause: What does it mean and why is it there?
- Allows for Landlord to recalculate operating expenses and recover any shortfall for the year, based upon insufficient estimates.
 - Can also reset monthly obligation going forward.
 - Typically includes a procedure for audit/objection.
- (ii) Typical Tenant Concerns
- Paying too much money either as a result of an error, higher costs, or both.
 - Audit rights; is it worth it? will the Landlord pay the cost? Who will perform the audit? Can it be done on a contingency basis?
- e. Notice of Sale (including foreclosure). A typical notice of sale will

take the form of a letter from the prior landlord advising the Tenant that there is a new owner of the Building (and the Lease), providing for new contact information, including where rent should be paid.

- (i) Lease Clause: What does it mean and why is it there?
 - May not impose outright obligation to notify Tenant, but provide that the definition of Landlord includes successors and assigns.
 - Release of prior Landlord (in Lease, not notice).
 - Attornment to new Landlord.
 - Change in notices, payment of rent.
- (ii) Typical Tenant Concerns
 - Make sure the Tenant has received proper notification as to where to pay rent and that notice is received from proper party.
 - Operational concerns since the Tenant will now be a party to a lease with a new Landlord and may be concerned, for example, that the property will not be maintained as well as it had been, that the property will not be managed as well, or even that the new Landlord may be a competitor.
 - Prior claims (see Estoppel Certificate), which could include issues regarding disposition of the security deposit, as well as incomplete lease obligations or other potential defaults.

(f) Relocation of Tenant

- (i) Lease Clause: What does it mean and why is it there?
 - Creates procedure whereby Landlord can recover space that it may need for another tenant and relocate existing tenant to another space.
 - Generally limited to one-time and intended to provide for substantially similar space for the tenant.

(ii) Typical Tenant Concerns

- Adequate notice.
- Comparable space (based on size, location, view corridor, buildout, etc.).
- Sufficient reimbursement of expenses (including moving costs, phone and data charges, new stationary).
- Condition of space.
- Disruption; don't want to be subject to this more than once; plus need to provide for sufficient notice and coordination (weekend move as opposed to during the week, or not during a specific time of the year, for example).

(g) Default Notice

(i) Lease Clause: What does it mean and why is it there?

- Creates procedure for formally notifying Tenant of a default under the Lease.
- Will include requisite cure periods and is typically divided between monetary and non-monetary defaults.
- Landlord will want to follow statutory requirements, as well as specific requirements under the Lease (Landlord does not want to create an opportunity for the Tenant to object based upon a formal defect).

(ii) Typical Tenant Concerns

- Liability; Is the Tenant really in default? Has a notice been sent to Tenant's lender and what is the potential impact? Does the Tenant have other defenses?
- Cure rights under the Lease.
- How does Tenant want to respond to the notice?

B. From Tenant

1. Requirements of Tenant's Lender – Lien Waiver

- a. Lease Clause; What does it mean and why is it there?
 - Landlord typically has a statutory lien on Tenant's equipment, fixtures and other property. Lease may expressly include lien language.
 - Tenant's Lender will want a waiver of Landlord's lien so that Lender can have a priority security interest in Tenant's property.
- b. Typical Landlord concerns
 - Landlord will not want to waive its lien. Subordination of Landlord's interest is a compromise position.
 - Landlord will want to limit time period during which Lender may access the premises to dispose of personal property.
 - Landlord will want Lender to pay rent while in possession of the premises.
 - Landlord will want Lender to assume responsibility for damages to the premises during Lender's occupancy and indemnify Landlord against any claims.
 - Landlord will want notice of Tenant's default under its loan agreement and Lender's intent to access the property.

2. Tenant Confirmation

- a. Sublet/Assignment (request or notice)
 - (i) Lease Clause; What does it mean and why is it there?
 - Tenant may want to assign or sublet all or part of the premises, whether because the Tenant wants to move to other (possibly larger) space, downsize its current

space, or perhaps assign to an affiliate. Typically leases will require a Landlord's consent for any assignment or subletting.

(ii) Typical Landlord Concerns

- Creditworthiness of proposed assignee/subtenant.
- How assignee/subtenant will affect tenant mix (applies primarily in retail).
- Whether the Landlord was negotiating with the assignee/subtenant for other space in the building/center or may want to lease other vacant space to the assignee/subtenant.
- Release of Tenant from liability.
- Fees payable to Landlord for reviewing the documentation, and plans and specifications for remodeling.
- Time period for Landlord's response to request for consent.
- Recapture rights.
- Payment of any "profits" on the rent to Landlord.
- Nondisturbance agreement for the assignee/subtenant.

b. Request for Alterations

(i) Lease Clause; What does it mean and why is it there?

- Tenant may need to make alterations to the premises during the term, or it may arise in connection with an assignment/subletting. The lease will typically restrict Tenant's ability to perform alterations without Landlord's consent.

(ii) Typical Landlord concerns

- Landlord will want right to approve plans and specifications.

- Landlord will want to approve Tenant's general contractor.
 - Landlord may want Tenant to post a performance bond or other assurance of payment of its contractor and subs, such as a Letter of Credit.
 - Time period for Landlord's response to request for consent.
 - Fees payable to Landlord for plan review.
- c. Rent Reduction Request/Size Reduction Request
- (i) Lease Clause; What does it mean and why is it there?
- In tough economic times, the Tenant may ask for a reduction in rent or ask to downsize the premises.
- (ii) Typical Landlord Concerns
- Landlord will not want to reduce rent, but may do so to prevent the Tenant from defaulting and vacating the space.
 - Landlord will want the rent reduction to terminate if the Tenant defaults before the end of the rent reduction period. Landlord may want to terminate the rent reduction retroactively following a default.
 - In consideration for agreeing to a rent or size reduction, Landlord may ask Tenant to waive certain rights such as cotenancy or exclusive rights or options to extend the term, or Landlord may insist that the Tenant agree to a relocation right.
 - Size reduction may be tied to Landlord leasing the adjacent space. Issues will include construction costs for building a demising wall, separating utilities, and other necessary renovations.
- d. Breach of Covenant of Quiet Enjoyment/Notice of Interference with Tenant's Rights
- (i) Lease Clause; What does it mean and why is it there?

- Tenant will want a covenant of quiet enjoyment from Landlord. Landlord may have violated the covenant of quiet enjoyment due to its actions or those of other tenants. Noise issues are a common source of complaints.

(ii) Typical Landlord Concerns

- Will not want to assume responsibility for actions outside Landlord's control, such as actions of other tenants.

e. Default Notice (including self-help/set-off notice)

(i) Lease Clause; What does it mean and why is it there?

- Tenant will want remedies for a Landlord default, rather than relying on litigation.
- Right of cure/self-help.
- Right of off-set.
- Right to terminate.

(ii) Typical Landlord Concerns

- Landlord's lender will not want Tenant to have offset rights or termination rights. This could affect Landlord's ability to finance the lease.
- Landlord may have concerns about Tenant exercising self-help right. For example, Landlord will not want Tenant to repair the roof.

II. "End of Term Issues"

A. Early Termination

1. Lease Clause; What does it mean and why is it there?

a. Why include termination clause?

- (i) Gives the parties the right to terminate the lease for foreseeable events without relying on costly and time consuming litigation and/or default remedies.

- Similar to commercial contracts that allow termination “with cause” or “without cause”
- b. Option to Terminate Prior to End of Term Without Cause
 - (i) If the parties believe their needs may change and one or the other will need to be released from the lease before the end of the term, they should consider including an express option to terminate the lease without the existence of a default. (ex. Tenant is signing a 10 year lease for office space, but is worried they may outgrow the space before the end of the term).
 - (ii) Termination provisions are most commonly requested by Tenant and usually require payment of a termination fee to the Landlord to make the Landlord whole and partially compensate the Landlord for the value the Landlord would have realized had the lease continued until expiration.

The fee can be either:

- a fixed amount that the parties negotiate.
- actual unamortized costs that Landlord incurred as a result of the lease (i.e. costs to landlord to build out of the space, leasing commissions, etc.) that is not paid until Landlord produces evidence of the costs.
- c. Ability to Terminate Triggered by Certain Conditions
 - (i) A lease may include provisions giving a party the ability to terminate upon a triggering condition.
 - (ii) Negotiated by the parties to deal with contingencies if there is the possibility that certain key assumptions on which the lease is based change during the term.
 - (iii) Examples of such clauses common in commercial leases:
 - Sales Threshold (Kickout) Clauses:
 - Gives the Tenant the right to terminate the lease if a sales threshold is not met by the Tenant (ex. if Tenant believes they can only afford the occupancy costs if they achieve gross sales of one million dollars a year by the third lease year, then they

could request a kick-out clause that states “if Tenant does not achieve gross sales of a certain minimum dollar amount in the third lease year, Tenant may unconditionally terminate...”).

- Need to make sure the term “gross sales” is defined in the lease.

- o Co-Tenancy Clauses

- Tenants who only want to be in a retail project due to certain “anchor” tenants who will draw customers for them may request the ability to terminate (or pay reduced rent) if the anchor tenant closes for business.

- Co-Tenancy clauses often give Landlords a grace period to replace the anchor. Be careful in drafting of “replacement” language.

- Often Co-Tenancy Clauses contain a “fish or cut bait” provision whereby the Tenant has a certain period of paying reduced rent before they must decide to either return to full rent or terminate the lease.

- o Other examples of such clauses:

- Drop Dead Dates for Delivery of Premises:

- Both parties should consider allowing for termination if the Landlord is unable to turnover the premises to the Tenant by a certain fixed date. Landlord may have financing issues; Tenant may need to find alternate space.

- Also can be used as leverage for Tenant to move Landlord along in its build-out.

- Casualty Clauses

- Lease provision that addresses what happens if there is a casualty that prevents the premises from being used as anticipated by the parties.

- Landlords often want to tie this to insurance. Tenants want the ability to withhold rent and/or terminate the lease if the premises cannot be occupied.

2. Typical Landlord/Tenant Concerns:

- a. Tenants should make sure to take into consideration the ability of Landlord to re-let so that Landlord does not receive a windfall from the termination.
- b. Landlord may want to only allow such termination right after a certain period of time has passed.
- c. Both parties should make the clause as unambiguous as possible regarding the fees so that there is certainty if the termination clause is triggered and the expenses of a lawsuit are avoided.

B. Options to Renew/Extend Term or Change Up Your Space

1. Lease Clause; What does it mean and why is it there?

- a. An option clause is a lease provision that gives tenant a renewal option to extend the lease term for a single period or for multiple periods so that an entirely new negotiation is not necessary at term end. Further, in order to build flexibility into space planning efforts, tenants will often negotiate for different types of options to add or subtract space from the leased premises over time.
- b. Typical clauses contain:
 - (i) Notice Requirements.
 - (ii) Rent During New Period (fixed rate vs. market rate).

2. Typical Landlord/Tenant Concerns

- a. Landlords often prefer a right of first offer.
- b. Tenants tend to request a right of first refusal.

C. Holdover

1. Lease Clause; What does it mean and why is it there:

- a. A lease provision (the “holdover clause”) that sets out the rights of the parties if the Tenant does not leave the premises when the term ends.
- b. Why not just sue? Eviction can be very time consuming.
- c. Typical Clause contains:
 - (i) Rent Increases.
 - (ii) Good Faith Negotiation grace period: no rent increase for a period of time so long as the parties are negotiating a new deal.

D. Restoration

1. Lease Clause; What does it mean and why is it there?
 - a. Leases should, but often do not, specify exactly what the tenant’s obligations will be with respect to the space at the expiration of the lease term.
 - b. When entering into a lease, the parties should craft a “surrender clause” that spells out the parties’ rights and obligations with respect to every different kind of fixture which is contemplated for the space, in order to avoid costly disputes at the end of the lease term.
 - c. Also consider a clause requiring a Tenant to remove all of its exterior signage, including pylon signs.
2. Typical Landlord/Tenant Concerns
 - a. Ensuring that it is clearly spelled out what Tenant is to remove and what remains.
 - b. Ensuring that damage to premises is repaired.
 - c. Retail Tenant will want to have a going-out-of-business sale; Landlord often will not want that.

ARTICLE 18.

SUBORDINATION

18.1. Subordination. Landlord may from time to time execute and deliver a first mortgage or first trust deed in the nature of a mortgage, both being hereinafter referred to as a "First Mortgage", against the Land and Building or any interest therein. If requested by the mortgagee or trustee under any First Mortgage, Tenant will subordinate its interest in this Lease to said First Mortgage, and to any and all advances made thereunder and to the interest thereon, and to all renewals, replacements, supplements, amendments, modifications and extensions thereof; and Tenant will promptly execute and deliver such agreement or agreements as may be reasonably required by such mortgagee or trustee under any First Mortgage. In connection with the foregoing, Landlord shall use reasonable efforts to obtain from such mortgagee or trustee an agreement of non-disturbance.

18.2. Liability of Holder of First Mortgage; Attornment. It is further agreed that (a) if any First Mortgage shall be foreclosed, (i) the holder of the First Mortgage, ground lessor (or their respective grantees) or purchaser at any foreclosure sale (or grantee in a deed in lieu of foreclosure), as the case may be, shall not be (x) liable for any act or omission of any prior landlord (including Landlord), (y) subject to any off-sets or counterclaims which Tenant may have against a prior landlord (including Landlord), or (z) bound by any prepayment of Rent which Tenant may have made in excess of the amounts then due for the next succeeding month, (ii) the liability of the mortgagee or trustee hereunder or purchaser at such foreclosure sale or the liability of a subsequent owner designated as Landlord under this Lease shall exist only so long as such trustee, mortgagee, purchaser or owner is the owner of the Building or Land and such liability shall not continue or survive after further transfer of ownership; and (iii) upon request of the mortgagee or trustee, if the First Mortgage shall be foreclosed, Tenant will attorn, as Tenant under this Lease, to the purchaser at any foreclosure sale under any First Mortgage, and Tenant will execute such instruments as may be necessary or appropriate to evidence such attornment; and (b) this Lease may not be modified or amended so as to reduce the rent or shorten the term provided hereunder, or so as to adversely affect in any other respect to any material extent the rights of Landlord, nor shall this Lease be cancelled or surrendered, without the prior written consent, in each instance, of the mortgagee or trustee under any First Mortgage.

18.3. Modification Required by First Mortgagee. Should any prospective first mortgagee require a modification or modifications of this Lease, which modification or modifications will not cause an increased cost or expense to Tenant or in any other way materially change the rights and obligations of Tenant hereunder, Tenant agrees that this Lease may be so modified and agrees to execute whatever documents are required therefor and deliver the same to Landlord within ten (10) days following the request therefor.

Recording Requested By and
When Recorded Mail To:

SUBORDINATION, NONDISTURBANCE AND ATTORNMENT AGREEMENT

_____ ("Lender"), made a loan (the "Loan") to

_____ ("Landlord"), secured by _____
_____ (the "Deed of Trust")
on the property commonly known as _____, (the "Property"), and more
particularly described on attached Exhibit A. The parties acknowledge that the Deed of Trust was
recorded _____ with the following office and recording information:
_____.

_____ ("Tenant") has a Lease dated _____, ____ (the
"Lease") with Landlord on all or a portion of the Property (the "Leased Premises").

Lender needs assurances from Tenant. Tenant is willing to give those assurances if
Lender will agree, so long as Tenant is not in default under the Lease, not to disturb Tenant's
possession of the Leased Premises in the event of foreclosure of the Deed of Trust. Tenant also
understands that Lender will rely on the assurances and statements made in this agreement.

NOW, THEREFORE, Lender and Tenant agree as follows:

1. Subordination. Tenant agrees that the Lease, and all rights of Tenant in, to and
under the Lease and the Property, are hereby unconditionally subordinated, and shall remain
unconditionally subordinate, to the lien of the Deed of Trust and any and all other instruments
held by Lender as security for the Loan, and to any and all renewals, modifications and
extensions thereof.

2. Tenant Not To Be Disturbed. Lender agrees that, so long as Tenant is not in
default under the Lease (beyond any period given Tenant by the terms of the Lease to cure such
default):

(a) Tenant's possession of the Leased Premises under the Lease shall not be
disturbed by Lender in any foreclosure or other proceedings brought to enforce the Deed of Trust
or by any deed in lieu of foreclosure.

(b) Lender will not join Tenant as a party defendant in any action or
proceeding foreclosing the Deed of Trust unless such joinder is necessary to foreclose the Deed
of Trust, and then only for such purpose and not for the purpose of terminating the Lease.

3. Tenant To Attorn To Lender. If Lender becomes the owner of the Property by reason of foreclosure or other proceedings brought to enforce the Deed of Trust or by deed in lieu of foreclosure, the Lease shall continue in full force and effect as if Lender were the original Landlord and Tenant hereby attorns to Lender as Tenant's lessor, except Lender shall not be:

(a) Liable for any act or omission of any prior lessor (including Landlord); provided that, upon becoming owner of the Property, Lender shall perform any maintenance, repair or restoration work to the Leased Premises or the Property required of (but unperformed by) any prior lessor under the Lease; in no event, however, shall Lender have any liability under this subparagraph (a) except for failure to perform such obligations after Lender becomes the owner of the Property; or

(b) Subject to any offset or defense which Tenant might have against any such prior lessor; or

(c) Bound by any prepayment of rent by Tenant, except as required by the terms of the Lease; or

(d) Bound by any amendment, modification or waiver of any material term of the Lease, unless made with the prior written consent of Lender; or

(e) Liable for any obligation of Landlord under the Lease with respect to any property other than the Property given as security for the Loan, and Tenant will look solely to Landlord for performance and observance of any and all such obligations.

If Lender becomes the owner of the Property and thereafter sells or otherwise transfers its interest in the Property, Lender shall have no liability with respect to obligations of the lessor under the Lease which arise following the sale or other transfer of the Property by Lender.

4. Third-Party Owner. If someone acquires the Property through Lender, whether at a trustee or foreclosure sale or otherwise, that person shall have the same rights and obligations to continue the Lease with Tenant as Lender would have under this agreement.

5. Purchase Options. Any option to purchase, right of first refusal, or other right that Tenant has to acquire all or any of the Property is set forth in the Lease. Tenant agrees that, under paragraph 1 above, any such option or right is hereby made subject and subordinate to the lien of the Deed of Trust and any and all other instruments held by Lender as security for the Loan, and to any and all renewals, modifications and extensions thereof. Foreclosure of the Deed of Trust or a deed in lieu of foreclosure shall not entitle Tenant to exercise any such option or right, but such option or right shall remain exercisable, upon and subject to the terms of the Lease, after foreclosure of the Deed of Trust or deed given in lieu of foreclosure.

6. Covenants of Tenant. Tenant covenants as follows:

(a) Tenant shall pay to Lender all rent and other payments otherwise payable to Landlord under the Lease upon written demand from Lender. By its signature below, Landlord consents to Tenant's payment of rent to Lender upon Lender's written demand, agrees that Tenant

may rely solely upon Lender's written demand regardless of any dispute between Landlord and Tenant, and releases and discharges Tenant from all liability to Landlord for any payment of rent made as instructed by Lender in writing.

(b) Tenant shall not subordinate its rights under the Lease to any other mortgage, deed of trust or other security instrument without the prior written consent of Lender.

(c) Tenant shall notify Lender if Landlord is in default under the Lease and will give Lender thirty (30) days after receipt of such notice in which to cure the default before Tenant invokes any of its remedies under the Lease.

7. Assignment of Lease. Tenant understands that Landlord's interest in the Lease has been assigned to Lender in connection with the Loan. Until Lender becomes owner of the Property, however, Lender assumes no duty, liability or obligation to Tenant under the Lease.

8. Costs and Attorneys' Fees. In the event of any claim or dispute arising out of this agreement, the party that substantially prevails shall be awarded, in addition to all other relief, all attorneys' fees and other costs and expenses incurred in connection with the claim or dispute, including without limitation those fees, costs and expenses incurred before, during or after suit, in any arbitration, in any appeal, in any proceedings under any present or future bankruptcy act or state receivership, and in any post-judgment proceedings.

9. Notices. Any notices under this agreement shall be in writing and shall be personally delivered or mailed, postage prepaid, certified or registered mail, return receipt requested. Any notice sent to a party shall be sent to the party at its address below its signature hereon. Each mailed notice shall be deemed given three (3) days after its postmark. Any party may change its address by notice to the other parties.

10. Miscellaneous. This agreement may not be modified except in a writing executed by the parties or their successors in interest. This agreement shall be binding upon and shall inure to the benefit of the parties and their heirs, administrators, representatives, successors, and assigns. This agreement may be executed in counterparts, in which case all originals together shall constitute a single instrument.

DATED this _____ day of _____, ____.

"Lender"

By: _____
Its: _____

Address:

"Tenant"

Address: _____

CONSENTED AND AGREED TO this _____ day of _____, ____.

"Landlord"

Address: _____

Lender's Acknowledgement

_____)
 _____) ss.
 _____)

I certify that I know or have satisfactory evidence that _____ is the person who appeared before me, and said person acknowledged that [he][she] signed this instrument, on oath stated that [he][she] was authorized to execute the instrument and acknowledged it as the _____ of _____ to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED this _____ day of _____, _____.

 Notary Public in And For _____, residing
 at _____
 Name (printed or typed): _____
 My appointment expires: _____

EXHIBIT A

Legal Description:

SUBORDINATION, NON-DISTURBANCE**AND****ATTORNMENT AGREEMENT**

THIS SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT (this "Agreement"), made as of _____, 2010 between _____ ("Tenant"), _____ ("Landlord") and _____ ("Lender").

BACKGROUND:

Pursuant to a Lease Agreement dated _____ (herein together referred to as the "Lease"), Tenant leased from Landlord certain premises consisting of _____ sq. ft. (the "Premises") contained within a shopping center known as _____ (the "Shopping Center") in _____, _____. Financing will be secured by a mortgage or other similar security agreement (the "Mortgage") encumbering Landlord's interest in the Shopping Center. Lender has requested that Tenant subordinate the Lease and all of Tenant's rights under the Lease to the lien of the Mortgage. Tenant will agree to such subordination upon the terms and conditions set forth herein.

NOW, THEREFORE, intending to be legally bound and in consideration of the mutual covenants and promises contained in this Agreement, the parties agree as follows:

1. Subordination. The Lease and all of the right, title and interest of Tenant in and to the Premises are and shall be subject and subordinate to the lien of the Mortgage and to all of the terms and conditions contained in the Mortgage, and to any and all renewals, modifications, replacements, consolidations or extensions of the Mortgage, in accordance with the terms, covenants and conditions contained herein.

2. Non-Disturbance. So long as Tenant is not in default under any provision of the Lease beyond any applicable cure period provided for in the Lease, then:

a) the right of possession of Tenant in and to the Premises and any and all of Tenant's rights under the Lease shall not in any way be affected, disturbed, interfered with, or terminated by Lender in the exercise of any of Lender's rights under the Mortgage; and Tenant shall not be named as a party defendant in any proceedings brought by Lender whether for foreclosure of the lien of the Mortgage or other exercise of its remedies thereunder.

b) in the event Lender acquires possession of the Premises, or acquires Landlord's interest in the Premises by foreclosure, or other proceedings, the Lease shall not be terminated or affected thereby and the Lease shall continue in full force and effect.

c) in the event Landlord's interest in the Premises is sold or otherwise disposed of pursuant to foreclosure or other proceedings, the Lease shall not be terminated or affected thereby, but shall continue in full force and effect, and any purchaser shall acquire its title subject to the Lease and the rights of Tenant thereunder.

3. Rights under the Lease. If Lender shall succeed to the interest of Landlord under the Lease, Lender shall be bound to Tenant under all of the terms, covenants and conditions of the Lease, and Tenant shall have the same remedies against Lender that Tenant has against Landlord for the breach of any provision contained in the Lease. Provided, however, that Lender shall not be:

a) liable for any default of Landlord or any prior landlord except for any default that remains unremedied after Tenant had notified Lender and had given Lender the opportunity to cure;

b) subject to any offset, deduction or defense which Tenant might have arising out of any default of Landlord or any prior landlord except for any default that remains unremedied after Tenant had notified Lender and had given Lender the opportunity to cure;

c) bound by any rent or additional rent which Tenant might have paid more than thirty (30) days prior to its due date under the Lease to Landlord or any prior landlord;

d) bound by any security deposit which Tenant might have paid to Landlord or any prior landlord.

4. Notice to Lender. Tenant agrees that if Landlord is in default under any of the provisions of the Lease, Tenant shall give written notice to Lender simultaneously with any notice of default sent to Landlord specifying that a default has occurred and the nature of the default. Tenant shall permit Lender a period of thirty (30) days from the date of such notice in which to cure such default prior to exercising any of the rights or remedies of Tenant under the Lease. Provided, however, in the event of a default that cannot be cured within the initial thirty (30) day cure period, the cure period granted to Lender shall be extended for a reasonable additional period not to exceed thirty (30) additional days.

5. Attornment. In the event that Lender or the purchaser at any sale of the Premises pursuant to the Mortgage shall succeed to the rights of Landlord under the Lease, Tenant, upon written request of the successor landlord, shall attorn to the successor landlord in accordance with all of the terms covenants and conditions contained herein and in the Lease.

6. Payments to Lender Following Default. Tenant acknowledges that the Lease has been collaterally assigned by Landlord to Lender, and Landlord, Tenant and Lender agree that from and after the date that Lender notifies Tenant to remit all payments due under the Lease to Lender, or any receiver appointed by Lender, Tenant shall follow such instructions, and Landlord

hereby agrees that Tenant shall have no liability to Landlord for any payments made in accordance with Lender’s instructions.

7. Certificate. Within thirty (30) days after written request by Lender or Landlord, Tenant agrees to deliver Tenant’s Estoppel Certificate in the form attached to this Agreement as Exhibit “A” to the party requesting it, provided, that any such request shall be deemed to have been made by Landlord, and Landlord shall pay any administrative charge for the processing thereof owed by Landlord to Tenant pursuant to the terms of the Lease.

8. Termination. After payment in full of the indebtedness secured by the Mortgage and/or the recordation of a release or satisfaction of the Mortgage, this Agreement shall become void and of no further force or effect. Lender shall promptly notify Tenant of the payment in full of the Mortgage and recordation of such release or satisfaction.

9. Termination of Prior Financing. Landlord represents and warrants to Tenant that any mortgage or other similar security agreement presently encumbering Landlord’s interest in the Shopping Center has been or will be released or satisfied prior to recordation of the Mortgage.

10. Miscellaneous.

a) Any notice or other communication pursuant to this Agreement shall be deemed served only if mailed certified mail, postage prepaid, return receipt requested, or sent by airborne express or other nationally recognized overnight courier, postage prepaid with evidence of delivery, to the party at the address listed below, or to such other address as may have been given by a party in accordance with this subsection, **PROVIDED THAT ANY NOTICE TO TENANT MUST BE ADDRESSED TO THE “ATTENTION OF THE LEGAL DEPARTMENT”**. Such notice shall be effective upon being deposited in the United States Mail or with the overnight courier in the manner described above.

Notices shall be sent to the following addresses until a new address is designated by a party hereto:

To Tenant:

To Landlord:

Attn: _____

To Lender:

Attn: _____

b) This Agreement shall bind and inure to the benefit of the parties, and their heirs, personal representatives, successors and assigns.

c) This Agreement shall not be modified or amended except in writing signed by all parties.

d) The provisions of this Agreement shall be governed by and construed under the laws of the state where the Premises is located.

e) As used in this Agreement, the words "foreclosure" or "foreclosure sale" shall include the acquisition of Landlord's interest in the Premises by voluntary deed (or assignment) in lieu of foreclosure.

IN WITNESS WHEREOF, this Agreement has been executed under seal as of the date written above.

WITNESS:

TENANT:

By:_____

WITNESS:

LANDLORD:

By:_____

Name:_____

Title:_____

WITNESS:

LENDER:

By:_____

Name:_____

Title:_____

ACKNOWLEDGMENTS

COMMONWEALTH OF PENNSYLVANIA)

)ss.

COUNTY OF)

On this the ____ day of _____, 2010, before me, personally appeared , who being by me duly sworn, did say that he is the Vice President of _____, a _____ corporation, and as said Vice President acknowledged said instrument to be his free act and deed and the free act and deed of said corporation.

My Commission

Expires: _____

NOTARY PUBLIC

STATE OF)

)ss.

COUNTY OF)

On this ____ day of _____, 2010, before me, personally appeared _____, who being by me duly sworn, did say that he/she is the _____ of _____, a _____, and said _____ acknowledged said instrument to be his/her free act and deed and the free act and deed of said _____.

My Commission

Expires: _____

NOTARY PUBLIC

STATE OF)

)ss.

COUNTY OF)

On this ____ day of _____, 2010, before me, personally appeared _____, who being by me duly sworn, did say that he/she is the _____ of _____, a _____, and said _____

acknowledged said instrument to be his/her free act and deed and the free act and deed of said
_____.

My Commission

Expires: _____

NOTARY PUBLIC

EXHIBIT "A"

TENANT'S ESTOPPEL CERTIFICATE

TO: CERTIFICATE HOLDER:

RE: LEASE AGREEMENT

DATED: _____, as amended by _____ (herein together/collectively referred to as the "Lease").

TENANT: _____

TENANT'S NOTICE ADDRESS:

LANDLORD: _____

PREMISES: _____ sq. ft.

As of the date listed below, Tenant hereby certifies the following to the Certificate Holder, to Tenant's present knowledge:

1. The Lease is in full force and effect.

2. Except as provided on Exhibit A, (i) any improvements to the Premises required by the Lease to be provided by Landlord prior to delivery to Tenant have been completed in accordance with the provisions of the Lease, (ii) Tenant has accepted the Premises and the improvements thereto and has taken possession of the Premises; and (iii) the Construction Allowance (as defined in the Lease), if any, has been paid to Tenant.

3. Except as provided on Exhibit A, Landlord is not in default of the Lease, and no event has occurred and no situation exists which, with notice or the passage of time or both, would constitute a default by Landlord under the Lease. Except as provided on Exhibit A, no setoffs or credits against rent have presently accrued. Tenant has no present knowledge of any circumstances which would give rise to any setoff or credit against rental obligations, and Tenant has no defenses to enforcement of any of Tenant's covenants or obligations under the Lease.

4. Except as provided on Exhibit A, Tenant has not assigned or sublet the Premises, or transferred its interest under the Lease.

5. The Lease is for a term beginning and ending on the dates specified on Exhibit A. Tenant has option(s) to extend the term of the Lease for the period(s) set forth on Exhibit A.

6. The Lease has not been modified, altered or amended except as provided above and contains the entire existing agreement between Landlord and Tenant.

7. Rent currently payable by the Tenant under the Lease is specified on Exhibit A and has been paid through the date listed on Exhibit A.

8. Tenant has made no payment to Landlord as a security deposit and Tenant has not prepaid any rent under the Lease more than thirty (30) days prior to its due date.

9. As of the date hereof, no actions, whether voluntary or otherwise, are pending against Tenant under the bankruptcy laws of the United States or any state thereof.

10. Tenant does not have any preferential right or option to purchase all or any part of the Premises except as provided in the Lease.

11. Except as provided on Exhibit A, there are no uncured defaults by Tenant under the Lease, and no event has occurred and no situation exists which, with notice or the passage of time or both, would constitute a default by Tenant under the Lease.

Tenant makes the foregoing statements subject to the following qualifications: (i) Tenant has not verified the presence and/or absence of any particular co-tenancy in the Shopping Center and makes no representation concerning co-tenancy or the present availability of any rent concessions and/or termination right resulting from the failure of any co-tenancy requirement; (ii) Tenant has not verified whether the manner or nature of the use of other tenants' premises entitles Tenant to any rent concessions and/or termination right and makes no representation with respect thereto; (iii) Tenant does not represent that any specific item billed to Tenant by Landlord under any additional rent or other charges section or article of the Lease (e.g., common area maintenance charges, real estate taxes, insurance charges, electricity, HVAC and the like) is proper and appropriate since Tenant has not audited Landlord's books and records; (iv) Tenant may be entitled to certain late delivery credits and/or rent abatements or credits pursuant to the terms of the Lease which are not described on Exhibit A hereto; and (v) Tenant shall not be subject to any liability in damages or otherwise if any statement made by Tenant herein is found to be untrue, however, except as limited herein, Tenant shall be estopped from asserting claims or defenses against the addressee hereof based on such untrue statement.

DATED: _____, ____

TENANT:

[-----]

By:

EXHIBIT A

[-----]

This Exhibit is an integral part of the Tenant's Estoppel Certificate to which the Exhibit is attached, given by Tenant to [-----] ("Certificate Holder") as of [DATE].

- 1) Construction Remaining to be Completed by Landlord: _____
- 2) Outstanding Construction Allowance: _____
- 3) Default by Landlord: _____
- 4) Setoff Rights which have Accrued: _____
- 5) Assignment or Subletting: _____
- 6) Commencement Date of the Term: _____
- 7) Expiration Date of Current Term: _____
- 8) Remaining Option(s) to Extend: _____
- 9) Monthly Rent: _____
- 10) Rent Paid Through: _____
- 11) Default by Tenant: _____

ARTICLE ____

ESTOPPEL CERTIFICATE

Tenant agrees that from time to time upon not less than ten (10) days prior request by Landlord, or the holder of any First Mortgage or any ground lessor, Tenant (or any permitted assignee, subtenant, licensee, concessionaire or other occupant of the Premises claiming by, through or under Tenant) will deliver to Landlord or to the holder of any First Mortgage or ground lessor, a statement in writing signed by Tenant certifying (a) that this Lease is unmodified and in full force and effect (or if there have been modifications, that this Lease as modified is in full force and effect and identifying the modifications); (b) the date upon which Tenant began paying Rent and the dates to which the Rent and other charges have been paid, (c) that Landlord is not in default under any provision of this Lease, or, if in default, the nature thereof in detail; (d) that the Premises have been completed in accordance with the terms hereof and Tenant is in occupancy and paying Rent on a current basis with no rental offsets or claims; (e) that there has been no prepayment of Rent other than that provided for in this Lease; (f) that there are no actions, whether voluntary or otherwise, pending against Tenant under the bankruptcy laws of the United States or any State thereof, and (g) such other matters as may be required by Landlord, the holder of the First Mortgage, or ground lessor.

ESTOPPEL CERTIFICATE

Re: [Property Address]

_____, 2010

[Lender Address]

Attention: _____

Re: Lease Dated: _____

Lessee: _____

Premises: _____

Lease Space address: _____

Ladies and Gentlemen:

The undersigned as the Lessee under the above described lease (the "**Lease**") for the above described Premises with _____ (the "**Lessor**"), hereby confirms as of the date hereof the following:

1. Lessee is in full and complete possession of the Premises, such possession having been delivered by the Lessor and having been accepted by the Lessee;
2. The Lease is in full force and effect; there is no existing default under the Lease on the part of the Lessor; the Lease has not been amended, modified, supplemented, or superseded; and there are no rental concessions, except as follows (if none, write "none"):

3. No rents have been prepaid except the current month's rent, if any, as provided by the Lease. Lessee does not now have or hold any claim against Lessor which might be set off or credited against future accruing rents;
4. Lessee has received no notice of a prior sale, transfer, assignment, hypothecation, or pledge of the estate of Lessee or of the rents secured therein, except to _____;
5. The Lease contains, and the undersigned has, no outstanding options or rights of

first refusal to purchase the Premises or any part thereof or the real property of which the Premises are a part;

- 6. No actions, whether voluntary or otherwise, are pending against the undersigned under the bankruptcy laws of the United States or any state thereof;
- 7. Lessee will give [Lender] copies of all notices required or given by Lessee to Lessor under the Lease.
- 8. Rents provided for in the Lease shall commence to accrue on the _____; the term of the Lease shall commence on _____, and shall terminate on _____; the Lease provides _____ option(s) to renew the Lease; and rents are as follows:

Base Rent (monthly) \$ _____

Percentage of Insurance,
Real Estate Taxes and
Common Area Maintenance and other
amounts Payable by Lessee
under the Lease _____ %

Other: _____ \$ _____
_____ \$ _____
_____ \$ _____

- 9. [Lender] shall rely on the representations made herein as inducement for making a Loan to Lessor.

LESSEE:

By: _____

Its: _____

TENANT'S ESTOPPEL CERTIFICATE

TO: CERTIFICATE HOLDER:

RE: LEASE AGREEMENT

DATED: _____, as amended by _____ (herein together/collectively referred to as the "Lease")

TENANT: _____

TENANT'S NOTICE ADDRESS:

LANDLORD: _____

PREMISES: _____ sq. ft.

As of the date listed below, Tenant hereby certifies the following to the Certificate Holder, to Tenant's present knowledge:

1. The Lease is in full force and effect.
2. Except as provided on Exhibit A, (i) any improvements to the Premises required by the Lease to be provided by Landlord prior to delivery to Tenant have been completed in accordance with the provisions of the Lease, (ii) Tenant has accepted the Premises and the improvements thereto and has taken possession of the Premises; and (iii) the Construction Allowance (as defined in the Lease), if any, has been paid to Tenant.
3. Except as provided on Exhibit A, Landlord is not in default of the Lease, and no event has occurred and no situation exists which, with notice or the passage of time or both, would constitute a default by Landlord under the Lease. Except as provided on Exhibit A, no setoffs or credits against rent have presently accrued. Tenant has no present knowledge of any circumstances which would give rise to any setoff or credit against rental obligations, and Tenant has no defenses to enforcement of any of Tenant's covenants or obligations under the Lease.
4. Except as provided on Exhibit A, Tenant has not assigned or sublet the Premises, or transferred its interest under the Lease.
5. The Lease is for a term beginning and ending on the dates specified on Exhibit A.

Tenant has option(s) to extend the term of the Lease for the period(s) set forth on Exhibit A.

6. The Lease has not been modified, altered or amended except as provided above and contains the entire existing agreement between Landlord and Tenant.

7. Rent currently payable by the Tenant under the Lease is specified on Exhibit A and has been paid through the date listed on Exhibit A.

8. Tenant has made no payment to Landlord as a security deposit and Tenant has not prepaid any rent under the Lease more than thirty (30) days prior to its due date.

9. As of the date hereof, no actions, whether voluntary or otherwise, are pending against Tenant under the bankruptcy laws of the United States or any state thereof.

10. Tenant does not have any preferential right or option to purchase all or any part of the Premises except as provided in the Lease.

11. Except as provided on Exhibit A, there are no uncured defaults by Tenant under the Lease, and no event has occurred and no situation exists which, with notice or the passage of time or both, would constitute a default by Tenant under the Lease.

Tenant makes the foregoing statements subject to the following qualifications: (i) Tenant has not verified the presence and/or absence of any particular co-tenancy in the Shopping Center and makes no representation concerning co-tenancy or the present availability of any rent concessions and/or termination right resulting from the failure of any co-tenancy requirement; (ii) Tenant has not verified whether the manner or nature of the use of other tenants' premises entitles Tenant to any rent concessions and/or termination right and makes no representation with respect thereto; (iii) Tenant does not represent that any specific item billed to Tenant by Landlord under any additional rent or other charges section or article of the Lease (e.g., common area maintenance charges, real estate taxes, insurance charges, electricity, HVAC and the like) is proper and appropriate since Tenant has not audited Landlord's books and records; (iv) Tenant may be entitled to certain late delivery credits and/or rent abatements or credits pursuant to the terms of the Lease which are not described on Exhibit A hereto; and (v) Tenant shall not be subject to any liability in damages or otherwise if any statement made by Tenant herein is found to be untrue, however, except as limited herein, Tenant shall be estopped from asserting claims or defenses against the addressee hereof based on such untrue statement.

DATED: _____, _____

TENANT:

[-----]

By: _____

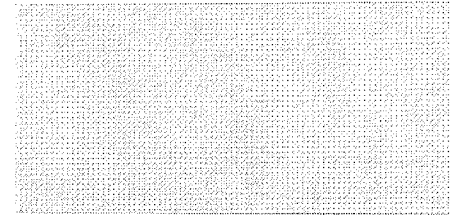
EXHIBIT A

[-----]

This Exhibit is an integral part of the Tenant's Estoppel Certificate to which the Exhibit is attached, given by Tenant to [-----] ("Certificate Holder") as of [DATE].

- 1) Construction Remaining to be Completed by Landlord: NONE
- 2) Outstanding Construction Allowance: NONE
- 3) Default by Landlord: NONE
- 4) Setoff Rights which have Accrued: NONE
- 5) Assignment or Subletting by Tenant: NONE
- 6) Commencement Date of the Term: _____
- 7) Expiration Date of Current Term: _____
- 8) Remaining Option(s) to Extend: _____
- 9) Monthly Base/Minimum Rent: _____
- 10) Rent Paid Through: _____
- 11) Default by Tenant: NONE

38. Memorandum of Lease. Neither party shall record this Lease or any of the exhibits and/or riders attached hereto, but shall enter into a "short form" or Memorandum of Lease in recordable form attached hereto as Exhibit D and made a part hereof, which shall set forth the parties, the legal description of the land, a description of the Premises, the Commencement Date and Expiration Date of the term of the Lease, and any options to renew, options to purchase or rights of first refusal granted hereunder.



MEMORANDUM OF LEASE

THIS MEMORANDUM OF LEASE dated the ____ day of _____, 2010 between _____ (hereinafter referred to as "Landlord") and _____ (hereinafter referred to as "Tenant").

WITNESSETH:

Landlord, in consideration of the rents, terms, agreements and conditions contained in that certain Lease between Landlord and Tenant dated the ____ day of _____, _____, leased to Tenant and Tenant leased from Landlord, the premises and the improvements thereon located in the City of _____, _____ (the "Demised Premises") as more particularly described in Exhibit A attached hereto and made a part hereof under the following terms and conditions:

1. The term of the lease is for _____ (____) years, commencing on the Commencement Date (as defined in the Lease) and ending on the Expiration Date (as defined in the Lease).
2. Tenant has a right to extend the term of the Lease for _____ (____) successive additional terms of ____ (____) years each as more particularly described pursuant to Paragraph ____ of the Lease.
3. Tenant has a right to purchase the Demised Premises as more particularly described in Paragraph ____ of the Lease.

This Memorandum of Lease is not a complete summary of the Lease. Provisions of this Memorandum shall not be used in interpreting the provisions of the Lease. In the event of conflict between this Memorandum and the Lease, the Lease shall control.

IN WITNESS WHEREOF, Landlord and Tenant have duly executed this Memorandum of Lease as of the day and year first above written.

LANDLORD:

TENANT:

STATE OF _____)
) SS.
COUNTY OF _____)

On this _____ day of _____, 2010, before me personally appeared _____, to me personally known who, being by me duly sworn did say that he is the _____ of _____ and that the foregoing instrument was signed on behalf of said _____ and acknowledged said instrument to be the free act and deed of said _____.

Notary Public
Commission Expires: _____

STATE OF _____)
) SS.
COUNTY OF _____)

On this _____ day of _____, 2010, before me personally appeared, _____, to me personally known, who, being by me duly sworn did say that he is an authorized signatory of _____ and that the foregoing instrument was signed on behalf of said _____ and said authorized signatory acknowledged said instrument to be the free act and deed of said _____.

Notary Public
Commission Expires: _____

ARTICLE 21.**SUBROGATION AND INSURANCE**

21.1. Waiver of Subrogation. Landlord and Tenant agree to have all fire and extended coverage and other property damage insurance which may be carried by either of them endorsed with a clause providing that any release from liability of or waiver of claim for recovery from the other party entered into in writing by the insured thereunder prior to any loss or damage shall not affect the validity of said policy or the right of the insured to recover thereunder and providing further that the insurer waives all rights of subrogation which such insurer might have against the other party. Without limiting any release or waiver of liability or recovery set forth elsewhere in this Lease, and notwithstanding anything in this Lease which may appear to be to the contrary, each of the parties hereto waives all claims for recovery from the other party for any loss or damage to any of its property insured under valid and collectible insurance policies to the extent of any recovery collectible under such insurance policies. Notwithstanding the foregoing or anything contained in this Lease to the contrary, any release or any waiver of claims shall not be operative, nor shall the foregoing endorsements be required, in any case where the effect of such release or waiver is to invalidate insurance coverage or invalidate the right of the insured to recover thereunder or increase the cost thereof (provided that in the case of increased cost the other party shall have the right, within ten (10) days following written notice, to pay such increased cost keeping such release or waiver in full force and effect).

21.2. Tenant's Insurance. Tenant shall carry insurance during the entire Term hereof with terms, coverages and in companies having a Best's Rating of at Least A and otherwise satisfactory to Landlord and with such increases in limits as Landlord may from time to time request, but initially Tenant shall maintain the following coverages in the following amounts:

- (a) Insurance against fire, sprinkler leakage, vandalism, and the extended coverage perils for the full replacement cost of all additions, improvements and alterations to the Premises owned or made by Tenant, if any, and of all office furniture, trade fixtures, office equipment, merchandise and all other items of Tenant's property on the Premises, with loss or damage payable to Landlord and Tenant as their interests may appear.
- (b) Insurance against breakage of all plate glass utilized in the improvements on the Premises in an amount not less than the reasonable replacement cost with loss or damage payable to Landlord and Tenant as their interests may appear.
- (c) Insurance against all worker's compensation claims in the statutory amounts, if necessary.

(d) Comprehensive public liability and property damage insurance with not less than \$2,000,000 combined single limit for both bodily injury and property damage, with loss or damage payable to Landlord and Tenant as their interests may appear.

21.3. Certificates of Insurance. Tenant shall, prior to the commencement of the Term, furnish to Landlord policies or certificates evidencing such coverage, which policies or certificates shall state that such insurance coverage may not be reduced, cancelled or not renewed without at least thirty (30) days prior written notice to Landlord and Tenant (unless such cancellation is due to nonpayment of premium, and in that case only ten (10) days' prior written notice shall be sufficient).

21.4. Compliance with Requirements. Tenant shall comply with all applicable laws and ordinances, all orders and decrees of court and all requirements of other governmental authority, and shall not directly or indirectly make any use of the Premises which may thereby be prohibited or be dangerous to person or property or which may jeopardize any insurance coverage, or may increase the cost of insurance or require additional insurance coverage.

21.5. Landlord's Insurance. Landlord shall carry at all times during the Term fire and extended coverage insurance (including flooding, vandalism, malicious mischief and special extended perils or "all risk") on the Building and the Project in an amount not less than the full replacement cost thereof.

ARTICLE 22.

NONWAIVER

No waiver of any condition expressed in this Lease shall be implied by any neglect of Landlord to enforce any remedy on account of the violation of such condition whether or not such violation be continued or repeated subsequently, and no express waiver shall affect any condition other than the one specified in such waiver and that one only for the time and in the manner specifically stated. It is also agreed that after the service of notice or the commencement of a suit or after final judgment for possession of the Premises, Landlord may receive and collect any moneys due, and the payment of said moneys shall not waive or affect said notice, suit or judgment.

ARTICLE 23.

TENANT - CORPORATION OR PARTNERSHIP

In case Tenant is a corporation, Tenant (a) represents and warrants that this Lease has been duly authorized, executed and delivered by and on behalf of Tenant and constitutes the valid and binding agreement of Tenant in accordance with the terms hereof and (b) if Landlord so requests, it shall deliver to Landlord or its agent, concurrently with the delivery of this Lease executed by Tenant, certified resolutions of the board of directors (and shareholders, if required) authorizing Tenant's execution and delivery of this Lease and the performance of Tenant's obligations hereunder. In case Tenant is a partnership, Tenant represents and warrants that all of the persons who are general or managing partners in said partnership have executed this Lease on behalf of Tenant, or that this Lease has been executed and delivered pursuant to and in conformity with a valid and effective authorization therefor by all of the general or managing partners of such partnership, and is and constitutes the valid and binding agreement of the partnership and each and every partner therein in accordance with its terms.

ARTICLE 24.

REAL ESTATE BROKERS

Tenant represents that Tenant has dealt with and only with CB Richard Ellis ("Tenant's Broker") and NAI Hiffman ("Landlord's Broker") (whose commissions, if any, shall be paid by Landlord pursuant to separate agreement) as broker in connection with this Lease and agrees to indemnify and hold Landlord harmless from all

4.5. Readjustments. Within ninety (90) days of the end of each Adjustment Year and after Landlord shall have determined the amount of Expenses and Taxes to be used in calculating the Expense Adjustment and Tax Adjustment for such Adjustment Year, Landlord shall notify Tenant in a detailed written statement (any such notice hereinafter referred to as "Landlord's Statement") of the actual Expenses and Taxes for the Premises and a calculation or reconciliation of Tenant's actual Expense Adjustment and Tenant's actual Tax Adjustment compared to the Rent Adjustment actually paid by Tenant for such Adjustment Year. If the Expense Adjustment and Tax Adjustment owed for such Adjustment Year exceeds the Rent Adjustment Deposit paid by Tenant during such Adjustment Year, then Tenant shall, within thirty (30) days after the date of Landlord's Statement, pay to Landlord an amount equal to the excess of the Expense Adjustment and Tax Adjustment over the Rent Adjustment Deposit paid by Tenant during such Adjustment Year. If the Rent Adjustment Deposit paid by Tenant during such Adjustment Year exceeds the Expense Adjustment and Tax Adjustment owed for such Adjustment Year, then Landlord shall credit such excess to Rent payable after the date of Landlord's Statement, or may, at its option, credit such excess to any Rent theretofore due and owing, until such excess has been exhausted. If this Lease shall expire or be terminated prior to full application of such excess and provided Tenant is not then in default under this Lease, Landlord shall pay to Tenant promptly the balance thereof not theretofore applied against Rent and not reasonably required for payment of Rent for the Adjustment Year in which this Lease expires, subject to Tenant's obligations under Section 4.7 hereof, provided no interest or penalties shall accrue on any amounts which Landlord is obligated to credit or pay to Tenant by reason of this Section 4.5.

4.6. Books and Records; Audit Procedures. Landlord shall maintain books and records showing Taxes and Expenses in accordance with sound accounting and management practices. Tenant or its representative shall have the right to examine Landlord's books and records showing Taxes and Expenses upon reasonable prior notice and during normal business hours at any time within six (6) months following the furnishing by Landlord to Tenant of Landlord's Statement provided for in Section 4.5. Tenant has the right upon prior written request to examine Landlord's books and records in cooperation with any other tenants of the Buildings. The books and records include, but are not limited to, accounting records, vendor contracts, payroll records, management agreements, and supporting invoices and detail for all items. If Tenant shall notify Landlord within such six (6) month period that Tenant disputes any specific item or items in Landlord's Statement and such dispute is not resolved between Landlord and Tenant within thirty (30) days after the date such notice is given by Tenant either party may, during the thirty (30) day period next following the expiration of the thirty (30) day period commencing on the date such notice is given, refer such disputed item or items for determination to an independent certified public accountant selected by

such party and approved by the other party, which approval shall not be unreasonably withheld, and the determination of such accountant shall be final, conclusive and binding upon Landlord and Tenant. Tenant agrees to pay all costs involved in such determination except in the case of Tax Adjustment and Expense Adjustment for any Adjustment Year where it is determined that Landlord has overcharged Tenant for Tax Adjustment and Expense Adjustment for such Adjustment Year by more than 5%, in which case Landlord shall pay such costs. Notwithstanding the foregoing, pending resolution of any disputed item hereunder, Tenant shall be obligated to pay its pro rata share of Rent Adjustments as and when due in accordance with the terms of this Article 4.

4.7. Proration and Survival. With respect to any Adjustment Year which does not fall entirely within the Term, Tenant shall be obligated to pay as Rent Adjustments for such Adjustment Year only a pro rata share of Rent Adjustments as hereinabove determined, based upon the number of days of the Term falling within the Adjustment Year. Following expiration or termination of this Lease, Tenant shall pay any Rent Adjustments due to Landlord within thirty (30) days after the date of each Landlord's Statement sent to Tenant. Without limitation of other obligations of Tenant which shall survive the expiration of the Term, the obligation of Tenant to pay Rent Adjustments provided for in this Article 4 accruing during the Term shall survive the expiration or termination of this Lease.

29.5. Definition of Landlord. The term "Landlord" as used in this Lease means only the owner or owners at the time being of the Building so that in the event of any assignment, conveyance or sale, once or successively, of said Building, or any assignment of this Lease by Landlord, said Landlord making such sale, conveyance or assignment shall be and hereby is entirely freed and relieved of all covenants and obligations of Landlord hereunder accruing after such sale, conveyance or assignment, and Tenant agrees to look solely to such purchaser, grantee or assignee with respect thereto. This Lease shall not be affected by any such assignment, conveyance or sale, and Tenant agrees to attorn to the purchaser, grantee or assignee.

NOTICE OF SALE

[Date]

Re: Lease dated _____ (the "Lease") by and between _____ ("Landlord") and _____ ("Tenant") with respect to approximately _____ square feet of space at _____ (the "Property")

Dear Tenant:

Please be advised that effective _____, Landlord sold the above-referenced property to _____ and, concurrently therewith, assigned all of its right, title and interest in and under the Lease to _____. Your security deposit in the amount of \$ _____ has been transferred to such entity and such entity shall be responsible for holding the same in accordance with the terms of the Lease referred to above. Effective _____, all future rental payments (including, without limitation, Base Rent, Rent Reimbursement and Additional Charges as described in the Lease) should be made payable to _____ and sent to the following address:

Any questions regarding maintenance and management of the property should be addressed to:

Very truly yours,

ARTICLE 26 - SUBSTITUTION SPACE

Landlord shall have the right at any time prior to the end of the Term of this Lease, or any renewal or extension hereof, to substitute, instead of the Premises, other space within the Building (which space shall have a Rentable Area of not less than 90% of the Rentable Area in the Premises as of the date of such substitution) hereinafter called the "Substitution Space."

Landlord shall give Tenant at least sixty (60) days' prior written notice of its exercise of its substitution right specifying the effective date of such substitution, whereupon, as of such effective date: (a) the description of the Premises set forth in this Lease shall, without further act on the part of Landlord or Tenant, be deemed amended so that the Substitution Space shall, for all purposes, be deemed the Premises hereunder, and all of the terms, covenants, conditions, provisions, and agreements of this Lease, including those agreements to pay Rent, based upon the Rentable Area of the Substitution Space, shall continue in full force and effect and shall apply to the Substitution Space, and (b) Tenant shall move from the present Premises into the Substitution Space and shall vacate and surrender possession to Landlord of the present Premises in the manner surrender is required pursuant to Article 19 hereof, and if Tenant continues to occupy the present Premises after such effective date, then thereafter, during the period of such occupancy, Tenant shall pay Rent for the present Premises as set forth in this Lease, in addition to the Rent for the Substitution Space at the above-described rates. Tenant shall accept possession of the Substitution Space in its "as-is" condition as of such effective date.

Notwithstanding the provisions of Section 26.2 above, if Landlord exercises its right to substitute the Substitution Space for the Premises after the Commencement Date, then Tenant shall have the option to require Landlord to alter the Substitution Space in the same manner as the present Premises were finished out or altered pursuant to the Lease. Such option shall be exercised, if at all, by notice from Tenant to Landlord within fifteen (15) days after the aforesaid notice from Landlord to Tenant of such proposed substitution; otherwise, such option in favor of Tenant shall be null and void. Tenant shall not have the right to exercise such option at any time when Tenant is in default under any of the terms, covenants, conditions, provisions, or agreements of this Lease. If such option is validly so exercised by Tenant: (a) Tenant shall continue to occupy the present Premises (upon all of the terms, covenants, conditions, provisions, and agreements of this Lease, including the covenant for the payment of Rent) until the date on which Landlord shall have substantially completed such alteration work in the Substitution Space; and (b) Tenant shall move from the present Premises into the Substitution Space immediately upon the date of such substantial completion by Landlord and shall vacate and surrender possession to Landlord of the present Premises in the manner surrender is required pursuant to Article 19 hereof, and if Tenant continues to occupy the present Premises after such date, then, thereafter during the period of such occupancy, Tenant shall pay Rent for the present Premises as set forth in this Lease in addition to the Rent for the Substitution Space at the above-described rates. With respect to such alteration work in the Substitution Space, if Tenant requests materials or installations other than those originally installed by Landlord, or if Tenant shall make changes in the work (such non-original materials or installations or changes being subject to Landlord's prior written approval), and if such non-original materials or installations

or changes shall delay the work to be performed by Landlord, or if Tenant shall otherwise delay the substantial completion of the work, the occurrence of such delays shall in no event postpone the date for the commencement of the payment of Rent for such Substitution Space beyond the date on which such work would have been substantially completed but for such delays, and in addition, Tenant shall continue to pay Rent for the present Premises as set forth in this Lease until it vacates and surrenders same as aforesaid. Landlord at its discretion may substitute materials of like quality for the materials originally utilized.

If Landlord exercises this relocation right after the Commencement Date, Landlord shall reimburse Tenant for Tenant's reasonable out-of-pocket expenses for moving Tenant's furniture, equipment, supplies and telephones and telephone equipment from the present Premises to the Substitution Space and for reprinting Tenant's stationery of the same quality and quantity of Tenant's stationery supply on hand immediately prior to Landlord's notice to Tenant of the exercise of this substitution right.

Relocation Rights of Landlord (for an amendment):

Notwithstanding anything in the Lease to the contrary, Landlord shall have the one-time only right to relocate Tenant to other premises within the area outlined in red on Exhibit "A-1" (the "Relocation Area") strictly in accordance with the terms and provisions contained herein, provided that Landlord may not relocate Tenant during the last two (2) Lease Years of the Initial Lease Term or the last two (2) Lease Years of any option period unless Tenant has exercised an option to extend the Term beyond the then-current term.

Landlord shall provide Tenant no less than one hundred twenty (120) days' prior written notice of Landlord's intention to exercise its relocation right (the "Relocation Notice"). The Relocation Notice shall (i) specify the date on which Tenant shall be required to vacate the existing Leased Premises (the "Relocation Date"), and (ii) identify the new premises within the Relocation Area (the "New Leased Premises"). The Relocation Date shall not be during the months of October, November or December, and shall be no less than one hundred twenty (120) days from the date of the Relocation Notice. The New Leased Premises (a) shall only be within the Relocation Area, (b) shall have a square footage that is within seven percent (7%) of the square footage of the Tenant's existing floor area, and (c) shall contain no less than the linear frontage of Tenant's existing Leased Premises.

The New Leased Premises shall be delivered free of asbestos, asbestos containing materials and other hazardous materials, and in full compliance with applicable laws and regulations. The New Leased Premises shall be constructed and fit-out by Landlord, at Landlord's sole cost and expense, utilizing new materials of similar or better quality than used in the fit-out of the existing Leased Premises, to Tenant's then-current standard "turn-key" fit-out specifications, including all new fixtures, trade fixtures and racks, a new HVAC system, new signage, and with all finish work completed and in move-in condition. In addition to the foregoing, Landlord shall pay all costs (i) incurred by Tenant in connection with relocating Tenant's inventory and other personal property from the existing Leased Premises to the New Leased Premises, (ii) changing utility services, (iii) overhead costs of Tenant's construction department, and (iv) removal and re-installation of Tenant's signage (or purchase of new signage in the event the existing signage can not be reasonably relocated). Landlord shall install a temporary sign at the original Leased Premises indicating that Tenant has relocated and advising of the location to which Tenant has been relocated for a period of not less than thirty (30) days after the Relocation Date.

The New Leased Premises shall be delivered to Tenant in the condition required hereunder at least thirty (30) days prior to the Relocation Date, but Tenant shall not be responsible for Rent or Other Charges on the New Leased Premises until the Relocation Date. Tenant shall pay Rent and Other Charges on the existing Leased Premises only until the Relocation Date and on the Relocation Date Tenant shall surrender possession of the existing Leased Premises and shall have no further liability or obligation with regard thereto. As of the

Relocation Date, the New Leased Premises shall be deemed the Leased Premises for all purposes, and thereafter Tenant shall pay Rent and Other Charges on the New Leased Premises only. Tenant shall not be required to pay increased Rent or Other Charges in the event the New Leased Premises are larger than the original Leased Premises, and in the event the New Leased Premises are larger than the existing Demised Premises Rent Other Charges will be based on the square footage of the existing Leased Premises. The provisions of this paragraph are subject to all other provisions of the Lease, including any rights in the Lease to pay amounts in lieu of Rent and/or Other Charges.

Upon the Relocation Date the “No-Build Area” identified on Exhibit “A” of the Lease shall be adjusted to reflect the new location of the Leased Premises, it being understood that the “No-Build Area” shall be approximately the same size, but located in front of the New Leased Premises, and Landlord’s obligations set forth in the Lease with respect to Landlord’s Work shall apply to all work performed by Landlord in the New Leased Premises. Landlord shall warrant all work completed by Landlord in the New Leased Premises for a period of twelve (12) months from the Relocation Date.

Tenant shall have the right, in its sole and absolute discretion, to reject the proposed New Leased Premises, provided Tenant shall furnish Landlord with written notice of such rejection within thirty (30) days of receipt of Landlord's Relocation Notice (the “Rejection Notice”), in which event the Lease shall terminate sixty (60) days from the date of the Rejection Notice.

In the event that Tenant shall be relocated to the New Leased Premises pursuant to the terms and conditions of this Section, occupancy of the New Leased Premises by Tenant shall be under and pursuant to the terms of the Lease, and the parties shall promptly enter into an amendment to the Lease, or other documentation as may reasonably be required to document the relocation, which shall confirm the floor area for the New Leased Premises, any changes to Rent and Other Charges, the “No-Build” Area and any other issues pertaining to the relocation.

RELOCATION NOTICE

[Date]

Re: Multi-Tenant Industrial Lease dated _____ (“Lease”) between _____, as Landlord (“Landlord”) and _____, as Tenant (“Tenant”) for Premises located at _____ (the “Building”)

Dear Sir or Madam:

Please be advised that pursuant to Section ____ of the Lease, Landlord is exercising its one-time option to relocate Tenant to substitute premises in the Building (the “Substitute Premises”), comprised of _____ square feet. A site plan showing the location and layout of the Substitute Premises is attached hereto. The date of such relocation shall be _____. As provided in the Lease, Tenant’s Rent shall not increase as a result of the relocation. Landlord shall provide a draft amendment to the Lease reflecting the Substitute Premises and any other changes to the Lease necessitated by Landlord’s exercise of the Relocation Option under separate cover.

Please do not hesitate to contact me should you have any questions.

Very truly yours,

Enclosure

ARTICLE 13- DEFAULT AND REMEDIES

Section 13.1 The occurrence of any one or more of the following events shall constitute an Event of Default (herein so called) of Tenant under this Lease: (a) if Tenant fails to pay any Rent hereunder as and when such Rent becomes due and such failure shall continue for more than five (5) days after Landlord gives Tenant notice of past due Rent; (b) if Tenant fails to pay Rent on time more than twice in any period of twelve (12) months, notwithstanding that such payments have been made within the applicable cure period; (c) if the Premises become vacant, deserted, or abandoned for more than ten (10) consecutive days or if Tenant fails to take possession of the Premises on the Commencement Date or promptly thereafter; (d) if Tenant permits to be done anything which creates a lien upon the Premises and fails to discharge or bond such lien or post such security with Landlord as is required by Article 11; (e) if Tenant violates the provisions of Article 8 by attempting to make an unpermitted assignment or sublease; (f) if Tenant fails to maintain in force all policies of insurance required by this Lease and such failure shall continue for more than ten (10) days after Landlord gives Tenant notice of such failure; (g) if any petition is filed by or against Tenant or any guarantor of this Lease under any present or future section or chapter of the Bankruptcy Code, or under any similar law or statute of the United States or any state thereof (which, in the case of an involuntary proceeding, is not permanently discharged, dismissed, stayed, or vacated, as the case may be, within sixty (60) days of commencement), or if any order for relief shall be entered against Tenant or any guarantor of this Lease in any such proceedings; (h) if Tenant or any guarantor of this Lease becomes insolvent or makes a transfer in fraud of creditors or makes an assignment for the benefit of creditors; (i) if a receiver, custodian, or trustee is appointed for the Premises or for all or substantially all of the assets of Tenant or of any guarantor of this Lease, which appointment is not vacated within sixty (60) days following the date of such appointment; (j) if Tenant fails to originally post or thereafter restore the Security Deposit as required pursuant to Article 21 hereof; or (k) if Tenant fails to perform or observe any other terms of this Lease and such failure shall continue for more than thirty (30) days after Landlord gives Tenant notice of such failure, or, if such failure cannot be corrected within such thirty (30) day period, if Tenant does not commence to correct such default within said thirty (30) day period and thereafter diligently prosecute the correction of same to completion within a reasonable time and in any event prior to the time a failure to complete such correction could cause Landlord to be subject to prosecution for violation of any law, rule, ordinance or regulation or causes, or could cause, a default under any mortgage, underlying lease, tenant leases or other agreements applicable to the Project. Notwithstanding anything contained herein to the contrary, if Tenant's failure to perform or observe any terms of this Lease involves an emergency or hazardous situation or threatens life or safety then Tenant shall cure said default immediately upon becoming aware of said failure.

Section 13.2 Upon the occurrence of any Event of Default, Landlord shall have the right, at Landlord's option, to elect to do any one or more of the following without further notice or demand to Tenant, Tenant hereby expressly waiving the requirement of service of any statutory notice or demand as a condition precedent to Landlord's exercising any of the following rights: (a) terminate this Lease, in which event Tenant shall immediately surrender the Premises to Landlord, and, if Tenant fails to so

surrender, Landlord shall have the right, without notice or demand, to enter upon and take possession of the Premises and to expel or remove Tenant and its effects without being liable for prosecution or any claim for damages therefor; and Tenant shall, and hereby agrees to, indemnify Landlord for all loss and damage which Landlord suffers by reason of such termination, including damages in an amount equal to the total of (1) the costs of recovering the Premises and all other expenses incurred by Landlord in connection with Tenant's default; (2) the unpaid Rent earned as of the date of termination, plus interest at the Interest Rate; (3) the total Rent which Landlord would have received under this Lease for the remainder of the Term, but discounted to the then present value at a rate of eight percent (8%) per annum, minus the fair market rental value on a net basis of the balance of the Term as of the time of such default, discounted to the then present value at a rate of eight percent (8%) per annum (but in no event shall the result thereof be less than zero for the purposes of this Section); and (4) all other sums of money and damages owing by Tenant to Landlord; or (b) enter upon and take possession of the Premises without terminating this Lease and without being liable to prosecution or any claim for damages therefor, and, if Landlord elects, relet the Premises on such terms as Landlord deems advisable, in which event Tenant shall pay to Landlord on demand the cost of repossession, renovating, repairing and altering the Premises for a new tenant or tenants and any deficiency between the Rent payable hereunder and the rent paid under such reletting; provided, however, that Tenant shall not be entitled to any excess payments received by Landlord from such reletting. Landlord's failure to relet the Premises shall not release or affect Tenant's liability for Rent or for damages; or (c) enter the Premises without terminating this Lease and without being liable for prosecution or any claim for damages therefor and maintain the Premises and repair or replace any damage thereto or do anything for which Tenant is responsible hereunder. Tenant shall reimburse Landlord immediately upon demand for any reasonable expenses which Landlord incurs in thus effecting Tenant's compliance under this Lease, and Landlord shall not be liable to Tenant for any damages with respect thereto.

Section 13.3 No agreement to accept a surrender of the Premises and no act or omission by Landlord or Landlord's agents during the Term shall constitute an acceptance or surrender of the Premises unless made in writing and signed by Landlord. No re-entry or taking possession of the Premises by Landlord shall constitute an election by Landlord to terminate this Lease unless a written notice of such intention is given to Tenant. No provision of this Lease shall be construed as an obligation upon Landlord to mitigate Landlord's damages under the Lease, except to the extent required by law.

Section 13.4 No provision of this Lease shall be deemed to have been waived by Landlord unless such waiver is in writing and signed by Landlord. Landlord's acceptance of Rent following an Event of Default hereunder shall not be construed as a waiver of such Event of Default. No custom or practice which may grow up between the parties in connection with the terms of this Lease shall be construed to waive or lessen Landlord's right to insist upon strict performance of the terms of this Lease, without a written notice thereof to Tenant from Landlord.

Section 13.5 The rights granted to Landlord in this Article 13 shall be cumulative of every other right or remedy provided in this Lease or which Landlord may otherwise have at law or in equity or by statute, and the exercise of one or more rights or remedies shall not prejudice or impair the concurrent or subsequent exercise of other rights or remedies or constitute a forfeiture or waiver of Rent or damages accruing to Landlord by reason of any Event of Default under this Lease. Tenant agrees to pay to Landlord all costs and expenses incurred by Landlord in connection with an Event of Default and the enforcement of this Lease, including all attorneys' fees incurred in connection with the collection of any sums due hereunder or the enforcement of any right or remedy of Landlord.

_____, 200_

Via Overnight Courier

[name]
[address]

Re: [Tenant name] (“[Tenant]”)/Delinquent Rent

Ladies or Gentlemen:

Reference is made to that certain _____ Lease Agreement dated _____ (the “Lease”) between Ridge _____ (“Landlord”), as landlord, and _____ as tenant for premises located at _____ (the “Premises”).

As you are aware, [Tenant] is required to pay Monthly Rent [and Rent Adjustments] pursuant to Paragraph __ of the Lease. [In addition, [Tenant] is also required to pay _____ for _____ pursuant to Paragraph __ of the Lease.]

As of the date hereof, Landlord has not received Monthly Rent [and Rent Adjustments] from [Tenant] for the month[s] of _____, 200_ in the amount of \$ _____. [Landlord also has not received payment of _____ in the amount of \$ _____, which payment was due on _____, 200_.] In addition, pursuant to Paragraph __ of the Lease, all past due payments accrue late charges in the amount of _____ from the due date until the date received by Landlord.

Demand is hereby made for payment in the amount of _____ plus late fees of _____, representing the amounts currently outstanding under the Lease. An invoice for payment is included herewith.

Very truly yours,

By: _____
Its: _____

Schedule 15

Waiver of Landlord's Lien. Tenant shall have the right to finance, lease and/or grant one or more security interests in Tenant's trade fixtures, furnishings, equipment, merchandise, inventory and other personal property located upon the Leased Premises (collectively, the "Tenant Property"), but not the leasehold estate, and Landlord has no interest therein. Landlord hereby waives any statutory and common law claim of right, title, lien or interest in any of the Tenant Property. Any party holding such a lien on Tenant Property will be granted a license to enter the Leased Premises in order to assemble, inventory or remove item(s) of Tenant Property, provided that prior to such entry such party executes and delivers to Landlord a written agreement, the form of which is reasonably acceptable to Landlord, wherein such party agrees to repair any damage caused by such assembly or removal and agrees to such other indemnity, insurance and other rules and regulations as Landlord may reasonably require. The form of such written agreement required by Tenant's current lender, is attached hereto as **Exhibit A**, which Landlord hereby agrees is reasonably acceptable. Within twenty (20) days following Tenant's written request, Landlord shall execute and deliver to Tenant a separate document to the same effect as this Section 91 on a form (whether the form attached hereto as **Exhibit A** or otherwise) provided by Tenant and approved by Landlord in its reasonable discretion. This Lease shall not be effective until Landlord delivers to Tenant an executed copy of the Landlord Agreement attached hereto as **Exhibit A**.

ASSIGNMENT/SUBLETTING CLAUSES

Tenant may assign this Lease or sublet all or a part of the Leased Premises with Landlord's consent, which consent shall not be unreasonably withheld, conditioned or delayed.

Notwithstanding the preceding sentence, Tenant shall not require Landlord's consent to any assignment of the Lease to (a) any entity which is a parent, subsidiary or affiliate of Tenant; or (b) any entity which is a successor to Tenant and its subsidiaries and affiliates, by way of merger, consolidation or corporate reorganization; or (c) any entity which has succeeded to the interest of Tenant by the purchase of all or substantially all of the assets or stock of Tenant. Any assignee of the Lease shall assume, in writing, all of Tenant's obligations under the Lease. Tenant shall give Landlord at least thirty (30) days' prior notice of any such assignment or sublet.

Any amounts received by Tenant from any sublessee, assignee, or transferee (except a sublessee, assignee or transferee which is an affiliate of Tenant described in Section _____), in excess of the Rent and Other Charges payable by Tenant to Landlord hereunder shall be deemed Rent and shall be paid by Tenant to Landlord.

Section 12.1 – Assignment/Subletting:

Tenant shall not assign this Lease or sublet the Leased Premises (collectively, a “Transfer”) without Landlord’s prior written consent, which consent shall not be unreasonably withheld, delayed or conditioned. Notwithstanding anything to the contrary contained herein, Landlord’s consent or approval shall not be required in the event of a Transfer (i) to any entity that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with Tenant or (ii) in connection with a merger, consolidation or reorganization or (iii) in connection with the sale of all or substantially all of the assets or stock of Tenant to (a) any entity that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with Tenant or (b) any other financially responsible entity, so long as in the latter event the use to which the Leased Premises is put is permitted under this Lease. Tenant may sublet, without Landlord’s consent, up to twenty percent (20%) of the Leased Premises to any women’s shoe or children’s wear concessionaire, so long as Tenant remains liable hereunder and the sales of any such concessionaire shall be included in Tenant’s Gross Sales.

Alternative Language:

Notwithstanding anything to the contrary in this Lease, Tenant, without Landlord’s consent, and without being subject to any conditions, limitations, fees, profit-sharing, or any other conditions or qualifiers whatsoever contained in any other paragraph of this Lease, may assign this Lease or sublet the Premises (i) to Tenant’s parent, or to any affiliate or subsidiary of Tenant or of Tenant’s parent; and/or (ii) in conjunction or connection with any merger, consolidation, corporate reorganization (other than pursuant to the bankruptcy laws) of Tenant, sale of substantially all or all of the corporate assets of

Tenant or sale or other transfer of substantially all or all of the stock of Tenant or Tenant's parent entity. Tenant agrees that it shall furnish to Landlord evidence of any such completed transfer within thirty (30) days of the date of such transfer, and that Tenant (or, if Tenant shall not be the surviving entity, its successor) shall remain liable for its obligations under this Lease, despite any such transfer.

In no event shall Tenant be permitted to use a series of one or more permitted transfers described in this Section 13.03 solely for the purpose of "spinning-off" this Lease to an independent third party that would not otherwise be a permitted transferee. As an example of the foregoing, Tenant shall not assign this Lease to an affiliate corporation whose assets consist solely of this Lease and the rights granted herein and thereafter sell the stock of such affiliate corporation to an independent third party, with the intended result being to defeat the purpose of this Section 13.03 by the transfer of this Lease to an independent third party by means of what would otherwise be two (2) separate permitted transfers.

No assignment, transfer or subletting otherwise permitted shall be effective unless and until the assignee or sublessee shall in writing expressly assume all of the provisions, covenants and conditions of this Lease on the part of Tenant to be kept and performed. In addition, no such assignment, subletting or transfer permitted hereunder shall act as a release of Tenant from any obligation accruing under this Lease, except as expressly agreed in writing by Landlord.

Section 12.1 – Assignment/Subletting – Consent not a Waiver for Subsequent Assignments/Sublettings:

The consent of Landlord to one assignment of this Lease or subletting of the Leased Premises shall not constitute a waiver of Landlord's rights hereunder in the event of any subsequent assignment or subletting.

Section 12.1 – Assignment/Subletting – Subject to Future Exclusives:

In no event shall Tenant assign this Lease or sublet the Leased Premises or any portion thereof for any use which shall violate the then-existing so-called "exclusive uses" granted by Landlord to any other tenant in the Shopping Center, so long as (a) any such then-existing exclusive uses shall not restrict or otherwise affect the ability of Tenant's assignee or sublessee to use the Leased Premises for the enumerated Permitted Uses set forth in Section 1.1.13. hereof (other than for any other lawful purpose) and (b) within ten (10) business days Tenant's written request, Landlord shall notify Tenant in writing of all such then-existing exclusive uses (which Tenant may and shall materially rely upon). If the event that Landlord shall fail to so notify Tenant of all such then-existing exclusives uses, then Tenant may furnish Landlord with a second written request and if Landlord shall fail to notify Tenant of all such then-existing exclusives uses within ten (10) business days after receipt of such second written request, then Landlord shall be in default of this Lease and Tenant may exercise all of its rights and remedies under this Lease and those available to Tenant at law and in equity.

Section 12.1 – Assignment – Tenant not Released:

Notwithstanding the consent of the Landlord to any assignment of this Lease, Tenant shall not in any manner be released from its obligations hereunder or from its continued

liability for the performance of the provisions of this Lease and any amendments or modifications thereto agreed to in writing by Tenant. The acceptance of any rental payments by Landlord from all alleged assignee shall not constitute approval of or consent to the assignment of this Lease by Landlord.

Section 12.1 – Assignment/Subletting – Landlord’s Refusal to Consent:

Tenant expressly acknowledges that Landlord may refuse to give its consent to any proposed assignment of this Lease or subletting of the Leased Premises if Landlord determines in good faith that Landlord’s interests in the Leased Premises or the Shopping Center would be adversely affected by, among other things: (i) the financial condition, creditworthiness or business reputation of the proposed assignee or subtenant; or (ii) the proposed use of the Leased Premises by the proposed assignee or subtenant (provided that such proposed use shall not be for the Permitted Uses set forth in Section 1.1.13. hereof, so long as Landlord shall furnish Tenant with written notice of its refusal and its reasons therefore within thirty (30) days of Tenant written request of Landlord’s consent to any assignment of this Lease or subletting of the Leased Premises.

Alternative Language:

In the event that in connection with any such assignment of this Lease or subletting of the Leased Premises, the Lease Premises shall be used for a use other than the Permitted Uses set forth in Section 1.1.13. hereof (a “Non-Permitted Use”), then the Non-Permitted Use shall not violate the then-existing so-called “exclusive uses” granted by Landlord to any other tenant in the Shopping Center, so long as, within ten (10) business days after Tenant’s written request, Landlord shall notify Tenant in writing of all such then-existing exclusive uses (which Tenant may and shall materially rely upon). If the event that Landlord shall fail to so notify Tenant of all such then-existing exclusives uses within such ten (10) business day period of time, then Tenant may furnish Landlord with a second written request and if Landlord shall fail to notify Tenant of all such then-existing exclusives uses within ten (10) business days after receipt of such second written request, then the Non-Permitted Use shall be deemed to not violate the then-existing exclusive uses so granted by Landlord to any other tenant in the Shopping Center and Landlord shall indemnify, defend and save Tenant (and Tenant’s guarantor, if any) and the assignee or sublessee using the Leased Premises for the Non-Permitted Uses harmless against all loss, liability, penalties, claims or demands of whatsoever nature, including reasonable attorneys’ fees and costs, arising from the Non-Permitted Use being conducted in the Leased Premises. The indemnification set forth in this paragraph shall survive the expiration, cancellation or termination of this Lease.

Section 12.1. – Assignment/Subletting – Excess Rent:

One-half (1/2) of any amounts received by Tenant from any sublessee of Tenant (excluding amounts received by Tenant for any security deposit or payment for Tenant's personal property) in excess of the Rent and Other Charges payable by Tenant to Landlord hereunder shall be deemed Rent and shall be paid by Tenant to Landlord.

Schedule 17

Landlord Default. Landlord shall be in default of this Lease (each a "Landlord Default") (a) in the event of a breach of any representation or warranty of Landlord hereunder or (b) in the event Landlord fails to perform or comply with any obligation or covenant of Landlord hereunder and such failure continues for a period of thirty (30) days after written notice thereof. Upon the occurrence and during the continuance of any Landlord Default, Tenant shall have the right, but not the obligation, in addition to and without prejudice to those rights and remedies which may be available through other actions or procedures at law or in equity, (i) to perform the obligations of Landlord and set-off the costs so incurred (together with interest thereon at the rate of 18% per annum) against the Rent and Other Charges as are due or shall become due and payable by Tenant to Landlord under this Lease; (ii) to cease payment of Rent and Other Charges due hereunder until such Landlord Default is cured; or (iii) to terminate this Lease on written notice to Landlord. Any and all rights and remedies which Tenant may have under this Lease, at law or equity, shall be cumulative and shall not be deemed inconsistent with each other. No consent or waiver, express or implied, by Tenant to or of any Landlord Default shall be construed as a consent or waiver to or of any other Landlord Default. Tenant may exercise its rights and remedies at such times, in such order, to such extent, and as often as Tenant deems advisable. No delay or omission by Tenant in exercising a right or remedy shall exhaust or impair the right or remedy or constitute a waiver of, or acquiescence to a Landlord Default. No waiver of a Landlord Default shall be effective unless it is in writing.

Alternative Landlord Default. In the event that Tenant may hold and/or declare Landlord in default of this Lease by giving written notice thereof, with a copy to Landlord's mortgagee, if Tenant has been advised of the name and address of such mortgagee, and Landlord or its mortgagee shall fail to correct such default within a period of thirty (30) days thereafter, or such additional period as may be reasonably necessary if Landlord or its mortgagee has commenced to cure such default and is diligently pursuing such cure to completion, Tenant shall have, in addition to and without prejudice to those rights of recovery which may be available through other actions or procedures at law or in equity, the rights set forth herein. Tenant shall have the option to either (i) terminate this Lease if (a) Landlord's default is of a material nature, (b) a serious condition exists or may result from Landlord's default, and (c) a material interference with Tenant's operations results from such default, or (ii) perform the obligations of Landlord and, if Landlord fails to pay the cost thereof within thirty (30) days after notice from Tenant, set-off any expenses incurred against the Rent and Other Charges as are due or shall become due and payable by Tenant to Landlord under this Lease, provided that Tenant shall not have the right to deduct an amount in excess of three months' Rent and Other Charges pursuant to the terms hereof in connection with any one default.

Alternative clause: Landlord shall be in default of this Lease (each a "Landlord Default") (a) in the event of a breach of any representation or warranty of Landlord hereunder or (b) in the event Landlord fails to perform or comply with any obligation or covenant of Landlord hereunder and such failure continues for a period of thirty (30) days after written notice thereof

(or such longer period not to exceed sixty (60) additional days as is reasonably necessary if such matter cannot reasonably be cured within thirty (30) days and Landlord has begun such cure within thirty (30) days after written notice from Tenant and is diligently prosecuting the same to completion). Upon the occurrence and during the continuance of any Landlord Default, Tenant shall have the right, but not the obligation, in addition to and without prejudice to those rights and remedies which may be available through other actions or procedures at law or in equity, (i) to perform the obligations of Landlord and set-off the reasonable out-of-pocket costs therefore actually paid by Tenant to independent third parties (together with interest thereon at the Interest Rate) against the Rent and Other Charges as are due or shall become due and payable by Tenant to Landlord under this Lease provided the work performed by Tenant relates solely to the Leased Premises and not to any other portion of the Shopping Center (including, without limitation, any of the Common Areas) and Tenant delivers an additional written notice to Landlord of its intention to perform the obligations of Landlord which reasonably describes the obligations to be performed and Landlord has failed to commence the cure of such Landlord Default within five (5) days after receipt of such notice (and to diligently prosecute such cure to completion); or (ii) to terminate this Lease effective on the date five (5) days after written notice to Landlord provided that the Landlord Default is of a material representation, warranty, obligation or covenant of Landlord under this Lease and the Landlord Default has not been cured by the effective date of the termination notice. Any and all rights and remedies which Tenant may have under this Lease, at law or equity, shall be cumulative and shall not be deemed inconsistent with each other. No consent or waiver, express or implied, by Tenant to or of any Landlord Default shall be construed as a consent or waiver to or of any other Landlord Default. Tenant may exercise its rights and remedies at such times, in such order, to such extent, and as often as Tenant deems advisable. No delay or omission by Tenant in exercising a right or remedy shall exhaust or impair the right or remedy or constitute a waiver of, or acquiescence to a Landlord Default. No waiver of a Landlord Default shall be effective unless it is in writing.

Lease Termination by Tenant:

In addition to any other right of termination under this Lease and notwithstanding anything herein or in the attached Guarantee to the contrary, Tenant may unconditionally terminate this Lease upon sixty (60) days' prior notice to Landlord sent within ninety (90) days after the expiration of the second Lease Year of the Initial Lease Term. If Tenant exercises its right to terminate the Lease as herein set forth, the Lease shall terminate upon the expiration of said sixty (60) day notice period and upon such termination, none of the parties hereto shall have any further obligation hereunder and this Lease shall be deemed null and void and of no further force and effect.

****IF AMOUNT IS DELETED, TAKE OUT HIGHLIGHTED LANGUAGE****

In addition to any other right of termination under this Lease and notwithstanding anything herein or in the attached Guarantee to the contrary, **provided Tenant shall pay Landlord the sum of Thirty Thousand Dollars (\$30,000) (the "Termination Fee")** prior to vacating the Leased Premises, Tenant may unconditionally terminate this Lease upon sixty (60) days' prior notice to Landlord sent within ninety (90) days after the expiration of the second Lease Year of the Initial Lease Term. If Tenant exercises its right to terminate the Lease as herein set forth, the Lease shall terminate upon the expiration of said sixty (60) days notice period and upon such termination, **provided Tenant shall have paid Landlord the Termination Fee**, none of the parties hereto shall have any further obligation hereunder and this Lease shall be deemed null and void and of no further force and effect. **Tenant may deduct from the Termination Fee any credits then due and owing to Tenant under the Lease.**

In addition to any other right of termination under this Lease and notwithstanding anything herein or in the attached Guarantee to the contrary, if Tenant does not achieve Gross Sales (as herein defined) of at least _____ Dollars (\$____) during the fifth (5th) Lease Year, **then provided Tenant shall pay Landlord the sum of Thirty Thousand Dollars (\$30,000) (the "Termination Fee") prior to vacating the Leased Premises**, Tenant may unconditionally terminate this Lease upon sixty (60) days' prior notice to Landlord sent within ninety (90) days after the expiration of the fifth (5th) Lease Year of the Initial Lease Term. If Tenant exercises its right to terminate the Lease as herein set forth, the Lease shall terminate upon the expiration of said sixty (60) days notice period and upon such termination, **provided Tenant shall have paid Landlord the Termination Fee**, none of the parties hereto shall have any further obligation hereunder and this Lease shall be deemed null and void and of no further force and effect. **Tenant may deduct from the Termination Fee any credits then due and owing to Tenant under the Lease.**

Schedule 18A

- A. Early Termination
 - 1. Express Option to Terminate

Tenant's Termination Right. At any time after seven (7) years after the New Office Area Delivery Date, Tenant shall have the unilateral right to terminate this Lease upon at least three hundred sixty-five (365) days' written notice to Landlord, with Tenant's regular installments of Rent being due throughout such 365-day notice period or the natural expiration of the Term, whichever is earlier. In such event, on the termination date set forth in Tenant's written notice, Tenant shall: (i) vacate the Demised Premises; and (ii) remit to Landlord a termination fee equal to Seventy percent (70%) times the remaining scheduled Rent and Additional Rent due under the terms of the Lease; provided, however, that should Landlord re-let the Demised Premises at any time after the effective date of termination of the Lease by Tenant through the natural expiration of the Term, Landlord shall, to the extent previously paid by Tenant to Landlord, reimburse Tenant for the Additional Rent paid by Tenant for the portion of the Demised Premises occupied by a new tenant(s) and for the period of time from the beginning of the new tenant's occupancy through the end of the natural expiration of the Term. . Landlord shall make reasonable commercial efforts to relet the Demised Premises upon receipt of a termination notice from Tenant. Effective on such termination date, the parties shall be released from all obligations set forth in the Lease, except for previously accrued obligations of Tenant and Tenant's responsibility to return to Landlord in the condition required by the Lease.

Schedule 19**Sample Sales Kick-Out Clauses**

Early Termination Right. Tenant shall have the right to terminate this Lease by notice given at any time after _____, 200____, in the event Tenant's annual Gross Sales for the period from _____, 200__ to _____, 200__ do not exceed _____ Dollars (\$_____). To exercise this option to terminate, Tenant shall give Landlord written notice of Tenant's decision to terminate on or before _____, 20____, [and deliver simultaneously with Tenant's notice a termination fee of _____ and ___/100s Dollars (\$_____)] or fifty percent (50%) of the unamortized portion of the Tenant Allowance, calculated from the effective date of Lease termination]. Said termination shall be effective [_____ (____) days after the Landlord's receipt of such notice] or [upon _____, 200__].

Additional Sample Tenant Termination Right:

Notwithstanding anything contained herein to the contrary, in the event that Tenant's Gross Sales for the fifth (5th) full Lease Year of the Term does not exceed One Million and 00/100 Dollars (\$1,000,000.00) ("Minimum Sales"), then, provided Tenant shall have the right to terminate the Lease by written notice given to Landlord within one hundred twenty (120) days after the end of the fifth (5th) full Lease Year. The termination notice shall state a date of termination no earlier than sixty (60) days and no later than ninety (90) days after the date of such termination notice and the Lease shall terminate on such date as if that was the originally fixed expiration date of the Term. If Tenant's Gross Sales in any Lease Year prior to the fifth (5th) Lease Year equals or exceeds the Minimum Sales, then the right to terminate provided above shall be rescinded; and thereafter there shall be no right to terminate this Lease pursuant to this provision.

Tenant's right to terminate the Lease pursuant to this paragraph shall be subject to and conditioned upon the following: (i) Subject to Section 22.08, Tenant must be continuously open and operating for business from the Commencement Date through the last day of the fifth (5th) full Lease Year; and (ii) Tenant must not be in default after notice and beyond any applicable cure periods under the Lease and the Lease must be in full force and effect.

Schedule 20**Sample Ongoing Co-Tenancy Clauses:**

Co-Tenancy: Notwithstanding anything to the contrary, in the event an Ongoing Tenancy exists which is defined as (i) less than three (3) anchor tenants, herein defined as tenant occupying at least fourteen thousand square feet (14,000) of contiguous space in the Shopping Center under a single trade name are open and operating for business in the Shopping Center; or (ii) less than seventy-five percent (75%) of the gross leasable floor area of the Shopping Center available for occupancy by tenants are open and operating for business in the Shopping Center for a continuous period of six (6) consecutive months (hereinafter "Cessation Period") both (i) and (ii) in the paragraph are defined as the "Ongoing Co-Tenancy Violation"; then beginning on the first day following the end of the Cessation Period the Minimum Annual Rent set forth in Section 1.01 shall be abated and in lieu thereof, Tenant shall pay Landlord fifty percent (50%) of Tenant's Minimum Annual Rent (such abatement shall hereinafter be referred to as "Tenant's Abatement Right").

If this condition continues for an additional six (6) months, then provided Tenant shall not be in default under this Lease after notice and the expiration of any applicable grace period, Tenant shall be entitled to terminate this Lease by giving sixty (60) days written notice to such effect to Landlord, which notice must be given, if at all within thirty (30) days after the last day of said six (6) month period and before the Ongoing Co-Tenancy Violation shall cease. In the event Tenant fails to exercise its termination right granted by this Section, Tenant shall thereafter commence payment of Minimum Annual Rent as set forth in the Lease.

Said Reduction shall in no event be deemed to modify, reduce or abate Tenant's obligation to pay all other Additional Rent, under the Lease nor shall such Reduction change or modify in any way the Commencement Date. Landlord shall not be liable for any damages arising from any such closure. It is expressly agreed and understood that the Tenant's Abatement Right shall be available only to the tenant entity specified in Section 1.01 and shall not be available to any Assignee under Article XI, of this Lease.

If Tenant terminates this Lease pursuant to this Section 22.12, then Landlord shall pay tenant Twenty-Five Thousand and 00/100 Dollars (\$25,000.00) (amortized over the Lease Term) towards reimbursement for Tenant's unamortized leasehold improvements to the Demised Premises. Such payment shall be made within thirty (30) days of the later of: (i) Tenant's demand therefore; or the date Tenant surrenders possession of the Demised Premises.

Co-Tenancy.

(a) If as of the Commencement Date (i) less than _____ percent (____%) of the leasable space in the Shopping Center (the "Retail Area") is leased to tenants with at least three (3) years of lease "term" then remaining that are open for business; or (ii) [fewer than ____ Major Tenants are open and operating in the Shopping Center] or [Specific Named Tenant or Tenants are not open and operating in the Shopping Center] ("Opening Co-Tenancy Requirement"), then upon the occurrence of either event Tenant shall be permitted to pay rent in the amount equal to _____ percent (____%) of Gross Sales (the "Co-Tenancy in Lieu Rental") monthly in arrears in lieu of Fixed Minimum Rent until the month immediately following the month in which the Opening Co-Tenancy Requirement is satisfied. If the Co-

Tenancy in Lieu Rental is greater than the Fixed Minimum Rent that would be due if not for this paragraph, Tenant shall pay the Fixed Minimum Rent instead of the Co-Tenancy in Lieu Rental. The Co-Tenancy in Lieu Rental shall be paid to Landlord in monthly installments computed on all Gross Sales during each month, without any prior demand therefor. Such monthly installments shall be payable within twenty (20) days after the expiration of each month. If the Opening Co-Tenancy Requirement is not satisfied for twelve (12) consecutive months, Tenant shall have the right to terminate this Lease by giving thirty (30) days' written notice to Landlord. The Lease termination effective date shall be thirty (30) days from Landlord's receipt of said notice.

(b) For purposes of this paragraph, a "Co-Tenancy Failure" shall be deemed to exist if and when either of the following occurs: (i) _____ [SITE SPECIFIC – MAY BE MULTIPLE TENANTS] ceases operations in the Shopping Center; or (ii) tenants comprising _____ percent (____%) or more of the portion of the gross leasable area of the Shopping Center labeled as Retail "A" (as shown on Exhibit _____ hereto) cease operations (excluding closures not exceeding fourteen (14) days due to temporary alterations, renovations, inventory audits and repairs). In that event and so long as Tenant is not in default under the Lease, beyond any applicable cure period, and is continuously operating the Premises during the Shopping Center's regular hours (subject to any exceptions permitted under the Lease), Tenant, at its election, may pay in lieu of Rent, the lesser of (a) a monthly percentage rent in the amount of _____ percent (____%) of all Gross Sales made from the Leased Premises payable within 20 days after the last day of each month or (b) Fixed Minimum Rent plus Additional Rent, during the period this provision is in effect. Upon the remedy of any Co-Tenancy Failure, Tenant shall resume paying all Fixed Minimum Rent, at the rates otherwise required under the Lease, on the first day of the full calendar month following Landlord's remedy of the Co-Tenancy Failure. If said Co-Tenancy Failure still exists after three hundred sixty-five (365) consecutive days from its occurrence, Tenant may terminate this Lease with thirty (30) days written notice to Landlord. The Lease termination effective date shall be thirty (30) days from Landlord's receipt of said notice.

A "Co-Tenancy Event" shall occur if for any reason, including but not limited to casualty or condemnation (a) Anchor A, or a single-user equivalent replacement _____ is not conducting business in the entire Anchor A space as shown on Exhibit "A", or (b) Anchor B, or a single-user equivalent replacement _____ is not conducting business in the entire Anchor B space as shown on Exhibit "A", or (c) twenty percent (20%) or more of the Relevant GLA (as hereafter defined) is vacant or otherwise not occupied by Retail Stores which are open and conducting business, or (d) less than ___ percent (___%) of the Relevant GLA is occupied by Qualified Tenants (as hereinafter defined) which are open and conducting business. Upon the occurrence of any Co-Tenancy Event, Rent and all Other Charges and payments due hereunder (however defined) shall abate until the date that both the Co-Tenancy Event has ceased to exist and Landlord has so notified Tenant. During the period of such abatement, Tenant shall pay monthly, in arrears, in lieu of the aforementioned Rent and Other Charges, Alternative Rent which shall be defined as the lesser of (i) the Minimum Rent, or (ii) two percent (2%) of Gross Sales (as defined in Section 4.3.) on a Sales Base of Zero Dollars (\$0.00). As used herein, "Relevant GLA" shall mean the total GLA of the Shopping Center excluding the **Anchor A** and the **Anchor B** spaces and the Leased Premises, provided that in no event shall the relevant GLA be less than ___ square feet regardless of the actual GLA. "Qualified Tenants" shall mean

national Retail Stores of the type generally found in first class "lifestyle" shopping centers, which generate a high volume of customer traffic and are of substantially similar character and appeal as the following: Victoria's Secret, Ann Taylor, Chico's, Coldwater Creek, Talbots, Banana Republic, Pottery Barn, William-Sonoma (as such businesses are being conducted on the date of execution of this Lease). "Retail Stores" shall mean retail stores of the type typically found in first-class shopping centers in the geographic area where the Shopping Center is located, engaged primarily in the sale of goods at retail, which operate seven (7) days per week. Retail Stores shall exclude, without limitation, the following: any theater, health club or gym, post office, bank, office space of any kind, bowling alley, hair salon, restaurant, seasonal rentals, closeout or liquidation-type operations, second-hand or thrift store, or any other tenant which sells goods at retail only as an incidental use.

In addition to the foregoing, Tenant may at any time after the date of the Co-Tenancy Event, terminate this Lease on thirty (30) days' prior written notice to Landlord, unless prior to such notice being sent both the Co-Tenancy Event has ceased to exist and Landlord has so notified Tenant. Upon such termination neither party hereto shall have any further obligation hereunder. The foregoing rights shall apply to any replacement stores for those noted in (a), (b), (c), and (d) above. Spaces occupied by seasonal rentals, closeout or liquidation-type operations, or tenants who do not operate seven (7) days a week will all be deemed to be vacant for purposes of this Section 12.6. In the event that more than one of the conditions listed in (a), (b), (c) or (d) above shall occur, Tenant's rights set forth herein shall apply separately and independently to each such event.

Landlord shall notify Tenant of the date of the occurrence of a Co-Tenancy Event within ten (10) days after the occurrence thereof. If Landlord fails to provide such notice, Tenant may notify Landlord at any time of the date which Tenant believes to be the date on which the Co-Tenancy Event occurred ("Tenant's Notice"), and in the event that Landlord fails to notify Tenant within thirty (30) days after receipt of Tenant's Notice that Landlord disputes the date set forth in Tenant's Notice, the date set forth in Tenant's Notice shall be irrevocably deemed to be the date upon which the Co-Tenancy Event occurred and Tenant's rights hereunder shall be effective as of the date set forth in Tenant's Notice.

Alternative Language:

If Tenant elects not to exercise such termination right within twelve (12) months of the date Tenant commenced paying Alternative Rent as a result of such Co-Tenancy Event, then Tenant shall, effective upon the expiration of such twelve (12) month period, resume the payment of the Rent and Other Charges otherwise due under this Lease as if such particular Co-Tenancy Event did not then exist.

In the event that _____ shall not have reopened, or been replaced with a single-user equivalent replacement _____ store that is open and occupying all of the applicable space, within one (1) year after the date that _____ (or if applicable, its single-user equivalent replacement _____ store) shall have ceased to be open for business at the Shopping Center as aforesaid, then Tenant may cancel and terminate this Lease by written notice to Landlord, which notice shall be given within thirty (30) days after the expiration of the

aforesaid one year period of time. If Tenant fails to exercise such termination right herein or elects not to exercise such termination right within the time period set forth herein, then Tenant shall, effective upon the expiration of such thirty (30) day period of time, resume the payment of the Rent and Other Charges otherwise due under this Lease as if such particular Co-Tenancy Event did not then exist (subject, however, to all of the other provisions of this Lease).

If Tenant exercises its right to terminate this Lease under this Section, Landlord may nullify such termination by furnishing written notice to Tenant that Landlord elects to nullify Tenant's termination notice, which notice by Landlord shall be furnished to Tenant within ten (10) days after Landlord's receipt of Tenant's termination notice, and, in such event, Tenant shall have the right to pay the Alternative Rent until the earlier of (a) such time as this Lease terminates or (b) such time as _____ opens (or a single-user equivalent replacement _____ store re-opens) for business in the entire premises vacated by _____ (or, if applicable, vacated by a single-user equivalent replacement _____ store), as such premises is shown on Exhibit "A" hereto.

Schedule 21**Drop Dead Dates****Sample Lease Clause:**

The Landlord agrees to provide the Landlord's Work, at its expense, in accordance with plans and specifications approved by the Tenant, which approval shall not be unreasonably withheld or delayed. Landlord shall use its best efforts to deliver the Leased Premises on August 30, 20__, If the Landlord's Work shall not be completed on or before October 1, 20__, (time being of the essence), the Tenant shall have the right at its election to either **(i)** cancel and terminate this Lease, which termination shall be effective as of the date of such notice, or **(ii)** continue the Lease in which event the annual rent due hereunder shall be adjusted so that, after the Rent Commencement Date, the Tenant shall receive three (3) days free rent for each day the completion of the Leased Premises is delayed. The Landlord's Work shall be deemed completed when all of the Landlord's Work shall have been completed except for punchlist items that shall not affect the Tenant's use or the appearance of the Leased Premises.

Options for Renewal of the Lease Term

Sample Lease Clauses**Section 3.04. Option to Extend the Lease Term**

Tenant shall have the right and option to extend the Lease Term upon the same terms and conditions, except as to Minimum Annual Rent which shall be as set forth in Section 1.01 and except that Tenant shall have no further option to extend the Lease Term, for the option terms set forth in Section 1.01 under Option Term (the "Option Term"), provided that at such time the option is exercised, Tenant is not in default under this Lease after notice beyond any applicable cure period. The Tenant shall exercise its right and option to so extend the Lease Term by serving written notice upon Landlord of its election to exercise said option as provided in Section 1.01 under Exercise of Option Term. In the event Tenant does not timely exercise its option for extension of the Lease as provided above, or is in default after notice and beyond any applicable cure period under this Lease at the time of such exercise or at any time thereafter prior to the commencement of the Option Term, then, in such event, Tenant shall have no right to the Option Term and the exercise of said option shall be null and void and of no further force or effect. If Tenant does not timely exercise such option, Landlord may act in reliance on such election not being exercised by the time period set forth above, and Tenant hereby waives any claim or right to invoke or exercise such election after the above prescribed time period. Time shall be of the essence with respect to Tenant's exercise of said extension option.

Schedule 23

Sample Letter Exercising an Option

VIA FEDERAL EXPRESS

Landlord Address

Re: Store at Chisholm Trail Center, Newton, KS (our store #209)

Dear Landlord:

Please accept this letter as formal notice of our intent to exercise the first of our two options for a two year extension of the Lease term. However, given the economic realities of our situation at Newtown, we must make the exercise of our option contingent on the Landlord's agreement that in the event of the need for a major repair or replacement of the HVAC system serving our Premises (i.e. exceeding \$8,000), Landlord will make the repair or replacement OR allow Tenant to do so and offset the amount from Rent. If the above contingency is acceptable to you:

- The new expiration date will be December 31, 2009;
- Gross Rent for the extension term will remain at 5% of Gross Sales, not to exceed \$35,000 per year;
- All other provisions of the Lease as amended shall remain in full force and effect.

If the contingency is acceptable to you, please sign the letter where indicated and return it to my attention. If we do not receive your signature we will need to re-think our decision regarding the option.

Thank you so much and we look forward to our continued mutual success at Chisholm Trail Center.

Sincerely,

Tenant

Agreed and Accepted:

RIGHT OF FIRST OFFER PROVISION

Tenant shall have a [one-time] [recurring] right of first offer to lease [all (but not less than all) of the _____ rentable square feet of space located on the _____ floor of the Building and also shown on Exhibit A hereto] [any space in the Building previously occupied by another tenant but becoming available for lease after the date of this Lease] (the "Expansion Space"), subject to any rights or options of other tenants existing on the date of this Lease, and subject to the following additional terms:

(A) After the date on which the Expansion Space is to become vacant is known to Landlord with reasonable certainty, Landlord shall deliver to Tenant a notice offering such space to Tenant (the "Expansion Availability Notice"). Such Expansion Availability Notice shall include (1) the Base Rent to apply to the Expansion Space, which Base Rent shall be at a per square foot rate which is equal to the greater of (i) the market rate in effect for comparable space in the area of the Premises at the time (taking into account all factors, including the condition of the Expansion Space, any build-out allowances and other relevant factors), or (ii) the rate of Base Rent for the remainder of the Term under the Lease, (2) a statement as to whether the Landlord will offer any allowances for space improvements or other similar concessions, (3) the date on which the Tenant may occupy such Expansion Space, and (4) any other important terms upon which the Landlord is offering the Expansion Space to the Tenant.

(B) In order to exercise its rights under this section, Tenant must give Landlord written notice of its election to accept the offer (the "Expansion Acceptance Notice") within 10 days after receiving the Expansion Availability Notice. In addition, if Tenant does not accept Landlord's determination of the market rate of Base Rent contained in the Expansion Availability Notice, and only if Tenant states this fact in the Expansion Acceptance Notice, then Tenant shall have the right to have the market rate of Base Rent to apply to Tenant's leasing of the Expansion Space determined by a panel of 3 licensed real estate brokers or appraisers, one of whom shall be selected by Landlord within 5 days after delivery of the Expansion Acceptance Notice, one of whom shall be selected by Tenant within 5 days after delivery of the Expansion Acceptance Notice, and the third of whom shall be selected by the first two within 5 days after the first two are selected. Each broker or appraiser, within 10 days after the third such party is so selected, shall submit a determination of such market rate, and the average of the two closest determinations (or, if higher, the rate in effect with respect to the Premises) shall be binding on the parties for purposes of calculating rate applicable to the Expansion Space. Landlord and Tenant shall each pay the fee of the broker or appraiser selected by it and they shall share equally the payment of the fee of the third such party. If Tenant does not notify Landlord in the Expansion Acceptance Notice of its election to have the market rate determined by the independent panel, the rate set forth in the Expansion Availability Notice given under subsection (A) above shall be binding on the parties. Moreover, if either Landlord or Tenant fails to timely select its broker or appraiser by the time required above, and such failure continues for a period of 5 days following a written request for such appointment from the other party, then if such appointment still has not been made within 3 days after a second written notice demanding the appointment, the party not

having made the required appointment will be deemed to have accepted the market rate determination of the other party's appointed broker or appraiser.

(C) If Tenant timely accepts the Landlord's offer in accordance with subsection (B) above, then Tenant's leasing of the Expansion Space shall be under all terms of this Lease for the remainder of the Term, as supplemented by the terms of the Expansion Availability Notice, and except that (i) the Base Rent shall be as determined in accordance with the provisions above, and (ii) the fraction used for Tenant's Proportionate Share of Real Estate Taxes and Operating Expenses (and any other calculation predicated on the Premises' share of space in the Building) shall be increased proportionately to reflect the addition of the Expansion Space to the Premises. Furthermore, within 15 days after [the later of] the Expansion Acceptance Notice [or determination of the Base Rent to apply as described in subsection (A) or (B) above], the parties shall execute a written amendment to this Lease describing the addition of the Expansion Space to the Premises and setting forth the foregoing changes to this Lease.

(D) If Tenant fails to give notice accepting the Landlord's offer by the time required above, or if at the time Tenant accepts such offer or at the time Tenant's lease of the Expansion Space becomes effective the Tenant is in default of any term of this Lease (past any applicable notice and grace period), [or if this Lease is assigned by Tenant or the Premises sublet in whole or in part,] then Tenant's right of first offer provided in this section shall be automatically terminated and of no further force or effect, and Landlord shall have the right to lease the Expansion Space to any parties and upon any terms it sees fit.

Right of First Refusal:

There is currently a space containing _____ square feet located adjacent to the Leased Premises (“Additional Space”) and occupied by _____ pursuant to a lease dated _____ as amended _____ between Landlord and _____ (the “_____ Lease”). If at any time during the Term, the Additional Space shall be vacated, or the _____ Lease shall expire or be terminated for any reason whatsoever, then in such event Tenant shall have the first right and/or option of leasing said Additional Space or any portion thereof designated by Tenant.

Landlord shall notify Tenant thirty (30) days prior to expiration of the term of the _____ Lease, or, if the _____ Lease shall be sooner terminated or _____ shall vacate its premises, Landlord shall notify Tenant within thirty (30) days after the occurrence of either such event, and Tenant shall have thirty (30) days after receipt of said notice to elect to lease said Additional Space or any portion thereof designated by Tenant. Failure on the part of Landlord to so notify Tenant shall be deemed a default under this Lease and shall entitle Tenant, in addition to any other remedy to which Tenant may avail itself hereunder, to pay monthly in arrears, in lieu of all Rents and Other Charges, the lesser of (a) the Minimum Rent or (b) the Alternative Rent (as such term is defined in Section ___ hereof). Failure on the part of Tenant to elect to lease the Additional Space or a portion thereof shall be deemed a waiver of the right set forth in this Section _____. Landlord represents and warrants to Tenant that (i) the term of the _____ Lease expires on _____, and contains no renewal options thereafter, (ii) Landlord shall not grant to _____ any further options or rights to extend or renew the term of the _____ Lease, and (iii) no other tenant has a right of refusal or option to lease the Additional Space.

In the event Tenant shall elect to lease the Additional Space, the Additional Space shall be delivered to Tenant in the condition set forth in Exhibit “C” hereto, free of all liens and encumbrances and of asbestos and other Hazardous Materials, and in compliance with all laws, orders, rules and regulations of applicable governmental authorities. All work set forth in Exhibit “C” shall be performed by Landlord at its sole cost and expense. Landlord shall provide a Notice of Completion pursuant to Section 3.2.1. hereof. In the event that the Additional Space is not delivered to Tenant in the condition required hereunder, Tenant may perform any construction necessary as a result of such failure and Landlord shall reimburse Tenant for any costs so incurred by Tenant upon demand.

The terms, covenants and provisions of this Lease shall apply to the Additional Space commencing upon the date which is the earlier of (a) the expiration of _____ (____) days after Landlord has (i) approved Tenant’s plans and specifications for construction of the Additional Space and (ii) completed the construction to be performed by Landlord pursuant to Exhibit “C” and delivered possession of the Additional Space in accordance with the provisions of this Lease and the Notice of Completion as defined in Section 3.2.1. of this Lease to Tenant,

or (b) the opening by Tenant of its business in the Additional Space (the “Revised Commencement Date”). The Additional Space shall be included within the definition of “Leased Premises” from and after the Revised Commencement Date, and all provisions of this Lease shall thereafter apply with respect to the Additional Space, except that (i) the Minimum Rent, which shall be payable at the

same rate per square foot on the Additional Space as for the original Leased Premises, shall be adjusted proportionately based on the additional square footage contained within the Leased Premises, (ii) the breakpoint for payment of Percentage Rent shall be appropriately adjusted based on the new Minimum Rent, (iii) Other Charges shall be computed based upon the new square footage of the Leased Premises, and (iv) Minimum Rent and Other Charges for the Additional Space shall commence to accrue on the Revised Commencement Date.

Landlord hereby consents to Tenant’s remodeling both the Additional Space and original Leased Premises into a single architectural unit including, without limitation at Tenant’s option, the installation of two (2) storefronts with one (1) of Tenant’s signs above each storefront.

Landlord agrees to diligently pursue all remedies available to obtain possession of the Additional Space if _____ fails to vacate at the expiration of its term or upon the earlier termination of the _____ Lease. Landlord further agrees not to extend the term of the _____ Lease or offer _____ any renewal options not already contained in its Lease.

Schedule 26**Section 3.03. Holding Over.**

Tenant shall not have the right to remain in possession of the Demised Premises after either the Expiration Date or the earlier termination of the Lease without having first received Landlord's written consent. If Tenant remains in possession of the Demised Premises thereafter without Landlord's consent, such possession shall be a default under the Lease and Tenant shall be deemed a holdover tenant on the following terms and conditions: Tenant's use and occupancy of the Demised Premises shall be at a rate equal to double the total of the Minimum Annual Rent and Percentage Rent, if any, as was due during the final month of the Lease Term, calculated on a per diem basis, plus all Additional Rent due in accordance with the terms of the Lease; Tenant shall be fully obligated to perform all of the terms and conditions contained in the Lease except as expressly modified by this paragraph; Landlord shall not be obligated or liable to Tenant for any failure to perform under the Lease; and Tenant shall not be deemed a "month-to-month" tenant. Tenant's failure to pay for its use and occupancy at the rate set forth above shall be a default under the Lease granting Landlord all rights available to it at law and at equity as well as under the provisions of Article XXI. If Tenant has remained in possession of the Demised Premises after the Expiration Date or earlier termination of the Lease, Tenant shall vacate and surrender the Demised Premises to Landlord within ten (10) days after written notice to Tenant. The provisions of this Section 3.03 shall survive the expiration of the Term or the earlier termination of the Lease. Notwithstanding the foregoing, if Landlord and Tenant are in good faith negotiations to extend the Lease during the period of such negotiations, even if after term expiration, the Rent and Additional Rent shall continue on the terms of the last month of the then concluding term.

Sample Letter:

VIA E-MAIL AND FEDERAL EXPRESS

Landlord

Re: store in _____

Dear Ms. _____:

As you may be aware, the Lease for our store at the _____ will expire December 31, 20___. Our company has been working with _____ of your organization towards the goal of continuing our relationship at a new location in the shopping center. Accordingly, we understand that we will be holding over as a month-to-month tenant in our current location at the same rents and under the same terms as set forth in our existing lease until such time as we reach a new agreement or one party notifies the other of its intent to terminate the relationship.

Please indicate your consent to this temporary arrangement by countersigning both of the enclosed originals and returning one to the following address: _____
_____.

Please don't hesitate to contact me with any questions.

Sincerely,

Tenant

Restoration & Other End-Of-Term Obligations

Schedule 28**Section 2.03. Surrender of the Demised Premises.**

At the Expiration Date or upon the earlier termination of this Lease in accordance with the terms and provisions hereof, Tenant shall quit and surrender the Demised Premises in "broom clean" condition and in the same condition as the Demised Premises were in upon delivery of possession, reasonable wear and tear excepted, and shall surrender all keys for the Demised Premises to the Shopping Center's property manager and shall inform the property manager of all combinations of locks, safes and vaults, if any, in the Demised Premises. Additionally, Tenant will remove all safes, vaults and restore the Demised Premises to the condition prior to their installation. Any alterations, additions, improvements and fixtures installed or paid for by Tenant upon the interior or exterior of the Demised Premises (if approved by Landlord as herein provided), other than unattached moveable trade fixtures and decorations, shall at the Expiration Date or upon the earlier termination of this Lease in accordance with the terms and provisions hereof, at Landlord's option, become the property of Landlord. If Landlord chooses not to retain such alterations, additions, improvements and fixtures, then Tenant shall, prior to the Expiration Date or earlier termination of this Lease, remove such of these as Landlord chooses at Tenant's expense and shall restore the Demised Premises to its condition immediately preceding Tenant's installation of such alterations, additions, improvements and fixtures. Should Tenant desire to leave any personal property in the Demised Premises, it shall request permission in writing from Landlord, describing such property, not less than thirty (30) days prior to such surrender; and absent such permission in writing, all such property shall be removed by Tenant. Tenant's obligation to observe or perform the covenants contained in this Section shall survive the expiration or earlier termination of the Lease Term. Notwithstanding the foregoing, Tenant shall also remove all showcases and decorative chandeliers, but Tenant shall not remove any floor or wall coverings.

Section 6.03. Signs, Awnings and Canopies

At the Expiration Date or earlier termination of the Lease, Tenant shall remove all of its exterior signs from the storefront, fascia and/or canopy and shall repair all damage caused by the initial installation and subsequent removal of such signage.

A. Casualty & Property Damage**Sample Lease Clause****Section 17.01. Destruction.**

If the Demised Premises shall be partially damaged by any casualty covered under Landlord's insurance policy, Landlord shall, upon receipt of the insurance proceeds, repair the same to the condition set forth in Exhibit B and the Minimum Annual Rent shall be abated proportionately as to that portion of the Demised Premises rendered untenable. The Breakpoint (if the Breakpoint is a fixed amount, that is not determined by dividing the Minimum Annual Rent by the Percentage Rent Rate) if any, shall also be

reduced by the same proportion. Landlord shall not be required to expend more than the proceeds of its insurance in repairing the Demised Premises. If (a) the Demised Premises (i) by reason of such occurrence is rendered wholly untenable, (ii) should be damaged as a result of a risk which is not covered by Landlord's insurance or (iii) should be damaged in whole or in part during the last three (3) years of the Lease Term or of any renewal term hereof, or (b) the building of which the Demised Premises is a part (whether or not the Demised Premises is damaged), or all of the buildings which then comprise the Shopping Center should be damaged to the extent of twenty-five percent (25%) or more of the then monetary value thereof or (c) if any or all of the buildings or Common Facilities are damaged, whether or not the Demised Premises are damaged, to such an extent that the Shopping Center cannot, in the reasonable judgment of Landlord or Tenant, be operated as an integral unit, then, in any of such events described in (a) through (c) above, Landlord may either elect to repair the damage to the condition set forth in Exhibit B (other than damage to Tenant's fixtures, furniture, equipment, other personal property and any other portions of the Demised Premises or any property located therein for which Tenant is required to or does insure or as to which Tenant shall be responsible to repair or restore as provided below) or may cancel this Lease by notice of cancellation given within one hundred eighty (180) days after such event and thereupon this Lease shall expire, and Tenant shall vacate and surrender the Demised Premises to Landlord. Tenant's liability for Rent upon the termination of this Lease shall cease as of the later of (y) the day following the event or damages or (z) the date upon which Tenant ceased to do business at the Demised Premises. In the event Landlord elects to repair the damage insured under Landlord's policies, any abatement of Rent shall end upon the date that Landlord completes Landlord's obligations to restore the Demised Premises. Nothing in this paragraph shall be construed to abate Percentage Rent, if any, but the computation of Percentage Rent shall be based upon the Breakpoint, as the same may be reduced hereunder. If the damage is caused by the negligence of Tenant or its employees, agents, invitees (for actions inside the Demised Premises but Tenant is not responsible for invitees' actions in the Common Area), concessionaires, or contractors, there shall be no abatement of Rent. Unless this Lease is terminated by Landlord or Tenant, Tenant shall repair and refixture the interior of the Demised Premises in a manner and to at least a condition equal to that existing prior to its destruction or casualty and the proceeds of all insurance carried by Tenant on its property and improvements shall be held in trust by Tenant for the purpose of said repair and replacement.



InfoPAKSM

Leasing Primer: A Summary of Issues and How-To Manual For Landlords and Tenants

Sponsored by:



Leasing Primer: A Summary of Issues and How-To Manual for Landlords and Tenants

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This InfoPAKSM organizes the collective experiences of lease transactions over many years, for the benefit of in-house counsel dealing with the all-important aspect of leasing real estate. This information is presented in checklist format, addressing the major issues encountered during sophisticated commercial leasing transactions, and presents potential solutions to those issues. It also includes a number of sample leasing provisions. This InfoPAK is intended to be a useful guide for counsel dealing with office, industrial, or retail properties, whether counsel represent landlords or tenants.

The information in this InfoPAK should not be construed as legal advice or legal opinion on specific facts, and should not be considered representative of the views of Wilmer, Cutler, Pickering, Hale, and Dorr, LLP or any of its lawyers, or of ACC or any of its lawyers, unless expressly stated. Further, this InfoPAK is not intended as a definitive statement on the subject. Rather, this InfoPAK is intended to serve as a tool for readers, providing practical information to the in-house practitioner.

This material was compiled by **Wilmer, Cutler, Pickering, Hale, and Dorr, LLP** ("**WilmerHale**"). For more information about the author, please see the "About the Author" section of this InfoPAK. For more information about WilmerHale, please visit the firm's website at www.wilmerhale.com.

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I. Introduction

Virtually every commercial enterprise deals with the leasing of space in real estate projects as a part of its business. Indeed, the leasing of space for use by businesses appears to vastly exceed the ownership of real estate for the same purpose. How lease documents are negotiated can influence the success of real estate projects for their investor owners, as well as determine the effectiveness and comfort with which a particular building will serve its users.

This InfoPAKSM combines experiences from leasing transactions at different types of properties (principally office, industrial, and retail projects) in many different metropolitan areas in the United States. The discussion will include a description of many of the issues commonly encountered during lease negotiations, and the resulting solutions often reached by the parties to a lease, without any particular priority being given to either the landlord's or the tenant's point of view over the other. In addition, sample clauses are included to expressly illustrate ways in which the parties to a lease might deal with a particular issue or achieve its solution.

II. Parties to the Lease

A. Issues Related to the Party Acting as Landlord

1. Recourse Issues

Title to real estate is most commonly held in single-purpose entities ("SPE's") which are entities with no other assets beyond the real estate in question. For this reason, a landlord often has no true credit standing beyond the equity stake the landlord holds in the building in which a particular tenant is leasing space. Even in cases where a building is not held by a SPE, it is common in most markets – indeed, almost universal – for a building's standard form lease to contain a provision limiting the tenant's recourse for any claims against the landlord to merely the landlord's interest in the building. A lease with this limitation prohibits recourse to any other assets of the landlord. In years past, and in most markets, tenants simply accepted this convention. Negotiated changes to these provisions have traditionally been limited to expanding the tenant's recourse to the proceeds of any sale or financing of the building, and to making landlord representations as to whether or not the building is mortgaged and, if so, the level of equity held by the landlord in the building.¹

2. Challenging Non-Recourse Provisions

In the current economic climate, recognizing that a high percentage of real estate projects are leveraged with mortgage financing, tenants are increasingly "pushing back" on clauses which limit the tenant's recourse for claims against the landlord. The issue of the creditworthiness of a landlord is becoming one of the more heavily negotiated issues in a lease. Correspondingly, the three areas of greatest concern for the tenant with regard to the landlord's credit are tenant improvements, capital expenditures, and day-to-day operations.

a) Tenant Improvements

Tenant improvement allowances relate to situations where the landlord, under a lease, will owe the tenant significant sums of money to pay for construction of the tenant build-out and other costs associated with the preparation of the space for use by the tenant.

b) Capital Expenditures

The landlord's ability to keep and hold reserves and make the capital expenditures necessary to keep the property in the proper condition on a long-term basis (e.g., roof repairs, Heating, Ventilation, and Air Conditioning ("HVAC") system replacement) is now a more heavily negotiated portion of leases.

c) Day-To-Day Operations

The landlord's financial longevity and ability to provide and pay for day-to-day services such as cleaning, utility service, concierge services, and general upkeep for the duration of a multi-year lease term is also a concern for the prepared tenant.

Practice Tip For Tenants: Secure the landlord's obligations, especially those related to single, large monetary outlays described in Section II.A.2.a, "Tenant Improvements," with a guarantee from a parent company (or another creditworthy affiliate), a commercial bank letter of credit, or other credit support which is sufficient to ensure the landlord's performance. As an alternative, tenants may negotiate for a set-off right as a proper remedy for a landlord's breach of any of these types of payment obligations.² Whether credit support will be necessary for the other long-term obligations of the landlord related to capital expenditures and day-to-day operations will depend on the stability and history of the building asset itself, the level of landlord equity in the building, the location and projected profitability of the building, and other similar factors.

B. Issues Related to the Party Acting as Tenant

1. The Tenant Entity

Of course, for landlords, the reciprocal issue is that of tenant credit for the rent and (in the case of retail leases) operating covenants in the lease. When the tenant is a conglomerate, the issue is a classic battle between the landlord's desire to obtain the largest possible entity available in the tenant's family of companies, to maximize the cushion against economic ups and downs over the course of a lease term, and the tenant's desire to minimize its corporate exposure and match its contractual obligations with individual operating units of the business. Sometimes landlords make the mistake of accepting as tenants divisions or departments of a corporate conglomerate, which appear to be sufficiently large to cover the rent obligations in the lease, but which are not validly formed and filed as separate corporate entities. It is important that the landlord verify that the tenant entity is truly a separately created, qualified corporate entity, in order to avoid the risk of later challenges to the very enforceability of the lease, and for the lease provisions regarding assignments and sublettings to have their proper effect. Moreover, the financial statements of the tenant, on which the landlord bases its underwriting for the lease, should match the corporate entity which is named as tenant in the lease.

2. Security Deposit

Even when the tenant has great financial strength relative to the size of its lease obligations,

landlords commonly will still require some form of security deposit in order to provide further protection against potential financial impact if the tenant defaults under the lease. The size of the security deposit will depend on the tenant's financial condition, the landlord's capital outlays, market practices, and other factors. An amount that matches one or two monthly installments of rent is typical; however, where the tenant is a start-up entity, and in many foreign markets, security deposits can increase to match a year's worth of rent or more. Typically the deposit will take one or more of the following forms:

- **Cash.** Cash is held by the landlord in escrow, usually without interest to the tenant.
- **Letter of Credit.** A letter of credit from a commercial bank or other similar financial institution is another commonly used deposit.
- **Guarantee.** A guarantee from a parent company, or another affiliate, with a greater financial standing than the tenant.

Practice Tip For Landlords: When using a letter of credit ("LOC") for the security deposit, make certain to specify in the lease all of the requirements that make the letter of credit fully effective as a credit support tool for the duration of the lease term. For instance, the LOC should:

- Be issued by a financial institution which itself has sufficient credit standing;
- Specify clearly the very simple circumstances under which it may be drawn (e.g., non-payment of rent or any other breach of the lease);
- Be fully assignable by the landlord upon sale of the building (without cost); and
- Provide for periodic extension, replacement, or drawing if the term of the LOC is shorter than the term of the lease.

Practice Tip For Landlords: The landlord should include a clause in the lease requiring the tenant to produce financial statements for the landlord on an annual basis throughout the lease term. This will enable the landlord to monitor the tenant's financial standing and to react more quickly to signs of financial distress. In retail leases, the landlord should require that this financial reporting by the tenant include a statement of the tenant's sales,³ possibly on a bi-annual or quarterly basis.⁴

C. Issues Related to Any Change in the Parties to a Lease

I. Assignments and Sublettings

Provisions governing any undertaking by the tenant to assign its lease or to sublet its space are among the most heavily negotiated provisions in any lease. The tenant will attempt to build into its lease as much flexibility as possible, in order to account for future changes in its business operations, changes in its need for space, or changes in its ownership structure. Correspondingly, the landlord will seek to preserve the credit of the tenant entity standing behind the lease, and to ensure the continued use of the space is in accordance with the rules of the building.

General Note: In office, industrial, and other similar commercial leases, assignment and subletting transactions give rise to a range of issues, including credit, use, and control issues. Due to the unique nature of retail properties and a landlord's desire to achieve a marketable mixture of all tenants together at a project, retail leases give rise to the same issues, plus some additional ones

such as issues associated with the tenant's experience in retailing, competition among different tenants, trade name popularity or protection, design or aesthetic concerns, and zoning or code compliance.

a) Defining Assignment & Subletting

Since assignment and subletting transactions typically trigger notice and approval requirements,⁵ most sophisticated leases will define assignment and subletting transactions broadly to include many types of corporate transactions:

- acquisition and merger transactions,
- corporate reorganizations,
- changes in ownership which result in changes in management or control,
- sales of substantially all the assets of the tenant, and
- other similar transactions.

This will help to capture transactions that are not necessarily straightforward lease assignments or space sublettings, but which will nevertheless have an effect on the tenant's credit or operations. However, some exceptions are warranted; for instance, transfers of stock in public corporations, even when resulting in a change in management or control, are often excluded from the list of transactions that will trigger notice and approval requirements for the obvious reason that these transactions cannot be controlled the tenant's management.

b) Landlord Prerequisites

A comprehensive lease will contain a specific list of items that must be furnished to the landlord whenever a transaction occurs, which falls into the definition of an assignment or subletting, and which therefore gives rise to notice and approval requirements. These provisions will detail:

- Written notice to the landlord a specified number of days in advance of the transaction.
- Financial statements of the transferee, prepared in accordance with Generally Accepted Accounting Principles ("GAAP"), always certified and (potentially) audited.
- A description of the general business of the transferee.
- A description of the transferee's use of the space, including any changes from the tenant's current use of the space, as well as any additional burdens to be placed on elevators and parking facilities.
- A monetary fee to pay for the landlord's legal fees and other costs of reviewing and responding to the tenant's request.

c) Landlord's Approval

With certain exceptions, the landlord's consent will generally be required for the defined types of assignment and subletting transactions. Moreover, tenants and landlords will battle over whether an objective or subjective test will apply to the granting or withholding of consent by the landlord (i.e., whether the landlord may or may not "unreasonably" withhold or "condition or delay"

consent). Beyond simply stating that a landlord has discretion, or conversely must not unreasonably withhold consent, the best leases list certain criteria which assist in the determination of whether a landlord must grant or may withhold consent. The vision will expressly state:

- Whether the proposed transferee has sufficient financial strength to perform the tenant's lease obligations throughout the duration of the lease term.
- Whether the proposed transferee has a sufficient net worth to ensure the landlord preservation of the financial credit behind the lease (especially in the context of a merger transaction or reorganization, where the tenant is transmogrifying into another entity).
- Whether the proposed transferee is already a prospect to lease other vacant space from the landlord.
- Whether the proposed transferee is an undesirable tenant for the building (for example, a government agency, a data center operator, or other high-density user of space which will overload building facilities and aggravate other tenants).
- Whether the transferee's proposed use of the space is incompatible with the building standards or other current tenants.
- In the context of a retail lease (and in certain other special circumstances), whether the trade name, merchandising practices, and overall experience of the proposed transferee is compatible with the landlord's desired tenant mix for the property generally.

General Note: In retail leases, the list of criteria that may enter into a landlord's decision to approve or deny a proposed assignment or subletting transaction will be even longer, especially for those transactions that involve a franchise operation. Additional factors in retail leases include the tenant's experience operating the particular business, the financial liquidity of the tenant and its trade relationships (e.g., payables and receivables), the nature and extent of any franchise requirements, and other similar factors.

Practice Tip For Landlords: The common law in many states provides that an assigning or subletting tenant remains liable under the lease unless that tenant is expressly released by the landlord. However, landlords should expressly state that in all instances, whether or not the landlord's consent is required for a particular assignment or subletting transaction, the original tenant will not be automatically released from its obligations under the lease. Rather, the original tenant will remain fully obligated and becomes the surety or guarantor for the transferee acting as the new tenant.

d) Pre-Approved Transactions

Most tenants will attempt to negotiate certain kinds of preapproved transactions into the lease. This will assist the tenant where certain transactions are either predicted or common in the tenant's business. Where a landlord does not release the original tenant from its obligations in these instances, many landlords easily agree to these pre-approved affiliate or "family" transactions. The five major types of transactions which may require notice to the landlord, but which commonly do not require prior approval are:

- Assignments, sublettings, or other transfers to affiliates of the tenant. Affiliates

should be defined in the lease as entities controlling, controlled by, or under common control of the original tenant.

- Transfers of shares in the public markets (over which the tenant has no control).
- Assignments or sublettings associated with merger or other corporate transactions.
- Short-term space license arrangements supporting joint ventures or other business collaborations between the tenant and customers, business partners, or other parties that have a business relationship with the tenant.
- Assignment of the lease to a lender as part of the collateral for a financing transaction.

Practice Tip For Landlords: In the case of mergers resulting from corporate transactions, landlords should adopt a net worth requirement or similar threshold (i.e., above the net threshold consent is not required, but below the threshold the landlord's consent would be required). This will allow the landlord to protect against losing the credit supporting a lease when a tenant enters into a corporate transaction where the resulting entity may be larger in gross asset terms but, due to added leverage, riskier or more fragile in terms of net asset value. Also, this illustrates the importance of requiring advance notice in the lease so that the landlord can participate in the financial calculations which determine whether consent is or is not required.

General Practice Tip: Assignments of the lease as a means of collateral for financing will need to be addressed on a case-by-case basis. This will be of value only to certain kinds of tenant businesses, such as large businesses that finance their operations to lenders that need to be able to step in and operate in the event of a default. Likewise, many landlords will not agree to a pre-approved collateral assignment, due to the risk that the ultimate tenant may become different than the one originally approved for the lease (i.e., a buyer of the tenant's assets following foreclosure by the tenant's lender).

e) Recapture Rights

Many landlords view a proposal by a tenant to assign or sublet as an opportunity to recapture the space, especially in those circumstances where the tenant's need for the space has diminished. This may benefit the landlord by providing an opportunity to take advantage of decreased vacancies and increased rents in the marketplace (by re-leasing the space for higher rents to another tenant) or to assist the landlord in retaining another, larger tenant that might need the space. The provisions establishing and governing these rights come in many different forms,⁶ and typically will provide the landlord with a specified period for exercising the recapture right following an assignment or subletting approval request, and the option of either cancelling the entire lease (in the case of a proposed assignment) or partially cancelling the lease as to the space the tenant desires to sublease (in the case of a proposed sublease). In most instances, the landlord will be given the right to deal directly with the proposed transferee.

Practice Tip For Tenants: Tenants should confirm that the landlord's recapture rights only apply in the case of a proposed assignment or subletting to an unaffiliated third party (i.e., when the tenant is simply unloading unneeded space) and not in transactions with affiliates. Also, the tenant should negotiate for the right to rescind its request for approval of an assignment or subletting, when its request would otherwise engender an exercise by the landlord of a right to recapture, to protect the tenant from those circumstances where it does not want to lose the space.

f) Splitting of Profits

It is possible for a tenant to garner a profit when entering into a sublease transaction with an unaffiliated third party in a market where rents have been increasing. A landlord will typically consider this its domain – to reap any advantage resulting from changes in the real estate market – but the tenant has possession and control of the space. First and foremost, in these instances tenants want to collect their costs of the subletting transaction, such as leasing commissions, the costs of refitting for the subtenant, and legal fees incurred in negotiating the sublease. Beyond the tenant's recovery of these costs, many leases provide for a compromise position where the landlord and the tenant share equally in the remaining net profits. Of course, the tenant will bear the risk of loss where there are no profits due to the costs incurred from the transaction, declining market rents, or a combination of both.

Practice Tip For Landlords: The landlord should require that the tenant's costs be amortized over the term of the sublease when being subtracted to reach a calculation of any sublease profit. This will provide for the landlord's share of any profit to be paid at an earlier point in time, and give the landlord the additional benefit of the time value of money, rather than being delayed by an up-front recovery of the tenant's costs.

g) Recognition Agreements

In a sublease situation, the subtenant's rights derive from the leasehold rights of the original tenant (i.e., the sublandlord), and in most states a sublease will be extinguished when the underlying lease, the "prime lease," is terminated. When negotiating a sublease, the subtenant will often request that the sublandlord obtain from the prime lease landlord an agreement directly benefitting the subtenant and promising to allow the subtenant an option to remain in the space even if the prime lease is terminated (for instance, upon default of the sublandlord). Whether or not the landlord will agree to issue such provision will depend on the size and importance of the subtenant, the size and configuration of the subleased space, a comparison of the rents under the prime lease and the sublease, and other similar factors. For instance, if the subleased space is small or renders the remainder of the sublandlord's space unmarketable, or the subtenant itself is undesirable to the landlord as a long-term prospect for the building, the landlord will be inclined to refuse to issue a recognition agreement.

However, if the stated rent of the sublease is higher than the stated rent of the prime lease, the landlord may be induced to enter into such an agreement with the subtenant, requiring in return that the subtenant must remain in the space and attorn to the landlord in the event of a prime lease termination. The most common elements of recognition agreement provisions between subtenants and prime lease landlords are as follows:

- The subtenant agrees to pay to the prime lease landlord a per square foot rent which is the higher of the rent under the sublease or the rent under the prime lease.
- The subtenant agrees to reconfigure the subleased premises if necessary to render the remainder of the prime lease premises marketable to third party replacement tenants.
- The subtenant attorns to the landlord and enters into a direct lease agreement with the landlord so as to create privity between the two.
- Other miscellaneous requirements:
 - the subtenant shall not be in default of the sublease;

- the subtenant shall pay the landlord's costs of negotiating the recognition agreement as well as any costs of reconfiguring the subleased space;
- the landlord will not be held responsible for any past obligations of the landlord to the original tenant.

Practice Tip For Tenants: The best time for a tenant to request that the landlord issue a provision for a recognition agreement is during initial negotiations of the lease (ironically, this is before the tenant has a sublease to present to the landlord). It is much more difficult, and indeed the tenant has much less leverage, to persuade the landlord to issue a recognition agreement if the original lease agreement does not require the landlord to do so.

2. Transfers by the Landlord

In all but the most unusual and specialized situations, a lease will provide that the landlord has freedom to sell the building or undertake any similar transaction, and enter into accompanying assignments of the lease, without being required to obtain the respective tenant's consent. This is essential for preserving the marketability and financeability of the building asset for the landlord. Nevertheless, the lease will usually require that the landlord transfer the security deposit to the new transferee of the landlord's interest in the building, and remain liable for past obligations, as a condition to being released from the landlord's obligations under the lease going forward after the transfer.⁷

III. The Premises & the Building

A. Defining the Space

1. Usable Versus Rentable

Since every lease must clearly describe the exact parameters of the space being leased by the tenant, often leases will include a floor plan delineating the outlines of the space. However, in most cases, there is a difference between the usable space to be occupied by the tenant and the rentable space on which the per-square-foot rent calculations are based. Likewise, there are different methods of measuring tenant spaces from one property type to another. For instance, the rentable square footages of retail and industrial spaces are typically simple measurements running from the exterior surface of exterior walls to the mid-point of interior demising walls. Office spaces involve more complicated measurements of usable space, working around building core and infrastructure space, and increasing the resulting measurement by a percentage to cover the building core and other common areas (referred to as "core factor" or "common area factor") for a resulting rentable square foot calculation.

2. Measurement of Space

The lease should state clearly the exact formula used in calculating the space, for both the landlord's and the tenant's benefit. These formulas are easily obtained from trade organizations such as the Building Owners and Managers Association ("BOMA"), metropolitan area realtors' boards, and similar organizations. Architects and space planners working in the industry will be familiar with these formulas and how to use them.

Practice Tip For Tenants: Often the space which is initially outlined by the landlord and the tenant at the inception of the lease will shift or take a different shape over the course of build-out construction where the construction is extensive and involves the installation of new walls. Where the landlord is performing the build-out, the tenant would be wise to negotiate for a provision which requires a re-measurement of the space after construction is complete, and a concomitant adjustment of rent figures (but one which caps or limits the amount that rent can *increase* based on such a re-measurement).⁸

B. Options for Expansion or Contraction of Space

I. Option Types

In order to build flexibility into space planning efforts, tenants will often negotiate for different types of options to add or subtract space from the leased premises over time.⁹ The tenant's intent is to match its leasing capabilities with its long-term plans for growth. Of course, in most cases, these options run entirely to the benefit of the tenant, save the unusual case where, due to special circumstances, the landlord has similar rights of recapture or termination. Options to expand and lease additional space beyond the original premises can be couched as a right of first offer ("ROFO") or a right of first refusal ("ROFR"). In the former case, the space is simply offered to the tenant, and the tenant is given a fixed period of time within which to agree, in writing, to lease the space upon prescribed terms before the space is offered in the general marketplace. In the latter case, if the landlord has reached a deal with another prospect (usually through a letter of intent or a signed lease), the landlord must first give the tenant the right to lease the space, but usually on the same terms reached between the landlord and the third party.

Practice Tip For Landlords: Landlords should always opt for a ROFO over a ROFR. Many brokers think that when a space is encumbered with a ROFR, the space becomes less marketable or even unmarketable altogether. This is because new tenant prospects may not spend time negotiating for space when another party has the ability to intercept any deal terms which may be reached. Ironically, one might go so far as to say that when a landlord gives a tenant a ROFR over space, the landlord will never be able to obtain a deal for the space with a third party, creating a tenant's indefinite right to lease the space. (This may be the tenant's goal in the first place!)

2. Option Term Details

There are a number of important details which should be addressed in any lease document providing option rights of any kind.

a) One-Time vs. Recurring Right

In the case of a ROFO or ROFR, the lease should specify whether the option is a one-time right, where the tenant has only one opportunity to lease the applicable expansion for the prescribed terms, or a recurring right, where the tenant will have the right to lease the space upon the prescribed terms each time the space becomes available during the tenant's lease term.

b) Option Triggers

The lease should specify the exact triggers of any expansion-type rights, such as:

- the time when the expansion space becomes vacant,
- a certain specified calendar date (by which the landlord must make certain the space is available), or
- the time when the landlord begins to market the space for lease.

Practice Tip For Tenants: The tenant should build into any expansion option (ROFO or ROFR) terms which provide that, even if the tenant declines to accept an offer to lease the subject space, the landlord must lease the space to a third party on terms which lie within certain parameters, or the landlord will be required to re-offer the space to the tenant. This provision helps to keep the landlord “honest” and provides some comfort that when an offer is presented to the tenant, it is a true, market-rate offer or a bona-fide offer from a third party (whichever applies). This usually comes in the form of an express requirement that the landlord lease the space to third parties within five percent or ten percent of the rental rate offered to the tenant, or on terms which are “substantially the same” as those offered to the tenant. (The latter formulation is considered vague and less preferable to landlords than using specific percentages.)

c) Specific Deadlines

The lease should specify, with exact dates, when a tenant must exercise option rights or relinquish those rights once the offer to lease has been presented. If the provisions drafted relative to the lease deadlines are vague, the landlord may have to contend with competing claims and/or other unanticipated disputes. Typically the deadlines for accepting or rejecting expansion space rights under a ROFO or ROFR are five, ten, or fifteen days.

d) Rent & Other Terms

Of course, these options must contain the basic terms on which the tenant would lease the space after electing to exercise an option. The greater the number of terms that are specified, the less likely disagreements or disputes will arise in the parties’ process of negotiating documentation for the tenant’s leasing of the expansion space. The key terms of an option typically include:

- rent (market rate versus existing rate under the original lease),
- space improvements or allowances for improvements (or other concessions, or lack thereof),
- commencement dates, and
- any other basic lease terms which apply to the particular situation.

The same provisions which can be used to determine the rental rate that will apply to expansion space upon the tenant’s exercise of an expansion option can be used to determine the rental rate that will apply upon the tenant’s exercise of an option to extend the term of the lease.¹⁰

C. Relocation Rights for the Landlord

I. Rationale

Landlords attempt to secure rights in their leases to relocate tenants under certain circumstances. Whether or not the landlord is able to retain a relocation right will depend on the relative

bargaining positions of the parties and the special circumstances of the property. Most often reserved for small tenant spaces, a relocation right can enable an office building landlord to relocate a tenant in order to accommodate a larger tenant's growth needs, or enable a retail project landlord to renovate or improve its property, shift tenants to improve the project's tenant mix, or take advantage of symbiotic relationships between different tenants. Of course, tenants will resist and seek to strike these clauses in order to avoid the business disruption of space moves. In reality, relocation clauses are only exercised in rare circumstances due to the high level of costs imposed upon the landlord.

2. Tenant Protection

Wherever a landlord will have a relocation right, the tenant may be able to negotiate for a number of protective terms which serve to minimize the effect of a relocation on the tenant. Such terms may include:

- sufficient advance notice of the relocation,
- a right to veto the specific space proposed for relocation if the space is not comparable to the tenant's original space,
- a limitation on the number of times a relocation right can be exercised,
- minimum requirements for the tenant's new space (e.g., size, accessibility, build-out, views),
- landlord's build-out of the space to a level of improvements at least matching the prior space, and/or
- landlord's payment of the costs of relocating the tenant (e.g., moving costs, stationery costs).

Practice Tip For Tenants: In addition to negotiating for protection against having the size of its space reduced when the tenant is relocated, the tenant should negotiate for protection against any increase in its rent if the new space is larger than its prior space.¹¹

D. Ancillary Space Needs of the Tenant

I. Types of Spaces

Often a tenant needs access to additional, remote spaces within the building for storage, equipment, and other materials supporting its business.

a) Storage Space

Many office tenants need space for excess files and other property, which typically do not require fully air-conditioned and heated build-outs, and therefore can be located in basements or other building locations undesirable for employee operations.

b) Satellite Antennas

Tenants may need access to a building's rooftop to install one or more satellite antennas used in the tenant's business, together with access to risers and conduits in the building in order to connect the antenna(s) to the tenant's premises.

c) Supplemental Heating, Ventilation, and Air Conditioning Systems

Additional space, typically on the building's rooftop, may be necessary where the tenant requires HVAC systems to supplement building systems. This may be necessary where the tenant has data center functions with 24-hour running computers or high-density employee operations like a call center. Access to risers and conduits for connecting such systems to the tenant's premises will also be necessary.

d) Emergency Generator

Tenants whose businesses are at risk during power outages may require back-up emergency generator systems. Many office buildings have pre-built emergency generators which can be shared by the buildings' various tenants. Access to risers and conduits for bringing generator power to the tenant's space will be necessary.

e) Miscellaneous Other Spaces

Other spaces for operations supporting a tenant's business, such as a mail-room or computer data center, can be a part of the tenant's primary premises or remote space which is handled in the same manner as the other ancillary spaces described above.

2. License Agreements

Most often, the tenant's use of the ancillary spaces described above will be handled through a license agreement, either negotiated as a companion document to the lease or incorporated into the lease itself. These license agreements should deal with certain basic issues.

a) Rental Charges

The license agreement should state clearly whether or not the tenant will be required to pay additional charges for use of the ancillary space. Rent is commonly charged for storage space; it is not commonly charged for satellite antenna space, supplemental HVAC space, or generator space.

b) Access & Installation

The tenant and its contractors will need access to the areas in which the ancillary space is located for initial installation of any applicable equipment, as well as for ongoing maintenance. This will include the location of the ancillary space (e.g., rooftop for antennas, basement for storage space or generator), as well as areas necessary for utility connections to any equipment in the space (e.g., risers, conduits).

c) Maintenance

The license agreement should specify who is responsible for maintenance of the area in which the ancillary space is located (although it is typically the landlord) and any related equipment located in such space (more typically the tenant's responsibility).

d) Indemnity

Typically the tenant will be required to indemnify the landlord for any property damage and personal injury caused during the tenant's initial installations or ongoing maintenance.

e) Non-Interference

The tenant will be required to avoid interfering with the landlord or with other tenants' activities

during the tenant's initial installation of equipment or ongoing maintenance. For satellite antennas, this can be expanded to include non-interference with other tenants' communication signals.

Practice Tip For Tenants: Although it is common for tenants to pay a charge for some or all of these types of ancillary spaces, it is not as common for the square footage of these spaces to be included in the tenant's proportionate share of building operating expenses which are associated with the building and charged to the tenant.¹² If such spaces must be included in the numerator of the percentage fraction used for a proportionate share calculation, then similar ancillary spaces leased by all tenants in the building should be included in the denominator, so that the fraction is truly reflective of the tenant's share of burdens on the building.

E. Rights to Other Building Amenities

I. Parking Spaces

Building amenities can be an important component which attract a tenant to a particular building over its competitors. In many cases, none is more important than parking rights. Where this is the case, the lease should set out the specific number of spaces that the tenant may use, whether those spaces are reserved specifically for the tenant or are non-exclusive and shared with other tenants, and the specific charges for the tenant's use of each space.

Practice Tip For Tenants: The tenant should negotiate for specific parking rates and avoid rate agreements that contain vague terminology such as "market" rates, which may increase disproportionately to the tenant's other rental charges during the lease term.

2. Other Amenities

A building may have any number of other amenities to offer a tenant (i.e., concierge, cafeteria, health club). As with parking spaces, the lease should specify the tenant's usage rights and any charges that apply.

Practice Tip For Tenants: Since building amenities are most likely shared with other tenants, a tenant may be able to negotiate for "most favored nation" status with regard to the building's charges for such amenities, so that the tenant will not be paying disproportionately more than any other tenant sharing the same facilities.

3. Building Signage

Signage will always be an important feature of any retail lease, but it can also be an important feature of office leases as well, especially where a building is visible from busy highway routes. The lease should state clearly the rules surrounding each one of the several different types of signs which might be involved:

- top-floor exterior office building signage,
- building lobby and elevator lobby signage,
- retail or office building pylon signage, and/or
- retail storefront signage.

The parties should also take into account any zoning or building codes that may have provisions affecting the size, shape, and type of signs which may be erected. Additionally, any one tenant's rights regarding signage must be coordinated with the rights of any other tenant which also has signage rights.

Practice Tip For Landlords: When a tenant has a right to install an exterior sign on an office building, or the right to install a pylon sign at a retail project, the landlord should establish minimum space occupancy requirements for the signage. Signage rights can be valuable, and the landlord should be able to recoup signage rights, and "re-sell" those rights to another party, if the tenant has a shrunken presence in the building or has transferred its space and left the building altogether.

IV. Rent & Other Charges

A. Basic Rental Structure in Leases

1. Gross Leases

In most metropolitan markets, office space leases are set up as "gross" or "full service" leases. With this rental structure, the tenant pays a base rent, which includes one component representing pure rent and another component representing the pass-through expenses of operating the building¹³ that are allocable to the tenant's space in a base year. The base year is typically the first year of the tenant's occupancy or the calendar year in which the lease term commences. This latter component is often referred to as the "expense stop." The pure rent component may have pre-agreed annual increases, but with the operating expense component, the tenant will pay in future years increases in the line items of operating expense which actually increase (and only to the extent of these increases over the same expense in the base year). Typically the reverse is not true; when the total operating expenses in a future year decrease to less than the total of those expenses in a base year (extremely rare), the base rent does not correspondingly decrease.

2. Net Leases

Most retail and industrial leases are set up as "net" leases. In a net lease, the base rent only reflects the pure rent component to be paid by the tenant, without any component for operating expenses. The tenant then either pays the building's operating expenses directly to third parties (common with full-building tenants), or these expenses are paid by the landlord in the first instance and then billed to the tenant in separate charges (common with multi-tenant buildings where tenants are each paying an allocated share of the expenses). The purest form of net lease is a "triple-net lease," where the base rent does not include any amount for real estate taxes, insurance premiums or other operating expenses, but rather all these expenses are paid on a pass-through basis. However, leases often combine gross lease and net lease concepts, and these are referred to as "modified gross" leases.

Cautionary Note: "Gross" leases and "net" leases mean different things in different industries and locations. For instance, in one market a "net lease" might include in base rent a component for operating expenses but not real estate taxes, whereas in another market the term may connote a

pure base rent structure with no inclusion for operating expenses or taxes of any kind. When initially negotiating a term sheet or letter of intent for a lease, the parties should take care to expressly define all of the possible rent charges, and not use the vague “gross lease” or “net lease” terminology.

B. Types of Rental Charges

I. Base Rent

All leases will have a base rent, or minimum rent, component. This is a fixed, annual rental charge, typically payable in monthly installments, representing the landlord’s recovery of capital outlay to acquire the applicable property (as well as further capital expenditures after acquisition), plus the landlord’s investment return. In most cases the base or minimum rent will have annual increases which are based on a predetermined and fixed percentage (such as two or three percent) or based on a fluctuating formula such as the Consumer Price Index (“CPI”). In the latter case of the CPI, the parties often agree to a minimum percentage and a maximum percentage, which serve to bracket the CPI for purposes of calculating yearly rent increases under the lease.

General Note: When the CPI index is used, the most common form of CPI used for purposes of a lease is the “CPI - All Urban Consumers, All Items, 1982-84 = 100.” However, there are many different CPI indexes published by the U.S. Department of Labor, including ones for specific industries (e.g., All Items Less Food and Energy, All Items - Housing, All Items - Apparel), specific metropolitan areas (e.g., New York, Washington-Baltimore, Chicago, and Los Angeles), and certain regions (e.g., Northeast, South, Midwest, and West). The parties should take care to use the index that is most reflective of the market factors that affect the tenant’s business, the type of real estate involved, and the market area in which the property is located.

2. Operating Expenses

In addition to base or minimum rent, landlords will charge tenants for certain expenses incurred by the landlord while operating the property, generally called “pass-through” expenses (even though such expenses are not always out-of-pocket costs) or, in the retail context, “common area maintenance” of expenses (“CAM”). Sometimes these expenses are built in the base rent charges, as in the case with a gross lease, but even in these cases the increases in operating expenses are captured separately so that the landlord can recover all of the costs associated with the property.

a) Types of Operating Expenses

Leases typically provide that the landlord may charge to the tenant a number of costs associated with the maintenance, repair, and operation of the building. Although almost never inclusive, most leases will contain a list of examples of allowable operating expense charges, the most common of which are as follows:

- Fees of third party vendors and service providers, including janitorial cleaning and supply companies, trash removal and hauling services, building maintenance and repairpersons, snow removers, and landscaping crews.
- Wages and benefits of employees of the landlord who work on-site, such as property managers, porters, superintendants or repairmen, which costs may be allocated among different buildings if such employees serve more than one property, but which will not include executive or high-level employees.

- Premiums for casualty, liability, and other types of insurance (such as rent loss insurance), as allocated to the property when the insurance is provided through blanket policies.
- Real estate taxes, charges under covenants or easements, and other similar assessments imposed on the property.
- Costs of electricity, water, and other utilities supplied to the common areas of the building, and the costs of utilities allocated to the tenant's space when not separately submetered and charged to tenants directly.
- Costs of materials and supplies, including tools, filters, office supplies and other similar items.
- Management fees to the management company operating the building for the landlord or, in the event the property is self-managed by the landlord, an administrative charge to compensate for the administrative work related to handling the duties of building operations. In some office markets, this will include an allocated rent for management office functions where the property manager uses an on-site office.
- The costs of making improvements to increase building efficiencies (such as energy-saving devices), to comply with new legal requirements, or for other similar purposes.

Practice Tip For Tenants: Tenants should make certain that the operating expenses charged through the lease do not include capital expenditures of the landlord related to the building, except in certain limited circumstances such as those incurred for code compliance or to increase building efficiencies, and in those cases the amount charged in any one year should reflect an amortization of the expenditure over a reasonable period, such as the useful life of the specific improvement.

Practice Tip For Landlords: In some circumstances, the landlord will calculate and charge to the tenant real estate taxes and insurance premiums separately from the other basic operating expenses. Separating such expenses may prevent increases in any one charge, such as real estate taxes or utility costs, from being cancelled out by decreases in another charge, such as insurance premiums, thereby improving the landlord's overall recovery.

b) Proportionate Share

Since most operating expenses are incurred with respect to the entire building and not specific tenant spaces, the landlord must allocate to the tenant a "proportionate share" or "pro rata share" of the building's operating expenses. This is almost always based on the percentage share of the square footage in the building represented by the tenant's space.

Practice Tip For Tenants #1: The tenant should always make certain that the tenant's proportionate share of operating expenses is based on the tenant's percentage share of *leasable* space in the building, as opposed to *leased* space in the building, so that the landlord assumes responsibility for the expenses allocable to the vacant portions of the building.

Practice Tip For Tenants # 2: Tenants in mixed-use buildings, such as office buildings with

ground-floor retail spaces, should make certain that the operating expenses which are assigned to the various components of the building (e.g., office component, retail component) are not misallocated or duplicated. For instance, retail tenants on the ground floor of a high-rise office building typically do not pay a share of the expense of maintaining the building's elevators, since neither the tenant nor its customers use the elevators. In addition, where it appears that a tenant may have either artificially limited its share of operating expenses (e.g., with an expense cap such as those frequently employed by grocery anchor tenants), or have actually contributed disproportionately to the increase in operating expenses incurred at the property generally (e.g., as in the example of a carwash which increases the water bill for a strip shopping center property), other tenants should negotiate for provisions which prevent them from having to subsidize that tenant's disproportionately low payments against disproportionately high expenses.

c) Calculation & Payment

Because operating expenses are incurred at different times during the course of a year, and sometimes payable in advance and other times in arrears, customarily the landlord will estimate the operating expenses and charge the tenant a monthly installment based on that estimate. Then, after year-end, the landlord will perform a reconciliation or "true-up" and compare the actual expenses versus the estimates paid by the tenant during the year, to determine whether the landlord requires additional payment or the tenant is entitled to a reimbursement.

d) Operating Expense Exclusions

Most leases contain a list of operating expenses which is not inclusive, but many leases also list certain expenditures that are to be excluded and that the landlord may not charge to the tenant. These are intended to limit the landlord purely to expense recovery and to prevent the landlord from deriving a profit on operating expenses. Common exclusions from operating expenses include:

- Debt service under mortgages, ground lease payments, and other costs related to the landlord's financing or re-financing of the building.
- Costs of initial construction of the building, building expansions, or improvements to other tenants' spaces.
- Costs of casualties or other losses which are covered by insurance proceeds.
- Costs of providing special services for individual tenants which are typically recovered through direct charges to the tenants requesting those services (e.g., after-hours HVAC service).
- Non-cash items or expenditures such as payments into reserves or depreciation.
- Capital expenditures except to the extent expressly permitted (e.g., when related to efficiency improvements or legally-required improvements) and amortized.
- Franchise, income, or other corporate taxes imposed on the landlord (other than real estate taxes).
- Compensation of executive employees which are above the level of property manager.
- Charges for services which are provided by affiliates of the landlord, including management fees, to the extent such charges exceed the market charges that would be reached through arms-length contracts with third parties.

- Leasing commissions or costs of marketing individual tenant spaces or the building itself.
- The costs of sculpture, paintings, lobby art, or items of a cosmetic or decorative nature.

e) **Grossing-Up**

Certain items of operating expense can vary at a building depending on the level of occupancy in the building. For instance, janitorial companies often charge a dollar amount per square foot of occupied space. With respect to these charges, and most often in the context of a gross lease where the base rent includes a component for operating expenses incurred in a base year, the parties will often “gross-up” these charges, or treat the charges as having been based on a certain (usually high, such as 90% or 95%) level of occupancy. This helps to protect the parties against wide swings in the amounts of operating expenses from year to year, when there may be wide swings in a building’s occupancy, and to reduce disparity between charges for a particular line item of operating expense in the base year versus subsequent years in the lease term.

Practice Tip For Landlords: Landlords are most interested in having gross-up provisions when occupancy levels are high at the beginning of the lease term. When occupancy levels drop over the course of time, without gross-up provisions the aggregate operating expenses for the base year would remain artificially high, and therefore increases in certain line items of operating expense may not be recovered in subsequent years.

Practice Tip For Tenants: Opposite from landlords, tenants are most interested in having gross-up provisions when occupancy levels are low at the beginning of the lease term. When occupancy levels increase over time, the aggregate operating expenses for the base year will be artificially low, and the increases in operating expenses resulting from the increases in occupancy in subsequent years may be charged disproportionately to the tenant.¹⁴

f) **Controlling Operating Expenses**

Tenants often seek to control operating expenses which are charged to the tenant under the lease, even though operating expenses are, by their nature, difficult to control. Landlords resist placing “caps” of any kind on operating expenses. Nevertheless, in many leases, the landlord and the tenant reach an agreement to cap certain kinds of “controllable” expenses. How controllable expenses are defined varies from lease to lease, but they most often include management fees, which are typically stated as a percentage of rent and do not change dramatically from year to year, and the costs of contracts between the landlord and its affiliates (which are controllable for the obvious reasons).

g) **Audit Rights**

Many leases give the tenant a right to audit the building’s operating expenses in order that the tenant may be able to verify the aggregate expenses as well as the tenant’s allocation of such costs. These rights are usually exercisable only within a given timeframe (for instance, within 60 or 90 days following a landlord’s year-end reconciliation statement) and only with respect to a limited period (for instance, the immediately preceding one or two years). The audit is typically performed by the tenant, at the tenant’s expense, unless the audit reveals an error which needs to be corrected, in which event the burden of bearing the costs of the audit shifts to the landlord.

Practice Tip for Tenants: When the lease limits the audit to only the preceding year or two in the lease term, the tenant would be wise to negotiate for a provision which enables the tenant, when discovering an error, to look back to the beginning of the lease term (no matter how long) so that the error may be fully corrected.

Practice Tip for Landlords: Landlords should prohibit audits from being performed by auditors who are compensated by a contingency fee, i.e., a percentage of "found" errors or overcharges. This incentivizes the auditor to claim overcharges, whether bona fide or not, and argue for reimbursement rather than to simply verify the landlord's accounting.

3. Percentage Rent¹⁵

Many retail leases go beyond base rent and operating expenses and charge tenants a percentage rent when the tenant's business at the premises reaches a certain level of sales. This form of rental charge is usually a percentage of gross revenues at the store which exceed a certain benchmark of sales, or breakpoint, which can be a *natural breakpoint* (i.e., one which, when multiplied by the applicable percentage, produces the tenant's base or minimum rent) or an *artificial breakpoint* (i.e., a negotiated number different than the natural breakpoint).

Cautionary Note: Percentage rent provisions can have unique tax implications for the parties to a lease, especially in the case of tax-sensitive real estate investment vehicles such as real estate investment trusts ("REITs") or public pension funds.

4. Dues & Other Charges

Again, with retail leases, additional charges may apply such as dues for merchant's association activities or fees for the landlord's marketing of the project. Traditionally, tenants at most large retail projects were required to participate in a merchant's association which held regular meetings and engaged in certain marketing and promotional activities for the benefit of the project, the costs of which were then paid by the tenants in the form of additional rent. In many recent cases, however, tenants are each charged a simple marketing fee, such as a fixed monthly sum or a percentage of the monthly rent installment, which the landlord then uses for media advertising, promotional events and other efforts to collectively market the project for all of the tenants' benefit.

5. Utility Charges

As shown above, the costs of electricity consumed with respect to the common areas of a building are charged to the tenants of the building through the operating expenses. The costs of electricity consumed by each tenant in its space may be charged to the tenant indirectly through the operating expenses (when the tenant space is not submetered) or charged to the tenant directly (when the tenant space is submetered). Where the tenant space is not submetered, most leases will contain a provision which states that if the tenant is using a disproportionate amount of electricity or another utility (such as water), then the landlord may submeter the tenant's space, at the tenant's cost, and apply the charges directly to the tenant. This protects the landlord against receiving complaints from other tenants about their having to subsidize the first tenant's heavy usage. Data centers and computer network rooms are often separately served by electrical power and charged directly to their tenant owners in order to address this issue.

Practice Tip For Tenants: Tenants should request provisions which prohibit surcharges, overcharges or other hidden profit for the landlord from being tacked on to utility charges. Also,

where submetering is involved, tenants should require public service commission ("PSC") approved submeters to ensure accuracy and to prevent charges from being added beyond those being imposed by the third party utility supplier.

Practice Tip For Landlords: Landlords should always retain the right to determine the utility supplier for the building, even where tenants may be separately submetered and charged directly by the utility supplier for their usage. This enables a landlord with multiple buildings to pool the buildings and provide a larger customer base to negotiate for more advantageous rates.

6. Late Payment

Most leases will contain provisions for interest and/or late fees to be charged when a tenant is delinquent in its rent payments.

Practice Tip For Landlords: Include both interest and late fees, at the highest levels achievable (although not higher than any limits provided by the law of the applicable jurisdiction), to prevent the late payment of rent from becoming a cheap borrowing tool for the tenant.

V. Lease Term & Extensions

A. The Initial Term of the Lease

1. Fixed Term

The initial term of commercial leases are usually a fixed term, often three to five years for industrial leases and five to ten years for office leases. Retail lease terms for anchor stores often contain multiple renewal options and run closer to 30 years, while the lease terms for the smaller, so-called "in-line" retail stores are similar in length to industrial and office lease terms.

2. Commencement Date

Lease provisions which set forth the formula for determining commencement of the initial lease term, and thus the tenant's rental obligations, are among the most heavily negotiated provisions in any lease. Almost always, these formulas hinge on the tenant space improvement work which is necessary to prepare the space for the tenant's occupancy. However, in some cases commencement can also be based on the relocation schedules of the tenant in question, relocation schedules of prior tenants occupying the space, and other factors. Both landlords and tenants should pay close attention to the interface between the build-out provisions of the lease and the lease commencement formulas. How these provisions are structured will determine how the risks of delayed occupancy and delayed rent payment are shared between the parties. One may describe the variables in this aspect of the lease as follows:

a) Completion of Improvements

Lease commencement may be defined as a function of when construction is completed and the space ready for the tenant's occupancy. This is especially true where the landlord is responsible for the lion's share of the improvements necessary to prepare the space for the tenant's occupancy. The key component will be when the tenant's space is "substantially complete."¹⁶

b) Fixed Tenant-Work Period¹⁷

Where the tenant is to build out all or a significant amount of the improvements, the lease typically gives the tenant a fixed period within which to complete this work, such as 90, 120, or 180 days, depending on the size and scope of the job and the extent of the tenant's share of the work. In such a case, the commencement date of the initial lease term will occur on the expiration of this tenant build-out period. Of course, most leases also provide that where the tenant finishes its work early, and begins to conduct business in the premises prior to the end of this period, the rental obligations begin on the earlier date of the tenant's beginning to conduct business in the space.

General Note: Retail leases also often use another factor in determining the commencement date of a lease term: "black-out" periods. Retail tenants often find that they are not able to perform construction and/or open new stores during the busiest selling seasons of the year (e.g., the period from Thanksgiving to New Year's for most retailers). In these cases, where the commencement date formula causes the commencement date to fall on a date within the black-out period, the commencement date would be automatically postponed to the end of the black-out period.

3. Delays in the Commencement Date

There are three principal causes of delay in the construction of tenant space improvements: tenant-caused delays, landlord-caused delays and force majeure delays.¹⁸ Because the lease commencement date (and thus rent payment) depends so greatly on the timing of construction of the tenant space improvements, the lease should address how each of these three potential causes of delay affect lease commencement.

a) Tenant Delays

In cases of a tenant-caused delay, the typical remedy is for the tenant to begin paying rent on the day on which rent obligations would have commenced, if not for the tenant delay.

b) Landlord Delays

In cases of landlord-caused delay, the typical remedy is for the tenant's rental obligations to be postponed for a number of days equal to the number of days of delay caused by the landlord. However, in some cases, especially where the tenant may be in holdover or even facing eviction at its prior location or may have urgent business needs which require timely construction (e.g., a retail store with an advertised grand opening), the tenant may negotiate for *additional* days of free-rent beyond the day-for-day postponement of rent ("2-for-1" and "3-for-1" clauses). This may enable the tenant to recover the collateral costs of delay (e.g., holdover penalties or costs of renting substitute space) or simply provide an incentive for the landlord to ensure timely construction and completion of the improvements.

c) Force Majeure

The parties will negotiate over which of the parties will absorb the risk of delays which are not caused by either the landlord or the tenant, but rather caused by factors outside of the parties' control, the so-called risks of *force majeure*. In some leases, the parties determine to share the risk, for instance by providing that lease commencement will occur one day earlier than actual completion of construction for every two days of delay caused by force majeure events (sometimes called a "1-for-2" clause). Another example of risk-sharing on this issue is a provision which allows lease commencement to be delayed for force majeure, but only for a fixed number of days, so the landlord accepts the risk for that initial number of days and the tenant accepts the risk for

the period after the fixed period expires. In addition, this risk of uncontrollable delay will often be shared depending on which party is responsible for the greater share of the build-out of the tenant space improvements, with the party responsible for the largest share of the work assuming the risk of force majeure (or the greater share of such risk). This is logical, given the fact that in many instances it will be difficult to differentiate between a force majeure delay, on the one hand, and a tenant delay or a landlord delay, on the other hand.

Practice Tip For Tenants: In some cases, the tenant is able to negotiate for a “drop-dead” date, after which, if the space improvements are not yet then complete, the tenant may terminate the lease and find alternative space. Typically this is only possible in the case of landlord delay, but might in some instances be expanded to include force majeure delay, and in all cases only after an extensive grace period. In the case of a lengthy delay, the landlord has already lost a large amount of rent, and the right to start the process over with a different landlord at a different building may be of limited usefulness to the tenant, so a term such as this is most valuable for negotiating leverage or as a disincentive (and stiff landlord resistance is to be expected).

B. Options for Renewal or Early Termination of the Lease Term

I. Notice Requirements for Renewal

A tenant may be granted a renewal option to extend the lease term for a single period or for multiple periods, with the latter to be exercised in sequence, with each of the subsequent options being conditioned on exercise of the preceding option. In virtually all cases, since renewal options (and other similar options) are for benefit of the tenant only, landlords will require that a tenant adhere to strict timing deadlines for exercise of an option, failing which the landlord will be permitted to lease the space to another party. Universally the notice requirements involve a date beyond which the tenant may not exercise the option (a “not-after” date), but in some cases the tenant is prohibited from exercising the option *before* a certain date, such as in the case of a market-rate renewal option where a too-early exercise makes determination of the true market rate of rent to apply on initial lease expiration difficult to predict. In addition, it is almost always required that the tenant not be in default of the lease when exercising a renewal option.

2. Rent Formulas

The question of what rental rate will apply during a renewal period may be determined in several different manners:

a) Fixed Rate

A fixed-rate option has a prescribed rental rate that will apply, often based on the rental rate in effect at the end of the lease term, plus a percentage increase which itself may also be fixed or based on a CPI formula.

b) Market Rate

A market-rate option will contain a formula determining the rental rate to apply based on general market factors present at the time of the exercise of the option, but also serves as a prediction of what the actual market rate will be when the initial lease term expires and the option period takes effect. These provisions can build in a negotiating period for the landlord and the tenant to reach an agreement on the applicable market rate, and generally provide for mini-arbitrations if the parties are ultimately unable to agree. Though there are numerous ways to structure such an

arbitration to reach the applicable market rate, several common procedures are as follows:

- Calculation of the market rate by a single arbitrator, who is either selected by mutual agreement of the parties, or selected by mutual agreement of two brokers or appraisers each of whom is selected by the landlord and the tenant, and with the arbitrator either calculating the rate or choosing a winning rate between that quoted by the landlord and that quoted by the tenant. (This latter style of arbitration is often called a "baseball-style" arbitration in a reference to the Major League Baseball's arbitration procedures for determining the salaries of professional baseball players.)
- Calculation of the rate by a panel of three arbitrators, with the rate determined by all three arbitrators together, or with the rate being determined through a procedure whereby each of the arbitrators calculates the rate, and then the average of the two closest rates equals the applicable rate.

Practice Tip For Landlords: Landlords should adopt a rental rate "floor," equal to the rate at the end of the initial term of the lease, in order to protect against the rental rate actually decreasing during a renewal term. This is a logical trade-off to the one-sided nature of an option which is otherwise entirely for the tenant's benefit.

Practice Tip For Tenants: In some cases, the tenant is able to negotiate for a rescission right, which enables the tenant to withdraw exercise of the option once the exact rate number to apply is reached through the applicable procedure described above. This helps to protect the tenant against the "blank check" phenomenon, i.e., from committing to a number before the tenant knows exactly what the number is.

3. Options To Terminate

Often considered renewal options in reverse, termination rights involve their own peculiar set of issues. First and foremost, termination options usually require simultaneous payment of a termination fee which enables the landlord to recover the following amounts:

- unamortized costs of the landlord's build out of the space which would otherwise not be recovered due to the tenant's shortening of the lease term,
- unamortized leasing commissions paid out at lease inception which would also not be recovered,
- legal fees and other costs which would have to be incurred a second time in connection with the landlord's obtaining a replacement tenant and negotiating a new lease,
- lost rent for the estimated downtime during the landlord's remarketing period before reletting, and
- sometimes, an outright fee paid by the tenant as a negotiated form of compensation to the landlord for granting the termination right.

Many termination provisions require that the tenant not be in default of the lease, and pay the agreed termination fees, prior to the termination being deemed effective.

General Practice Tip: The parties should be specific in stating the exact dollar amount of the termination fees to apply or, if this is not possible, set forth an exacting formula for determining the fees at the appropriate time (about which there can be no disagreement). From the landlord's perspective, this ensures the landlord of collecting the correct amount of money; from the tenant's perspective, this provides an element of certainty and reduces the risk that a dispute over the calculated amount of the fees will call into question the very effectiveness of the tenant's exercise of the termination right.

C. Tenant Holdovers Beyond the Lease Term

I. Rate Increases

Most leases provide that when a tenant holds over in the premises beyond the term of its lease, the tenant must pay an artificially increased rental rate until the tenant vacates. This increase is usually between 125% and 200% of the rental rate which is in effect at the end of the term. The rationale for this is twofold:

- to incentivize the tenant to plan its space moves ahead of time and avoid holdover, and
- to compensate the landlord for increased costs and risks associated with a tenant holdover.

Practice Tip For Tenants: Tenants are often able to negotiate a short "transition period" of 30 or 60 days in which no penalty rates or reduced penalty rates apply.

2. Other Remedies

Of course, the greatest risk for the landlord during a tenant holdover is the potential loss of a replacement tenant which requires a more immediate occupancy. Whether or not the lease will go on to expressly state that the tenant is, or is not, responsible for consequential damages of this type resulting from a holdover is an issue that is heavily negotiated between landlords and tenants. In almost all leases, however, the landlord retains the right to evict the tenant, but this is only protection against the most extreme holdovers, since court action and a lengthy process is usually required for an eviction to take place.

VI. Tenant Space Improvements

A. Initial Preparation for the Tenant's Occupancy

I. Division Of Work

In some cases the landlord is responsible for all of the improvements necessary to prepare the space for the tenant's occupancy; in others, the tenant is solely responsible. However, in the majority of cases the necessary work is divided between the landlord and the tenant. The lease will need to define carefully the corresponding roles and responsibilities of the parties, as well as

the interconnections between these provisions and those defining the lease term and rent commencement.¹⁹ Where both parties are performing significant aspects of the build-out, the lease should contain provisions requiring that the parties use reasonable efforts to coordinate their respective components of the work, instruct their contractors accordingly, and indemnify each other from the mistakes or negligence of their respective contractors.

2. Landlord's Work

The landlord's obligations with respect to tenant space improvements typically involve, at a minimum, the creation and delivery of the space in a "shell" condition. This would entail perimeter walls defining the space, bringing HVAC, electrical and plumbing system trunk lines to the space, and potentially installing a ceiling grid with standard lighting fixtures.

Practice Tip For Tenants: The landlord's work should be defined as specifically as possible. This is best accomplished by attaching a list of specifications to the lease with dimensions, materials and other details to the fullest extent possible. Correspondingly, in defining the landlord's work the lease should not rely on vague terms such as "building standard" or "industry standard" which can lead to differing expectations between the landlord and the tenant.²⁰ Alternatively, if the terms building standard or industry standard must be used, it is best to include specifications or a list of comparable properties to which the work and materials must be compared in order to give the term real meaning.

3. Tenant's Work

In virtually all jobs, even where the landlord is to perform the finish work in the space (discussed below), the tenant will still have a certain amount of work to perform in order to prepare the space for occupancy, such as the installation of computer and telephone lines, the erection of racking and equipment (in industrial spaces), the move-in of furniture and office machines, and the stocking of supplies and inventory. This type of tenant work does not necessarily need to be defined as carefully as that to be performed by the landlord, but all aspects of this work will be subject to submission of plans to, and approval by, the landlord (discussed in more detail below). The lease should set forth any specific requirements or limitations of the building itself. These requirements or limitations may include floor-loading capacities, maximum electrical capacities, and even restrictions of the per-square-foot density of employees imposed by the building's HVAC capacity.

4. Work Letter

The best leases will contain a series of provisions or an exhibit setting out in very specific terms all of the procedures governing the parties' performance of the "finish" work necessary to initially prepare the space for the tenant's occupancy and business (referred to by many as the "work letter"). This so-called *work letter* will address many components of the complicated design and construction process:

a) Construction Management

Defining the roles of the general contractor and the construction manager or supervisor, including whether any additional fees for the latter will be required.

b) Space Planning

Process for space planning (including any "test-fits") and developing a schematic design and floor plan for approval of the parties.

c) Construction Drawings

Design and drafting of construction drawings, and review and comment by the parties (and addressing comments with revisions), all according to a specific schedule for each stage of the process.

d) Permitting

Application for a building permit, submission of construction drawings, addressing agency comments, and paying the applicable fees.

e) Bidding Process

Process for creating a bid package, obtaining bids from contractors and subcontractors, and selecting winning bidders.

f) Budget & Schedule

Creation of a budget for all costs related to the build-out, as well as a timeline and schedule for completion of the build-out, for approval of the parties.

g) Contracts & Contractors

Approval of the contractors and subcontracts to perform the work and (if necessary) the contracts covering the work.

h) Bonding

Where larger jobs are involved, and if applicable, establishing the thresholds and requirements for bonding of the construction work through sureties.

General practice tip: The parties can negotiate for “deemed approval” provisions which help to enforce a strict timeline for the many stages of the build-out process. For instance, the lease could provide that if one of the parties has missed a deadline for responding to a written request for approval of a set of drawings or a set of bids for construction, the other party could send a second request, which seeks approval or comment by a specific (and shorter) deadline, but which also states that if the second deadline is missed the first party’s approval will be deemed granted. (It is best to have a second notice such as this before any party’s approval is deemed granted.)²¹

B. Completion of the Tenant Space Improvements

I. Substantial Completion

Most leases have provisions which borrow from the American Institute of Architects (“AIA”) and other construction contract forms the concept of “substantial completion” to define the landlord’s build-out obligations and to assist in the determination of lease commencement.²² Formulas defining this moment of substantial completion typically require the fulfillment of several conditions:

a) Completion of Work

Substantial completion can mean the completion of the space improvements required for the tenant’s occupancy, to the extent sufficient for the tenant to move in and begin conducting business in the premises, but usually subject to completion of the punchlist discussed below.

b) Certificate Of Completion

A certification by the architect of record for the job and/or a construction manager supervising the job (if one is involved in the job) that the improvements have been completed in accordance with the approved plans and construction drawings defining the improvements.

c) Certificate Of Occupancy

Issuance of a certificate of occupancy by the applicable local permitting agency which certifies that the tenant may legally occupy the space for business purposes.

Practice Tip For Tenants: Where the landlord is constructing the improvements necessary for the tenant's occupancy, the tenant should negotiate for advance notice of a prescribed number of days prior to the expected date of substantial completion, in order to give the tenant time to coordinate its own move-in, and own fixturing and cabling work (i.e., installation of computers and telephones).

2. The Punchlist

Every lease should have a procedure for determining the last and to be completed, following substantial completion, for the space improvements to be finally and fully completed. Typically there will be an inspection by the parties to develop a mutually agreed-upon list of minor omissions or corrections that do not affect the tenant's ability to do business in the space but which at the time still remain complete (the so-called "punchlist"). The lease should require that the landlord complete all punchlist items within a fixed number of days, such as 30 days, following substantial completion.

C. Delays in Completion of the Initial Improvements

1. Tenant Delays

The tenant's own actions can cause a delay in the construction of improvements, even when they are to be performed by the landlord. Many leases list several possible ways in which this can occur to cause such a "tenant delay":

- the tenant can fail to meet a deadline in the lease for approving or commenting on design plans or construction drawings,
- the tenant can request changes to the work or additions to the work after construction has already begun (so-called "change orders"),
- the tenant can require specialized detail work or materials which are uncommon in the standard build-out for spaces of the type used by the tenant (the so-called "long-lead" items), or
- the tenant or its contractors can interfere with the landlord's own construction work or contractors.

2. Landlord Delays

Of course, landlords can also be the cause of a delay in the completion of improvements. Examples of "landlord delay" which are often listed in a lease are:

- the landlord fails to submit design plans or construction drawings to the tenant for review and approval according to the expected timetable in the lease,
- parties under contract with the landlord, or for whom the landlord is otherwise responsible (e.g., architects, contractors and subcontractors), fail to meet their build-out obligations in a timely manner,
- the landlord fails to render the required payments for contract work and suffers a job stoppage or other similar delay, and
- the landlord's work fails inspection or is otherwise defective and must be re-done.

3. Force Majeure

The third type of delay which needs to be addressed in the lease is a delay which is caused by neither the tenant nor the landlord: delays of *force majeure* which are caused by factors outside of both parties' control. Clauses defining these types of delays vary widely among different leases, but there are certain common denominators (all of which are intended to capture extreme or unusual circumstances, and not the situations commonly encountered in construction):

a) Nature

So-called "Acts of God" or extreme weather such as earthquake, flood, hurricane, or catastrophic storm.

b) Emergency

Acts of war or terrorism, civil unrest, sabotage, or other national emergency.

c) Casualty

Casualty or accident such as fire, explosion, or other destruction.

d) Government

Unusual governmental action such as moratorium, condemnation or unforeseeable change in law. Also, a government delay in issuing a building permit or other permit (as long as the delay did not result from an act or omission of one of the parties).

e) Extraordinary Circumstances

Strikes or other labor strife (affecting construction beyond the project in question), extreme shortage of materials (beyond customary market fluctuations), or extended electrical blackout or municipal infrastructure failure.²³

General Note 1: Force majeure clauses should be drafted and negotiated carefully, with precision in the types of events which qualify as force majeure, and without catchall phrases or other vague phrases which can include circumstances which would also arguably qualify as tenant delays or landlord delays.

General Note 2: Delays generally: Due to the monetary implications of delayed rent payments, the area of construction delay is fertile ground for dispute. The definitions of tenant delay, landlord delay and force majeure delay are necessarily vague and potentially overlapping. (For instance, is a general contractor's delay in completing work a force majeure delay, or is it a tenant

delay or a landlord delay depending on which party has a contract with the general contractor?) This potential for disputes is compounded by the fact that construction projects are complicated, with many steps and stages, and often subject to aggressive time tables established by the parties. For these reasons, this is a good area for a mini-arbitration or a truncated arbitration procedure, which can resolve disputes between the parties with respect to any aspect of the build-out process relatively quickly and give the parties a better chance of staying on their original (or close to original) timetable.

D. Allowances & Payment for Tenant Space Improvements

I. Turnkey Jobs

In some cases, the landlord will promise to build and pay for a specific and prescribed set of improvements to the tenant's space, regardless of the cost of those improvements. Such an arrangement is referred to as a "turnkey" construction job. Here the parties must carefully define the improvements with as much detail as possible. Any lack of specificity leaves the parties at risk of differing expectations; the tenant may envision a more extensive or grandiose build-out than the landlord expects to make. From walls and dimensions, to finishing touches such as coats of paint, weight of carpet and style of moldings, the parties should attach a plan and full set of specifications to the lease whenever a *turnkey* improvement job is contemplated.

Practice Tip For Landlords: Landlords should obtain, and become comfortable with, detailed and realistic costs estimates of the cost of all turnkey improvements, since the landlord will assume the risk of cost overruns regardless of the cause.

2. Improvement Allowances

In the majority of leases, rather than committing to a turnkey job, the landlord will provide a monetary allowance towards the cost of the tenant space improvements. In these instances the tenant will pay the costs of the improvements in excess of the allowance (thus assuming the risk of cost overruns). However, allowances may be used when either the landlord or the tenant is building out the space. Most leases require that improvement allowances be used solely for improvements to the landlord's real estate (*e.g.*, walls and ceilings, and not furniture or copiers), but often where the entire allowance will not be used for construction, application of the allowance to design fees, moving costs or even free rent is allowed (up to negotiated limits). Moreover, there are certain prerequisites that apply to each payment of a portion of the landlord's allowance into a tenant space improvement project:

a) Pro Rata Shares Of Costs

Where the parties have made construction budget estimates, the landlord and the tenant know that each will have to pay a share of the costs of the improvements. The lease will then need to determine *when* each party's obligations are to be paid. The landlord can be required to pay the first costs, the tenant can be required to pay the first costs, or the parties can pay a share of each stage of invoices, pro rata, based on their expected shares of the aggregate budget estimate.

b) Bills & Receipts

Leases typically require that all work which is to be paid directly to contractors be evidenced by bills, and that all work which is to be paid in the first instance by the landlord or the tenant, and then reimbursed, be evidenced by written receipts verifying payment.

c) Certificates Of Completion

Typically a lease will require that, before any work is to be paid for, an architect or other professional involved in the job issue a certificate stating that the work has been satisfactorily completed.

d) Progress Reports

Often, in addition to certificates of partial completion, other progress reports are required such as breakdowns of the components of the work by trade and by percentage of completion. Many times, these reports are required to be on applicable AIA forms.

e) Lien Waivers

Waivers of liens should be issued by the general contractor and any subcontractors performing work on the job for which an allowance or other payment is to be made.

f) Retainage

Many leases will require that, as with larger construction jobs, a percentage of each invoice amount (typically 5% or 10%) be held back and not paid until the end of the improvement work, in order to ensure proper completion of the work and to make provision for any corrections or other contingencies that may need to be addressed.²⁴

Practice Tip For Landlords: The landlord should make certain that the lease is clear that the tenant will pay all costs of the build-out in excess of the specified allowance. And, where the tenant is to actually perform the build-out, the tenant should be required to complete the work and draw the allowance within a fixed period of time.

E. Subsequent Alterations to the Space by the Tenant

1. Discretionary Modifications

Virtually all leases prohibit a tenant from altering or improving its space without the landlord's permission, except that many leases give the tenant a modicum of leeway for minor modifications. The applicable provisions often place a dollar limit on the value or cost of modifications which may be made without consent (best stated in aggregate terms since modifications may be made on more than one occasion), while others limit these pre-approved modifications to cosmetic changes (such a window treatments, carpet and wall hangings). In most leases, the tenant is specifically prohibited from making any improvements which require a building permit, or from altering the structure of the building or any of its HVAC, electrical, plumbing or other mechanical systems, without first obtaining the landlord's approval.

2. Landlord's Approval

Typically advance notice to the landlord is required prior to the tenant making any alterations or improvements to its space or the surrounding building. Likewise, where the landlord's approval is also required, the parties will negotiate the issue of whether an objective or a subjective standard will apply, i.e., whether the approval can or cannot be unreasonably withheld by the landlord.

Practice Tip For Landlords: It is common for a landlord to agree that it will not unreasonably withhold its consent to any proposed tenant modifications which do not affect the structure of the

building, but the landlord should retain full discretion, and apply a subjective standard, over improvements which affect the exterior of a building or (in the context of a retail lease) which may be viewed from the exterior of the tenant's premises. Building attractiveness and appearance is a subjective matter and the sole purview of the building's owner.

3. Prerequisites to Making Alterations

Provisions governing the making of alterations or improvements by a tenant contain certain basic elements:

a) Plans

Plans (detailed plans for large jobs) describing the work are to be submitted to the landlord.

b) Contractors

Landlords often reserve the right to veto contractors whom the tenant proposes perform the alterations, or even to affirmatively require certain contractors be used for certain types of work in the building (for instance, the landlord's chosen engineer when complicated high-rise mechanical systems are to be modified or affected).

c) Supervision

Landlords will often reserve the right to engage their own professionals to supervise the making of the alterations or improvements in order to ensure quality work, to protect building systems, and to charge for this service (often between three to eight percent of the cost of the work, depending on the size of the job).

d) Indemnity

Generally the tenant will indemnify the landlord against property damage and/or personal injury caused by the tenant's contractors performing the work.

F. Restoration & Other End-Of-Term Obligations

I. Wear & Tear

Leases should, but often do not, specify exactly what the tenant's obligations will be with respect to the space at the expiration of the lease term. Most leases say that the tenant is not responsible for normal or customary "wear and tear." They do require the tenant to remove its personal property such as furniture, office machines and other personality. However, many leases are silent with respect to fixtures installed by the tenant and do not say whether the tenant is permitted, or required, to remove them. Moreover, what is legally defined as a fixture can vary a great deal, from bookcases and consoles to wires and ducts in ceilings. When entering into a lease, the parties should spell out the parties' rights and obligations with respect to every different kind of fixture which is contemplated for the space, in order to avoid costly disputes at the end of the lease term. (In high-rise office spaces and other specialized build-outs, disputes over these obligations can run into the millions of dollars.)

Practice Tip For Landlords: Always require that the tenant remove at the end of the lease term any IT wires and cabling that the tenant installs in the walls, ceilings or floors. This kind of "fixture" is almost never re-usable, but often must be removed from a space after the tenant

vacates (among other reasons, to avoid fire hazard), and therefore its removal is often a hidden and unexpected cost.

2. Specialty Alterations

Certain kinds of alterations are specialized enough that the parties almost always negotiate their disposition at the end of the lease term. Examples are bank vaults, customized national defense or intelligence improvements (such as a Sensitive Compartmented Information Facility (“SCIF”) space), internal stairwells, raised flooring, supplemental HVAC systems and emergency generators. These are often called “specialty” alterations and are usually defined as alterations which are uncommon for the type of space in question or otherwise serve a unique need of the specific tenant (versus other tenants in the building). The tenant almost always must remove specialty alterations at the request of the landlord. However, as with the concept of “fixtures,” these are difficult types of alterations to capture accurately in a uniform definition, so the parties should specify each of the individual alterations that the parties contemplate will be installed and that must be removed at the end of the lease term.

General Note: In many other nations, including European nations, the tenant will typically have much greater obligations with respect to the restoration of its space following the end of its lease term. This will often entail returning the space to its original pre-lease state, even if this includes demolition, erection of walls, replacement of ceilings, and other similar improvements.

VII. Restrictions on Use of Space

A. Lease Provisions Controlling the Use of Space

1. Permitted Uses

Every lease will set forth the permitted use of the space by the tenant. Many times this is stated in fairly generic terms (e.g., offices, restaurant, doctor’s office, etc.) but should also contain some detail where appropriate (e.g., “sales” office, “fast-food” restaurant or “delicatessen”), as well as name any incidental or accessory uses (e.g., a drive-through function for a pharmacy or a data center or call center for a sales office). Establishing basic parameters of the permitted use of each tenant’s space in a building will enable the landlord to avoid conflicts between incompatible uses and, at retail projects, protect synergies between different tenants.

2. Special Use Provisions in Retail

Use provisions are among the most highly negotiated terms in any retail lease. On the one hand, the landlord owner of a retail project will seek to tightly control all the tenants’ uses of their respective spaces in order to combine an array of uses, prevent unnecessary competition between tenants, and create a marketable tenant mix to enhance the aggregate sales and thereby the value of the property. On the other hand, each tenant will resist use limitations to the greatest extent possible in order to preserve flexibility in its business and enable the tenant to adapt over time to a fast-changing retail world. In addition to battling over permitted use clauses, landlords and tenants have, over time, concocted several additional types of provisions related to use and occupancy in order to advance their respective interests:

a) Continuous Operating Covenants

Having a tenant “go dark” by closing and boarding up its store is anathema to any retail landlord. The mere sight of closed stores can scare away customers, and therefore ultimately other tenants, from a retail project. To combat this possibility, landlords often use continuous operation covenants which require the tenant to remain open and “fully staffed and stocked” with employees and merchandise during certain prescribed business hours. (Exceptions include holidays and temporary periods for renovations or the taking of inventory.) If a tenant violates these covenants, the landlord has remedies which may include specific performance, termination or monetary penalties.

Practice Tip For Landlords: In practice, obtaining court orders compelling a tenant to re-open a closed store is difficult to accomplish, and terminating the violating tenant’s lease exacerbates the problem, so landlords should monetize their remedies for violations of these clauses as much as possible. (Whether monetary charges for these types of violations are enforceable will vary from state to state.) The objective is to create a monetary penalty that is clear and enforceable enough to provide a strong disincentive and prevent the tenant from closing its store in the first place.

b) Radius Restrictions

Often landlords are strongly interested, once they bring a particular type of tenant into a retail center, in preventing the tenant from opening competing stores in nearby projects. This is of course particularly true of “destination” businesses upon which the landlord will depend to bring customer traffic to the property. Typically these radius restriction clauses will prohibit the tenant from opening the same or a similar store within a prescribed number of miles (e.g., one mile, five miles) or within the jurisdiction of the project (e.g., the same city or county). Remedies for violation of a radius restriction often include the landlord’s right to file an injunction preventing opening or operation of the offending store or where the tenant’s lease includes a percentage rent feature, include the revenues of the offending store in the gross revenue calculation of percentage rent.

Practice Tip For Landlords: Landlords adopting radius restrictions in tenants’ leases should include affiliates of the tenant in order to avoid the tenant’s separately incorporating a second store to easily circumvent the restriction.

General Note: Radius restrictions have competition and antitrust implications, both on the federal law and the state law levels, which if violated can lead to a landlord losing benefit of the clause or, worse, suffering potential claims for damages and penalties. Whenever imposing a radius restriction, a landlord should perform its research and take care to draft a restriction which will be upheld considering the particular jurisdiction and type of tenant business.

c) Exclusive Use Clauses

Tenants often protect themselves against competition from elsewhere within the same retail project by requiring that the landlord grant them an exclusive use provision which prohibits the landlord from entering into leases with other tenants permitting the operation of the same type of store or the sale of the same type of merchandise. Indeed, it is almost universal for some types of businesses – supermarkets, pharmacies, computer stores and video rental stores, to name a few – to require exclusive use protection before agreeing to lease space in a retail center. Many exclusive use provisions are couched as prohibiting the landlord from leasing to another tenant, the “primary business of which” is the prohibited use (or which “primarily operates” the prohibited

use). However, these terms are vague, and the common denominators underlying the description of any business will naturally evolve over time, creating the possibility of disputes in the future. Landlords and tenants will be wise to describe the protected uses in as quantifiable a set of terms as possible. For instance, the most effective clauses prohibit a specified percentage of gross revenues from being derived from the sales of a certain type or category of merchandise, or limit the square footage which may be devoted to the sale of that type or category of merchandise.

Practice Tip For Landlords: Landlords can reduce the list of disputes over exclusive use clauses by:

- carving out from such clauses any use rights granted to tenants signing leases prior to the tenant to whom the exclusive use clause is granted, and
- by prohibiting the tenant to whom the exclusive is granted from violating any exclusive use clauses granted to any prior tenants. (In the latter case, the tenant will demand to see copies of the exclusive use clauses so granted to the prior tenants.)

d) Co-Tenancy Provisions

Often tenants who locate at a particular retail project due to the presence of another specific retailer will negotiate for escape or punitive clauses if the drawing-card retailer closes its store and leaves the project. Sometimes tenants will negotiate for similar clauses based on percentage decreases in occupancy (thus increases in vacancy) at a center generally. These co-tenancy clauses typically grant the landlord a grace period within which to obtain a substitute for the key co-tenant or increase occupancy levels to above the magic threshold, but failing this the tenant will usually have the right to:

- reduce its base or minimum rent or adopt an all-percentage rent structure (in the latter case, thereby shifting the risk of lower sales to the landlord), and/or
- terminate its lease and leave the project.

Practice Tip For Landlords: Where possible the landlord should require that the tenant prove with sales reports that the failure of a co-tenancy condition actually does result in lower sales for the tenant. Likewise, where this may be proven, the landlord should limit the tenant's remedies for a co-tenancy violation to a temporary period, following which the tenant must return to its initial lease and rent structure (if the tenant does not exercise a right to terminate the lease in a timely fashion). This is because the loss of a key tenant, or a drop in the occupancy level at the property, may not necessarily result in lower (or at least materially lower) sales for the tenant, and the tenant may not decide to terminate its lease after all based on that one failed co-tenancy condition. In this case it is best for the landlord to not have the tenant benefitted by a lingering termination or rent reduction right which might be used by the tenant at a later time and for a different reason.

e) Sightline Covenants

Retail tenants for whom sight-lines to major roads are important for business and sales will protect themselves by prohibiting the landlord from constructing building improvements which interfere with these sightlines. The most common example is a supermarket tenant which imposes on the landlord certain "no-build" areas that are customarily defined to include the parking areas and any outlot parcels which are located directly in front of the tenant's store.

f) Prohibited Sales Or Uses

A landlord may require a clause which will prohibit the tenant from selling certain products or merchandise that are objectionable to the landlord or incompatible with the property, but which, if not expressly prohibited, might otherwise fall within the description of the tenant's permitted use. For instance, a landlord leasing space to a tenant for a pharmacy may seek to prohibit the tenant from selling alcohol, pornographic magazines or drug paraphernalia. Correspondingly, the tenant may seek to prohibit its landlord from leasing space elsewhere at the project to other tenants which engage in undesirable uses. If the property is a retail project, examples might include pool halls, adult theatres, "dollar" stores or dance clubs.

3. Rules & Regulations

In most leases the landlord reserves the right to adopt and apply to all tenants in the project a list of rules and regulations governing the use of the building and particularly the common areas to be shared by the tenants. The rules typically address matters of cleanliness, safety, noise and nuisance, as well as the sharing of amenities like parking spaces. Tenants often negotiate for assurances that all such rules and regulations will be "reasonable" and applied "uniformly" to all tenants.

B. Regulatory Limitations on Use of Space

1. Zoning

The parties to a lease, both landlord and tenant, should be comfortable that the zoning ordinance applicable to the property in which the tenant is leasing space permits the contemplated use of the space by the tenant. Even if this is obvious and therefore easy to assume (such as with office space in a Central Business District ("CBD") high-rise office building), verifying the permissibility of the tenant's use usually can be done with little effort or expense. Zoning agencies are often set up to provide quick answers to zoning questions such as this, with many set up to permit the research on-line.

2. Special Exceptions

Many contemplated tenant uses have features which take them beyond the realm of permitted uses (typically permitted without additional scrutiny and approvals) and require special approvals such as special exceptions or conditional use permits. These are uses that local zoning codes treat differently, due to their involving greater safety or health considerations or having a greater effect on surrounding properties, than the customary uses permitted in a certain zone. Examples are a drive-through window linked to a pharmacy, a surgical clinic associated with a doctor's office, a classroom connected with an educational sales office, or outdoor public seating at a restaurant. These uses can often require a public hearing or other special approvals before being permitted for a particular property. In these cases the issuance of full approval by the applicable authorities should be a condition to the tenant's being able to conduct that aspect of its use of the space or, if that aspect is critical to the success of the tenant's business, a condition to the effectiveness of the lease itself.

Practice Tip For Landlords: Tenants often request that landlords permit them to use their space for "any legally permitted use." Landlords should avoid this type of clause and should favor a clause which defines the tenant's use more specifically (while prohibiting all others), so that the landlord may better control all of its tenants' uses, and therefore the cumulative effects of all those

uses, on the landlord's property.

VIII. Building Services

A. Building Services to be Provided

1. Heating & Air-Conditioning

In some leases, more often in retail and industrial leases than in other types of leases, the tenant assumes responsibility for maintaining HVAC systems which are used to keep the space at comfortable operating levels. However, in the majority of leases, especially office leases, it is the landlord's responsibility to provide a comfortable premises, and this includes the maintenance of the base building HVAC systems as well as the calibration of the distribution network of ducts that delivers air to the individual tenant spaces.²⁵ Typically this obligation extends for prescribed building hours, which mimic typical business hours (e.g., 8:00 AM to 6:00 PM on weekdays, and 9:00 AM to 1:00 PM on Saturdays, except holidays), and the tenant must pay the costs of any HVAC service that is requested beyond these hours.

Practice Tip For Tenants: In office leases, tenants should require a provision that obligates the landlord to maintain both the temperature and the humidity in the tenant's space within certain specified ranges. The temperature and humidity ranges should be tight enough to assure the tenant comfortable conditions year-round, but also be wide enough to take into account winter and summer outdoor conditions. Sample specifications for temperature and relative humidity are 72° Fahrenheit (23.33° Celsius) Dry Bulb to 76° Fahrenheit (24.44° Celsius) Dry Bulb, and 15% (winter) to 50% (summer), respectively.

2. Cleaning Services

Every lease should set forth the landlord's and the tenant's relative obligations with respect to all cleaning services which are required for the property. Such services include exterior trash and snow removal (almost always the landlord's obligation), interior common area cleaning (almost always the landlord's obligation), and interior tenant space janitorial service (the tenant's obligation in retail and industrial leases, the landlord's obligation in office leases).

Practice Tip For Tenants: In office leases, the tenant should approve and attach to the lease "janitorial specifications" which will describe the type of cleaning activities to take place (e.g., window cleaning, vacuuming, trash removal, recycling, etc.) and the frequency of service (e.g., window cleaning quarterly, dusting weekly, bathroom cleaning and trash removal daily, etc.). In some cases, where the tenant is interested in high levels of security (such as a defense contractor) or assuring first-class operations (such as a Class A office tenant), the tenant will seek a right to perform these services through its own employees or contractors and to have the associated costs removed from its rent for operating expenses.

3. Utilities

The lease should set forth the utility services that are to be provided to the tenant's space. Such service includes electricity, hot and cold running water and (sometimes) gas or cable TV.

4. Elevator Service

The lease should assure the tenant round-the-clock access to the premises, including access to passenger and freight elevators where applicable (with the latter sometimes containing restrictions on usage to preserve availability for all tenants and the landlord).

Practice Tip For Tenants: The above “comfort” provisions are very important to the tenant’s enjoyment of the space throughout the lease term and therefore should be emphasized in lease negotiations. Moreover, since good building service is by its nature a vague concept which is hard to capture with specificity, the tenant can obtain extra assistance on this point by requiring a provision which obligates the landlord to operate the building at all times in accordance with “First Class” or “Class A” standards. Where these terms are used by brokers in the local market, they will create points of comparison which may help to resolve disputes which later develop over whether the landlord is providing a required level of services.

5. Security

Sometimes special requirements for tenants, such as special security protection, need to be addressed in the lease. Both the methods (e.g., cameras, guards, key-pad systems) and the responsibility for the costs of providing security should be clearly stated. In all cases, the landlord should be given access to the tenant’s space (except extraordinary cases such as government security space or bank vaults), and any security systems specialized for a tenant’s benefit should be coordinated with the systems in place for the building generally.

Practice Tip For Landlords: Landlords may promise to provide certain methods of security (e.g., lobby desk, guards, cameras), and may even agree as part of the rental structure to pay for such security, but landlords should not *guarantee* the effectiveness of any security measure and should disclaim liability for lapses or criminal activity of any kind.

6. Other Services

The lease should describe any other services which the tenant seeks to have available for the duration of the lease term, including access to building amenities such as concierge services, health club facilities and parking facilities.²⁶

B. Building Systems & Capabilities

I. Electrical Capacity

Leases customarily contain clauses which prohibit each tenant from using electricity at levels which, when combined with the usage of other tenants, will overload the electrical capacity of the building. It is best for both parties to render this limit in specific and quantifiable terms, such as an average number of watts per square foot of the tenant’s space (e.g., six watts per square foot in many office leases). Moreover, this type of limit can be stated in terms of a “connected load” (the aggregate maximum capacity of all equipment, machinery and appliances in the space drawing electricity) or in terms of a “demand load” (the aggregate amount drawn by these items which are actually in use at any given time). The tenant will find the latter statement of the electricity limitation to be the more forgiving one, since all of the electricity-drawing items in a space are rarely turned on and drawing electricity at the same time.

2. Emergency Generator

Some tenants (for instance, many financial institutions) need assurance that their computer systems will be protected against interruption from blackouts, storms and other mishaps. This is accomplished through emergency generator systems. Such systems are often provided by the landlord at a building and shared by more than one tenant or, in the absence of such a capability at the building, then purchased, installed and connected by the tenant for its individual use.²⁷ Rights relating to the use of a common building generator or space for a tenant-installed generator may or may not carry additional rent charges to the tenant.

3. Supplemental HVAC System

Similar to the need for back-up power generators, some tenants need supplemental HVAC systems, when the building systems are insufficient to properly heat and cool the tenant's space given the tenant's density of personnel, or when the tenant has special systems such as data centers or computer rooms which require specialized temperature control. Typically the tenant will pay for installation of these systems, pay the ongoing electrical charges associated with them (through submetering), and pay for removal of the systems at the end of the lease term.

C. Interruptions in Building Services

I. Service Interruption

All leases should address how the risks of interruptions in building services are to be shared between the landlord and the tenant. This includes interruptions which are:

- caused by the landlord, such as failure of a building's HVAC system due to a lack of maintenance,
- caused by the tenant, such as when a tenant installs electrical lines which overload the building's capacity, and
- caused by factors outside the parties' control, such as a municipal electrical blackout.

2. Remedies

The basic remedies for certain kinds of interruptions in building services are rent abatement and/or lease termination. (In unusual cases the tenant will negotiate for the additional remedy of self-help rights where the landlord is at fault for the cessation of the building service in question.) However, whether and when the tenant can exercise any remedy may depend on:

- whether the service interruption causes the space to be untenantable (*i.e.*, entirely unusable for the tenant's business) or whether it causes mere inconvenience,
- whether the duration of the interruption is a matter of hours or days or is more prolonged, and
- whether the landlord is at fault or the interruption was caused by force majeure beyond the landlord's control.

Theoretically, the landlord can address the loss of rent from a tenant's rent abatement through rent-loss insurance; correspondingly, the tenant can protect itself from having to pay rent for space it cannot use through business interruption insurance.²⁸

IX. Maintenance & Repair Obligations

A. Obligations of Landlord and Tenant With Respect to the Space and the Building

I. Maintenance & Repairs

Every lease should define clearly and with specificity the obligations of the landlord and the obligations of the tenant with respect to maintenance and repair duties. Of course, the typical balance of duties between the landlord and the tenant will differ depending on the type of property being leased.

a) Office Leases

Office leases will typically place the highest burden on the landlord with respect to maintenance and repairs:

- Landlord maintains the foundation, structure and roof of the building, as well as the exterior skin of the building, all other improvements (e.g., parking facilities, walkways, driveways), and any landscaping.
- The landlord provides "full service" operations and maintains all HVAC, electrical, plumbing and other building systems and equipment, all "building-standard" lighting, all internal infrastructure (e.g., risers, conduits, ducts), and all internal common areas.
- Tenant has simpler obligations to maintain its own personal property, its own installations and improvements which are not "building standard" (e.g., special lighting, kitchen facilities), and its premises generally.

General Note: Here the concept of building standard, particularly in the context of an office lease, helps to define and divide the parties' maintenance obligations, as the term refers to the items that are uniformly standard to the building (and thus usually provided by the landlord as a part of building operations or as part of a tenant space build-out), as opposed to items that are custom-ordered or custom-built and unique to the tenant. In many office leases, the tenant will be responsible for the cost of maintaining items which are not building standard, while the landlord actually performs that maintenance and simply bills the tenant for the costs.

Practice Tip For Tenants: Terms requiring the landlord to perform its maintenance and repair duties according to "First Class" or "Class A" standards, as discussed in the context of the landlord's provision of building services in Section VIII.A, "Building Services to be Provided," can also be valuable to the tenant in clarifying the standards required of the landlord for maintaining

and repairing the building.

b) Retail & Industrial Leases

Retail and industrial leases typically place a higher burden on the tenant than office leases:

- As with office leases, the landlord maintains the foundation, structure and roof of the building, as well as the exterior skin of the building, all other improvements (e.g., parking facilities, walkways, driveways), and any landscaping.
- The tenant maintains HVAC, electrical, plumbing and other building systems and equipment serving the space, as well as all installations and improvements.
- Tenant generally maintains the entire interior of the space.

Practice Tip For Landlords: Where the tenant is to maintain HVAC systems, the landlord should always require (and verify) that the tenant obtains and keeps in place during the lease term a preventive maintenance contract for the HVAC system and any other major equipment serving the premises. This will ensure the landlord that at the end of the lease term, when these systems are returned to the landlord's care, they do not need premature repairs or replacement for lack of proper maintenance by the tenant. The tenant otherwise has no natural incentive to protect the longevity of these systems beyond the life of the lease term.

General Note: The parties should negotiate and address the issue of who pays for capital repairs (i.e., replacement) to HVAC and other major systems, the need for which arise during the lease term. This can be entirely the landlord's responsibility, or the tenant's responsibility, but in the latter case the tenant should not be required to pay costs which, if amortized, would relate to periods beyond the expiration of its lease term.

B. Landlord's Access to the Tenant's Space For Repairs and Alterations

I. Notice & Entry

Since the tenant has possession and control over the leased premises throughout the lease term, the landlord needs an affirmative right to enter into the tenant's space when necessary for the landlord to fulfill its maintenance and repair duties. These provisions typically require advance notice to the tenant (except in the case of emergency) and that the landlord take reasonable steps to avoid, or reduce, interference with the tenant's business operations. Sometimes these provisions require that the actual work by the landlord be performed during business hours, such as when the tenant has security concerns and needs to be present with contractors at all times (e.g., military defense contractor tenants), and sometimes they require that the work be done after business hours, such as when the tenant does not have security concerns and has less tolerance for business disruptions (e.g., a warehouse distribution center tenant). Landlords also reserve the right to enter the tenant's premises for the purpose of showing the space to prospective mortgagees, buyers and tenants, although in the latter case the tenant sometimes imposes restrictions, especially where a showing to a prospective tenant may be interpreted as a precursor to closing of the business and create employee unrest.

2. Building Alterations²⁹

The landlord may also need to enter into the tenant's space, not for the purpose of fulfilling

maintenance and repair obligations to the tenant, but for the purpose of making repairs to the larger building generally, or in connection with building expansions, renovations, reconfiguration and/or redevelopment. The same principles of advance notice, determination of working hours, and non-interference will apply in these situations as well.

Practice Tip For Tenants: Landlords typically have the right to alter or reconfigure building improvements outside their tenants' spaces; this may include rearranging parking areas or access points, or reconfiguring common areas or amenities. However, tenants should place restrictions on the landlord's ability to perform aspects of these alterations which could bring the greatest harm to the tenant's business. For instance, a retail tenant might need to prevent its landlord from developing outparcel property in any manner which would block visibility of the tenant's storefront from the roadway frontage. Other tenants may need to protect the access points to and from parking facilities from being voluntarily changed by the landlord to protect the commuting convenience of the tenant's customers and employees.

X. Insurance & Liability

A. Tenant's Insurance Requirements

I. Specific Coverages

Most landlords seek to be protected against the negligent acts of the tenant, as well as to be given assurance that the tenant is not operating its business in an unreasonably risky fashion (and thereby giving rise to credit concerns of the landlord). For this reason, most leases contain requirements for certain minimum levels of insurance that the tenant would be required to carry during the lease term, depending on the nature of the tenant's business and its particular use of the space being leased.

a) Liability Insurance

All tenants should be required to carry a minimum level of commercial general liability insurance, and the lease should state the required type and minimums, both for single events and with respect to the aggregate claims during the policy period.

b) Casualty Insurance

Tenants should carry casualty and property insurance on its equipment, furniture and other personal property. This is a matter of wise business policy, but it also supports the notion (discussed below) that the landlord should not be responsible for damage to the tenant's property resulting from water leaks, fires and other mishaps in the spa6000000 0 0 0..

d) Other Coverages

Leases often require that the tenant procure and maintain during the term other forms of insurance: umbrella liability insurance, workmen's compensation insurance, employer's liability insurance, dram shop liability insurance (for restaurants and bars), business automobile insurance, etc.

2. Carrier Requirements

Insurance provisions in leases typically require that the tenant's insurance carrier be awarded a certain minimum underwriter's financial rating (such as a "Best's Guide" rating) as well as be licensed to issue insurance in the state where the property is located.

3. Additional Insureds

Typically the tenant will be required to name on its liability policy as additional insureds the landlord, the landlord's lender (if applicable) and the landlord's property manager, as their interests may appear.

4. Special Insurance Features

Lease provisions on insurance should expressly address whether the tenant is permitted to fulfill the insurance requirements through blanket policies or self-insurance programs.

a) Blanket Policies

Where the tenant is a multi-site business, the tenant may have a blanket insurance program. In these cases, the tenant's insurance limits are carried at a higher number, but at a lower cost, than would be the case for individual policy coverage at each individual site. However, this does not guarantee to the landlord that any minimum amount of coverage would apply to events at the leased space, so claims at other sites could possibly use up all the available insurance before a claim is made at the premises. For this reason, the landlord may still have a "per location" requirement and require a minimum amount of coverage to apply at the landlord's property.

b) Self-Insurance

In leasing parlance, self-insurance could mean that the tenant actually has an affirmative insurance program, where the tenant conducts risk analysis and funds reserves at appropriate levels to address the risks it is predicted to encounter, or it could mean that the tenant simply has no insurance at all. Of course, the latter is usually not acceptable to the landlord, and the former is most appropriate for larger tenants (especially ones which might be larger and more financially sound than the insurance companies from whom they would otherwise be purchasing the insurance). Thus the lease should prohibit the tenant from satisfying the insurance requirements through self-insurance unless these size and reserve issues are addressed with relevance to the particular circumstances of the tenant and the lease.

B. Landlord's Insurance Requirements

I. Coverages

Landlord insurance requirements in leases are customarily less specific than those applicable to the tenant. The landlord will typically carry:

- casualty and property insurance,
- commercial general liability insurance, and
- rent loss insurance.

Practice Tip For Tenants: Tenants should require that the landlord procure and maintain during the lease term casualty and property insurance up to the full replacement value of the building (albeit with an appropriate deductible). This will assure the tenant that, in the event of a casualty,³⁰ there will be sufficient proceeds with which the landlord may restore the building and thereby the tenant's premises.

2. Asymmetry

Typically the landlord does not, and cannot, agree to name the tenant as an additional insured on the landlord's liability policy. Even though this aspect of the insurance requirements in a lease appear uneven when comparing the tenant's requirements with the landlord's requirements, this is appropriate; the tenant has only one set of requirements to fulfill with each lease transaction, whereas the landlord could have numerous sets of requirements in numerous tenant leases, even within the same building. Thus the landlord's requirements tend to be uniformly written so the landlord can be sure to comply with all leases at once.

C. Clauses Waiving Rights Of Subrogation

1. Mutual Benefits

Many leases contain clauses for mutual waivers of subrogation. These clauses provide that the landlord and tenant both waive their right to sue the other when suffering damage which is caused by the other, but which is covered by insurance as required by the terms of the lease. Both parties are essentially agreeing to look to their insurance rather than to each other for recompense of loss, and thus both parties are benefitted by these provisions.

2. Insurers' Agreement

Since the parties are in actuality giving away rights (i.e., the right to sue each other) which would be exercised by their respective insurance companies instead of themselves, it is important for each of the parties to make certain that its insurance policy does not prohibit waivers of subrogation or become void upon such waivers. Where a policy is restricted in this fashion, it is incumbent upon the applicable party to obtain an endorsement to its policy permitting the waiver. (Such endorsements are easily available, and often without additional cost, in many insurance markets.)

General Note: It is important that the waiver of subrogation clause apply to losses which are covered by insurance which is required by the terms of the lease (as opposed to the insurance which is actually obtained by the parties), in order that the waiver does not fail if one of the parties fails to obtain the proper levels of insurance.

D. Provisions For Indemnification Against Damage or Injury

1. Tenant Indemnifications

In virtually all leases the tenant will indemnify the landlord against claims for damages, injuries or other losses or liability arising out of the use and occupancy of the space by the tenant and its employees, contractors, invitees and licensees. This follows the logic that the tenant is present, and in control of the space (while the landlord is not), and thus the tenant is the party who can most easily take steps to avoid accidents or mishaps which give rise to such claims. An appropriate carve-out to such an indemnification is any claim which arises due to negligence or other action (or omission) of the landlord or its contractors.

2. Landlord Indemnifications

Tenants often request that the landlord indemnify the tenant for claims arising from damages, injury or other loss incurred by the tenant. Landlords are often reluctant for the reason that they are not always present at a property and cannot control any of the tenants at the property or their employees. When landlords do agree to indemnify, the details related to what kinds of loss the landlord is indemnifying against, and where an incident giving rise to a claim may occur for the indemnification to be applicable, are highly negotiated between the parties.³¹

Practice Tip For Landlords: The best option for the landlord is to not affirmatively indemnify the tenant, but rather to carve out from the tenant's indemnity the landlord's negligence or willful misconduct. If this is not sufficient, and the landlord must indemnify the tenant, then the indemnification should be limited to the landlord's own acts and potentially that of its employees and contractors (parties under the landlord's control). The landlord should not indemnify the tenant from the actions of tenants other than the tenant being indemnified, or against incidents or occurrences in the common areas of the property, since the landlord would be taking on risks of liability for matters which it does not control, and potentially at levels which could outstrip the value of the rentals it receives under the lease.

XI. Agreements For Lenders & Purchase

A. Estoppel Certificates Confirming Certain Facts

1. Purpose

Most leases require that the tenant execute and deliver to the landlord, within a fixed number of days after request (*e.g.*, within 7 days or 10 days), an estoppel certificate which confirms certain facts related to the lease and the parties' respective obligations under the lease. Landlords need the ability to obtain these certificates from tenants since they are routinely required by prospective mortgagees and purchasers. Typically the estoppel certificate will provide that the certificate is given with the knowledge that the recipient (*i.e.*, landlord, mortgagee and/or purchaser) may be relying on the certificate and therefore will be entitled to enforce its statements.

Practice Tip For Tenants: Although most estoppel provisions require the tenant to give estoppel

certificates to landlords when requested, the tenant may have circumstances in which it needs an estoppel certificate from a landlord, such as when a tenant undergoes a merger transaction or a corporate financing transaction where the acquirer or lender requires confirmation that the tenant is in good standing with its landlord. Landlords customarily agree to make the estoppel certificate obligation a mutual obligation between the parties.

2. Elements

The provision requiring an estoppel certificate should include certain basic elements:

a) Lease Documents

Confirm the governing lease document or documents, including all amendments, exhibits and guarantees.

b) Lease Term

Confirm the exact calendar dates of the lease term, including both commencement and expiration dates.

c) Rent Charges

Set forth the then-current rent charges in dollar amounts, including base rent, pass-throughs (e.g., operating expenses) and other charges (e.g., parking fees), as well as any free rent periods or other concessions that might apply to such charges, and the calendar date through which such charges have been paid.

d) Improvements

Confirm that any improvements or allowances for improvements have been performed or paid (as the case may be) by the landlord, as well as confirm any other nonrecurring obligations of the landlord which must be performed for the tenant's benefit.

e) Options

Confirm whether or not the tenant has any options to renew the lease, terminate the lease, purchase the property or other similar rights.

f) Defaults

State that there are no defaults on the part of the party giving the estoppel, and that there are, to the knowledge of the giver, no defaults on the part of the other party to the lease.

Practice Tip For Tenants: Estoppel certificates are tantamount to an amendment to the lease, at least between the giver of the certificate and the recipient. Thus the document gives the tenant an opportunity, but also a burden, to "speak now or forever hold its peace." Thus the tenant should take care not to overlook any perceived defaults on the part of the landlord or other issues in dispute.

General Tip: Where possible, the lease should contain an exhibit which contains a sample estoppel certificate that would be acceptable to both parties to the lease.

B. Agreements for Subordination, Non-Disturbance, and Attornment.

I. Subordination, Non-Disturbance, or Attornment

The subordination, non-disturbance or attornment agreement (“SNDA”) is a three-party agreement between a landlord, its mortgagee and the tenant. It may be required by the lender, who needs certain assurances from the tenants in a mortgaged building which are the primary source of income to repay the mortgage. Alternatively, it may be required by the tenant, who needs assurances from the lender in case the lender becomes the tenant’s landlord following a foreclosure. However, in all events, the standard SNDA is intended to provide some benefit to both parties.

General Note: SNDAs take on a greater importance, and are thus more highly negotiated, during periods of economic distress, such as in the early 1990’s and in the financial crisis period of today. This is due to the fact that in these times, it is more common for a landlord to default under its mortgage loan and subsequently lose its building to foreclosure.

2. Elements

The standard SNDA will typically cover certain basic issues and contain certain basic elements:

a) Estoppel Statements

For the lender’s benefit, often a SNDA will contain many of the statements that an estoppel certificate would contain: confirmation of the lease documents, certification that there are no defaults, etc.

b) Notice of Default

The tenant promises to give the lender written notice of any defaults by the landlord, and to give the lender a grace period in which to effectuate a cure, before exercising remedies such as terminating the lease or setting off against rent.

Note For Tenants: This is an additional obligation and therefore burden on the tenant, but having the right to contact the landlord’s lender in the event of a default may be the *best* method of getting the default cured. However, the tenant should be careful to give the lender only a fixed time period (such as 15 or 30 days), and not an open-ended period (such as a “reasonable” period), to effectuate a cure.

c) Subordination

Even where the lease preceded the lender’s mortgage on the property, the SNDA will subordinate the lease to the mortgage. This will be important when the documents conflict, for instance when provisions governing the use of proceeds to restore a building following a casualty differ between the lease (where insurance proceeds must be applied to restoration of the space) and the mortgage (where proceeds must be used to pay back the lender). These subordination provisions are contingent upon simultaneous issuance of non-disturbance provisions (discussed below).

d) Non-Disturbance

The lender agrees that if it succeeds to the interests of the landlord in the building, such as through a foreclosure or a deed in lieu of foreclosure, the lender will honor the lease and permit tenant to

remain in the space, as long as the tenant complies with the terms of the lease. This is the tenant's chief protection against being evicted and having its leasehold interest wiped out in a foreclosure, due to the subordination of the lease to the mortgage described above, or having the lender attempt to renegotiate the tenant's rent or other terms under a threat of such an eviction.

e) **Attornment**

Upon notice from the lender to the tenant that the lender has taken over the landlord's interest under the lease, the tenant will attorn to the lender, paying rent to the lender (and not the landlord), and generally treating the lender as the landlord from that point forward.

f) **Other Provisions**

SNDA's may contain any number of other provisions which are to be specifically negotiated between the parties. Several common provisions are as follows:

- The tenant agrees (for the lender's benefit) that no lease amendments can be enforced against the lender unless the lender approved the amendment at the time it was executed between the landlord and the tenant.
- The tenant agrees (for the lender's benefit) that the lender shall not be liable to the tenant for any damages resulting from a breach or default committed by the landlord prior to the lender taking over the building and the tenant's lease.
- The lender agrees (for the tenant's benefit) to cure any defaults which are ongoing after the lender takes over the building, in return for the tenant's agreement to pay its rent to the lender. (The lender will often attempt to carve out from this obligation to cure ongoing defaults of the landlord any obligation to cure a failure of the landlord to pay any outstanding space improvement allowances.)
- The parties agree (for their mutual benefit) to enter into a written agreement confirming their new and direct relationship as landlord and tenant under the lease.

General Tip: The parties should, where possible and practical, include an exhibit to the lease which contains a form of SNDA which would be acceptable to all three parties: landlord, tenant and lender. Most often the starting document for negotiations is the lender's form SNDA.

XII. Casualty & Condemnation Provisions

A. Casualty & Property Damage

I. Restoration

Most leases provide that if there is damage to the tenant's space or other portions of the building, the landlord will be responsible for restoring the premises to their pre-casualty condition. Moreover, leases often require that when the landlord decides to (or is required to) re-build, the landlord will do so within a reasonable time period or a fixed number of months.

General Note: The parties should make certain that the restoration obligations of the landlord, and whether or not the landlord must restore the space improvements constructed for the tenant,

match the parties' insurance obligations. Particularly the landlord will want to make certain that it does not have an obligation to restore improvements for which it receives no insurance proceeds to pay the cost of restoration.

2. Termination

As an exception to the landlord's obligation to rebuild, landlords will often seek the right to terminate the tenant's lease (and all other tenants' leases) where the damage to the building is so extensive, or the insurance proceeds so lacking or new regulations governing rebuilding so onerous, that the landlord determines it is not economically feasible or desirable to rebuild. Leases with these provisions usually require the landlord to make its decision and notify the tenant within a certain fixed number of days after the damage occurs. This notice should be required to set forth a reasonable, bona fide estimate of the timetable for repairs if the landlord determines to rebuild. Correspondingly, the tenant will often seek a right to terminate if, based on the landlord's timetable, the restoration of the tenant's space will take longer than a certain number of days (e.g., 180-240 days, or longer, depending on the size and type of space and the tenant's business).

Practice Tip For Landlords: Landlord's having an obligation to restore the building upon a casualty should condition this obligation on insurance proceeds being issued, made available by the landlord's mortgagee, and being sufficient in amount to fund the rebuilding. Also, where there is a time limit on the landlord's rebuilding efforts, the landlord should be permitted to extend the limit when delayed by causes of force majeure outside the landlord's control.

Practice Tip For Tenants: Tenants should obtain the right to terminate the lease if there is a casualty in the last one or two years in the lease term.

B. Condemnation & Eminent Domain

1. Restoration

If there is a condemnation or eminent domain action which takes a portion of the landlord's property, the landlord will be required to restore the remainder of the property to the fullest extent possible to its condition and operating capabilities prior to the taking (except in certain circumstances described below).

2. Termination

Landlords will often seek to have termination rights in certain circumstances following a taking by condemnation:

- if the remainder of the property following the taking cannot be operated profitably or for the same purposes,
- if a threshold number of tenants with termination rights do actually terminate following a taking, or
- if the condemnation proceeds issued on account of the taking are seized by a lender and applied towards repayment of its loan (and thus refinancing proceeds are not available).

Tenants often seek termination rights based on different criteria:

- if any of the tenant's space is taken,
- if key amenities such as access points or parking areas are taken, or
- if a sufficient portion of the property outside the tenant's direct use is taken to render the portions surviving the taking undesirable for the tenant's business (such as in the context of a retail property).

3. Condemnation Award

Many leases do not permit the tenant to share in any condemnation award issued upon a taking of the landlord's property. Alternatively, some leases permit the tenant to file an action to seek an award of its own, so long as doing so does not reduce the size of the landlord's award. In reality, however, when the tenant's premises are taken, both parties suffer loss:

The tenant loses

- the cost of relocating and the difference in market rental rates between the space taken and the replacement space (if the latter is higher), and
- the cost of any improvements to the space constructed by the tenant.

The landlord loses

- the cost of any improvements constructed in the space by the landlord, and
- the value of its reversion following the end of the tenant's lease term.

XIII. Defaults & Remedies

A. Defaults by the Tenant

1. Monetary Defaults

Because rental obligations are scheduled in advance and predictable for the tenant, and in order to prevent a large arrearage from quickly building, landlords will often have short notice and grace periods before a rental delinquency ripens into a monetary default under the lease. Leases either require that these notice periods, customarily between 3 and 10 days, pass before the landlord can exercise any of its remedies or even before a default is called in the first place. Landlords can often be unyielding on these short grace periods for monetary defaults in order to avoid being in default of its own debt service obligations and to prevent the tenant from using the late payment of rent as a short term borrowing tool.

2. Non-Monetary Defaults

Beyond the non-payment or late payment of rent, there is a panoply of possible non-monetary defaults that can occur under a commercial lease. Violations of express covenants in the lease

typically carry a longer grace period than that for monetary defaults, such as a 15-day or 30-day grace period, and often have a second layer of grace period, such as 60 or 90 days, for defaults which are especially difficult to cure in a short period of time. Other, more circumstantial defaults under the lease (such as a tenant bankruptcy or the tenant's assignment of the lease without consent) will have grace periods which differ depending on the nature of the default.

Practice Tip For Landlords: Landlords should insist on a fixed number of days for grace periods with respect to every kind of default listed in the lease. Grace periods which allow the tenant open-ended time periods to cure (for instance, grace periods which extend while the tenant is "diligently pursuing" or "making reasonably efforts to" cure, or which make the tenant's cure period subject to extension for causes of force majeure) should be avoided. When the tenant is in default, the landlord will need to have a date certain, beyond which the landlord can take action and exercise its remedies without being challenged for having done so at a later time.

B. Landlord's Remedies on Tenant Default

1. Landlord Cure

Many leases give the landlord a right to cure a default by the tenant, for instance with non-monetary defaults, and charge the attendant costs to the tenant (usually with interest). Where this entails work within the tenant's premises, the landlord must have an express right to do so, since the tenant will have exclusive possession of the space absent an affirmative right of the landlord to enter.

2. Lease Termination

The landlord will have a right to terminate the lease upon the occurrence of a tenant default. However, landlords should be aware that actual termination of the lease, versus other action against the tenant, may change the nature of the claims for damages that the landlord may bring against the tenant.

3. Repossession of Space

With or without terminating the lease entirely, the landlord may terminate the tenant's right to possession of the space, and evict the tenant, as a remedy for the tenant's default.

Cautionary Note For Landlords: Although many leases give the landlord a right to exercise self-help in repossessing a defaulting tenant's space, without going through court proceedings to obtain an eviction order, the landlord-tenant law in some jurisdictions prohibit extra-judicial action such as this. Before taking these steps, the landlord should be familiar with the local laws governing the landlords actions in addition to knowing how the landlord's rights are stated in the lease.

4. Reletting of Space

After repossessing the space, the landlord may make alterations to the space and re-lease the space to a replacement tenant. Effectively, full termination of the lease will be necessary for exercise of this remedy. A substitute tenant will insist on confirmation that the prior defaulting tenant's lease has been terminated before taking steps to move into the defaulting tenant's space.

5. Distraint

Where the landlord has a lien on the tenant's personal property contained within the space, the landlord will often have the right to seize and sell the tenant's personal property to third parties in order to repay the tenant's rent debt. The landlord's lien can arise by statute under local or state law or by express provision in the lease itself. In all cases, the landlord's actions will be subject to certain rules governing the seizure and resale of personalty to avoid breach of the peace and to ensure equitable treatment of the tenant. In cases where the lien is created by express provision in the lease, often these rules will be determined by the Uniform Commercial Code of the state in which the property is located.

Practice Tip For Tenants: Where the landlord has a lien on the tenant's personal property contained within the leased premises, either by statute or by lease covenant, the tenant should negotiate for an advance, automatic subordination of the landlord's lien to any lien granted by the tenant to leasing companies, installment sale companies or financial institutions which might also be taking a lien and security interest in the same property.³²

6. Claim for Damages

The landlord will typically have the right to bring a claim for several different kinds of monetary damages against the tenant:

a) Rent Arrearage

Damages will include all forms of rent which are past due, plus interest and penalties.

b) Future Rent

The amount of rent outstanding will continue to accrue when and as rent due dates continue to pass without payment.

c) Accelerated Rent

In lieu of future rent, leases often permit the landlord to accelerate the future rent payments (otherwise accruing over the remainder of the lease term) to a single and current amount. Typically, this amount will be subject to reduction for discounting to present value, and for the fair market rental value of the premises which the landlord will ostensibly receive when it re-leases the space to a substitute tenant prior to the end of the defaulting tenant's lease term.

Practice Tip For Landlords: Some local laws prohibit, and many courts frown upon, accelerated rent clauses. Accordingly, the landlord should draft any accelerated rent clause carefully and with eye toward local law in order to give the provision its greatest chance of being enforced.

d) Recovery of Costs

The landlord will be entitled to recover costs of repossession of the space and altering the space for reletting to replacement tenants, but these amounts should be calibrated to exclude any amount which is already recovered through an accelerated rent clause of the type described above, as well as any space improvement costs which, if amortized, would relate to periods of the replacement tenant's lease term which extend beyond the defaulting tenant's lease term.

e) Attorney's Fees & Court Costs

In order to make the landlord whole following a tenant's default, typically the lease will permit the landlord's claim to include attorneys' fees, court costs and any other expenses incurred by the landlord in enforcing its remedies.³³

Practice Tip For Landlords: Even though the common law in many states requires the landlord to mitigate damages in the event of a tenant default, landlords should avoid clauses which require mitigation as a matter of contract between the landlord and the tenant. These clauses would potentially create a duty from the landlord to the tenant and therefore places the landlord in the awkward position of having to defend its actions related to new leasing efforts to a tenant which is in default and which gave rise to the need for a new tenant in the first place. Generally, where the tenant is in default, the landlord should have freedom to decide where it wants to place a new tenant in the building (the defaulting tenant's space or other space) and to negotiate the applicable rent for the new tenant. Many states have statutes which require landlord mitigation on tenant default, but these statutes are most often limited to residential leases.

C. Defaults By The Landlord

I. Types of Defaults

Although landlord defaults can include monetary defaults (e.g., failure to make payments of an improvement allowance), landlord defaults will most likely be of the non-monetary variety (e.g., failure to make repairs or provide required services). In all cases, the landlord should be given a grace period which is sufficient to enable the landlord to effectuate a cure given the nature of the particular default.

General Note: Many leases do not contain provisions defining landlord defaults or tenant remedies at all. In these cases, if there is a landlord default, the tenant's remedies will be as provided in the common law (and possibly statutory law) of the jurisdiction in which the property is located.

2. Tenant Remedies

Necessarily, because of the different nature of a landlord default (versus a tenant default), the remedies for a tenant will be different.

a) Termination

The tenant may have a right to terminate the lease after a landlord default and move to another building. Since it is such a draconian remedy, leases which expressly state this right often require that the tenant effectuate the termination through court action rather than having the right to do so unilaterally.

b) Damages

The tenant may also be able to bring a claim for damages against the landlord, including damages for the costs of moving to another premises and any increased rent that must be paid at the new space.

Practice Tip For Landlords: Where a lease grants to the tenant a right to bring a claim for damages

against the landlord, the landlord will want to make certain that the tenant waives its right to claim *consequential* damages. The landlord does not want to be exposed for damage claims that can be as potentially limitless as a claim for lost business dealings or lost business opportunities.

c) Self-Help

In some circumstances, tenants are able to negotiate for rights of self-help following a landlord default, for example the right to plug a leaky roof or make a repair to the building that the landlord has failed to make. In these instances the landlord is typically obligated to reimburse the tenant for the costs incurred in exercising its self-help rights.

Practice Tip For Landlords: Where a tenant has self-help rights, the landlord should insist on a second notice and grace period before the tenant may begin curing the default. Also, the tenant's efforts to cure should be subject to the other provisions of the lease governing alterations (e.g., required permits, indemnification against damage or injury, prevention of liens).

d) Set-Off

Tenants are also able to sometimes negotiate for set-off rights as a remedy for landlord default, often coupled with self-help rights to ensure the tenant reimbursement of its costs of effecting a cure.

General Note: Self-help and set-off rights are anathema to both landlords and their lenders. (They fear that these types of provisions may be misused by a tenant to block efforts on the part of the landlord to collect rent or to enforce other restrictions against the tenant.) Where the lease must contain these provisions, the parties should adopt second notice provisions, provisions stating that these remedies will not apply against a foreclosing lender, and other provisions to assist in making the self-help and set-off rights more palatable.

XIV. Miscellaneous

A. The Objective Standard of Reasonableness

1. Where Suitable

Leases often state generally that with regard to the giving or denying of consents or approvals, or the making of any decisions or taking of any action under the lease, the parties must exercise their rights using an objective standard of reasonableness. There are many areas covered in a lease where applying such an objective standard is possible and helpful: initial space improvements, confirmation of insurance, space alterations, and proposed assignments or sublettings, to name a few. Although general provisions applying this objective standard to an entire lease in an overarching fashion are common, doing so may not be the best choice of the parties, especially for the landlord, because there are certain areas covered by a lease which are inherently subjective.

2. Where Not Suitable

In several areas a party's giving or denying consent should be exercisable by that party in its sole discretion: exterior design, signage and (in the retail context) permissible alternative uses are a few.

Also, calculations of rent or other numerical obligations should not be subject to “second-guessing,” since in this area there is supposed to be only one correct answer and, theoretically, parties should not be able to disagree. For this reason, parties often find that the best approach is to address “reasonableness” on a case-by-case basis throughout the various provisions contained in the lease.

3. Deemed Approval

Many disputes between lease parties arise from one party requesting approval of a matter, which the other party subsequently refuses. However, many other disputes arise from one party withholding a response to a request for approval, or failing to timely make a decision or an election which is required under the lease, to the detriment of the other party. This is especially true in the area of construction of tenant space improvements, since the process has many stages and requires many steps on the part of each of the landlord and the tenant. One solution or remedy for this problem is to have a deemed approval clause which requires a party to respond to a request for a consent or approval within a certain time period, failing which the consent or approval is deemed granted to the other party.

General Practice Tip: Wherever a “deemed approval” clause is used, before a party’s consent or approval is treated as having been given to the other party, the clause should require a second notice, one which gives the recipient a second chance and expressly states the time period for response and the consequences for not responding to the request contained in the notice.

B. Alternative Dispute Resolution

1. Where Suitable

Provisions which require the parties, in the case of disagreement, to submit their disagreement to mediation and/or arbitration are most often used in the context of determining market rental rates to apply to expansion space or during renewal terms.³⁴ However, there are a number of other areas covered in a lease which lend themselves to mediation and arbitration (also called alternative dispute resolution (“ADR”)) as cheaper and quicker methods of resolving disputes than litigation in court. Though not identical, these areas will tend to track the list of areas which lend themselves to objective standards of reasonableness when consents are required by a party to the lease.

2. Where Not Suitable

As with the reasonableness standard, ADR is not a “one size fits all” proposition, and there are areas in a lease for which ADR should *not* be applied. For instance, where a party is in default under the lease (including where the parties *dispute* whether a party is or is not in default), ADR should not be used. This is particularly true where the tenant may be subject to eviction and with respect to rent collection actions and the calculation of outstanding rent delinquencies by a landlord. In these cases the parties will want to reserve the benefits and protections of applicable law, due process and rights of appeal. Also, ADR should not be used in those areas discussed above which lend themselves to subjective standards of approval, such as matters of aesthetics or property appearance, as these are areas in which a party (particularly landlords) will not want to be subject to unofficial second-guessing.

3. Court Appeals

In all cases where the parties decide that ADR is appropriate, the parties will also need to determine whether the ADR is final and non-appealable, or instead simply an option and a precursor to potential court action. Again, as with the application of subjective versus objective standards in leases, whether or not to use ADR, including whether the ADR is or is not appealable, should be determined on a case-by-case basis.

General Practice Tip: With respect to disputes which are small or which may require an especially quick resolution, it is beneficial for the parties to establish their own specific procedures to resolve the dispute as quickly, inexpensively and accurately as possible. With respect to disputes which are more complicated or involve larger stakes, and which therefore will take longer to resolve, the parties may decide to refer to the rules and procedures established by one of the many organizations offering ADR services. The American Arbitration Association (“AAA”), the Judicial Arbitration & Mediation Service (“JAMS”), and the Institute for Conflict Prevention and Resolution (“CPR”) are a few examples.³⁵

XV. About The Author

A. WilmerHale

WilmerHale is a full-service law firm with over 1,000 lawyers throughout 12 cities in the United States, Europe, and Asia. The firm is comprised of over 40 practice groups organized in five major areas of law: Corporate & Transactional Law, Intellectual Property, Litigation & Controversy, Government & Regulatory Affairs, and Securities Law. More than 140 of the firm's lawyers hold advance degrees in scientific and technological fields in addition to their legal degrees. Moreover, the firm has many lawyers with previous government service, as well as alumni currently serving in important government positions, which include senior level positions in the Office of the White House, Department of Justice, Securities & Exchange Commission, Department of Defense, Internal Revenue Service, and Federal Trade Commission. The firm prides itself on the skill and creativity of its lawyers, both junior and senior, who practice with the highest levels of competence and ethics. The firm is also annually among the nation's leaders in its commitment to *pro bono* legal service.

B. The Real Estate Group

The Real Estate Group ("The Group") at WilmerHale contains over 30 lawyers and paralegals with fulltime practices of a national and international scope in real estate. The Group has a broad-based practice with significant experience in private equity investment, joint ventures, distressed real estate solution, development and land use, real estate finance, acquisitions and dispositions, leasing, and management. This experience includes the six major commercial property types: retail, office, industrial, multi-family, assisted living, and hotels or resorts. Moreover, The Group's lawyers have a working knowledge of related areas of law and frequently collaborate with their colleagues in the Tax, Litigation, Securities, Labor & Employment, Fund Formation, Bankruptcy, and Environmental practice groups. The Group's clients include some of the world's largest institutions, small and entrepreneurial companies and individual investors. In 2007-2008, The Group handled transactions with an aggregate value of nearly \$20 billion, including developments of nearly 25 million square feet of new space. The Group prides itself on handling transactions in a manner which not only brings good results for, but which also enhances the reputation of, its clients.

C. Thomas E. D. ("Ted") Millspaugh

Thomas E.D. ("Ted") Millspaugh is a partner in the Real Estate Group resident in the Washington, DC office of the firm. He has a law degree from the University of Virginia and an undergraduate degree from the University of North Carolina (with Highest Honors, Morehead Scholar). He has been named Chamber and Partner's, CHAMBERS USA: AMERICA'S LEADING LAWYERS FOR BUSINESS as "The Best Lawyers in America" for real estate several times. In addition to other professional and community service, Mr. Millspaugh is a member of the Maryland State Bar Committee on Opinions in Commercial Transactions, and an active member of the Urban Land Institute, the Pension Real Estate Association, and the Real Property Section of the Maryland State Bar Association. He also serves on the Advisory Board of the Chicago Title Insurance Company.

Mr. Millspaugh's practice is notable for its breadth in many different areas within the real estate field. Highlights of his experience and representations include:

- Institutional Investment, Capital Markets & Private Equity
 - Representation of one of the world's largest investment management firms in acquisition, leasing, and financing transactions in over 30 states.
 - Representation of institutional investor in joint ventures with Real Estate Investment Trust ("REIT") and with a national developer for over \$500 million in transactions.
- Real Estate Finance, Loan Workouts & Restructurings
 - Representation of major state pension fund and its advisor in a complex \$294 million master credit facility secured by four multi-family projects.
 - Representation of troubled loan fund in workouts and restructurings related to over \$200 million of loans secured by properties throughout the U.S.
- Leasing, Management & Corporate Facilities
 - Handling real estate facilities for one of world's largest asset management firms in 12 countries throughout U.S., Europe, Asia, and South America.
 - Represented state pension funds and their advisors in hundreds of leasing transactions for office, industrial, and retail properties throughout the U.S.
- Permitting, Development & Construction
 - Representing global financial institution in negotiation, leasing, and development of its over 350,000 square feet world headquarters in Baltimore, MD.
 - Represented national office supplies retailer in development of highly automated distribution centers in California, Maryland, and Connecticut.

Mr. Millspaugh would like to thank several individuals who made significant and valuable contributions to this InfoPAK:

- **Scott Carter** (Franklin Street Properties, Chairman of ACC Real Estate Committee),
- **Michael Collins** (National Passenger Rail Corporation, Chair of the Leasing & Development Subcommittee),
- **Jeffrey Kaiser** (Lehigh Gas Corporation, Vice Chair of Real Estate Committee),
- **Joseph Creech** (WilmerHale), and
- **Kamaal Jones** (WilmerHale).

XVI. Sample Provisions

A. Schedule 2.A(I)

NON-RECOURSE PROVISION

Neither Landlord nor any trustee, director, officer, employee, representative, partner, asset manager, investment advisor or agent of Landlord, nor any of their respective successors and assigns, shall be personally liable in any connection with this Lease. Tenant shall resort solely to the Building (including any proceeds of sale, financing or refinancing thereof and any insurance or condemnation proceeds issued on account thereof) for payment to Tenant of any claim asserted by Tenant or for any performance by Landlord of any of its duties or obligations hereunder. Tenant acknowledges and agrees that recourse to any other assets of Landlord or any of its affiliates is hereby expressly waived and released by Tenant.

B. Schedule 2.B(2)

LETTER OF CREDIT PROVISION

Notwithstanding Section ____ above, Tenant shall have the right, at Tenant's expense, to furnish the Security Deposit in the form of a letter of credit satisfying the requirements of this provision. Tenant may make such election at any time during the Term of this Lease, and upon delivery of such a letter of credit satisfying the requirements of this provision (the "Letter of Credit"), any monies then being held by the Landlord as the Security Deposit shall be returned to Tenant. Such Letter of Credit shall be in form and substance satisfactory to Landlord and shall fulfill the following minimum requirements:

(A)The Letter of Credit shall be issued by a commercial bank or other financial institution which is located in the _____ metropolitan area and which is otherwise satisfactory to Landlord in its reasonable discretion. Landlord hereby agrees that the _____ is satisfactory to Landlord.

(B)The beneficiary named in the Letter of Credit (the "Beneficiary") shall be the Landlord, and the Letter of Credit shall expressly state that the Landlord, the _____ or other advisor, agent or representative of Landlord, or any authorized officer of Landlord, may make draws under the Letter of Credit after a default by Tenant as herein provided.

(C)The Letter of Credit shall have a term of at least 1 year from the date of issuance thereof and shall be automatically renewed from year to year, unless written notice of non-renewal is given at least 45 days prior to expiration to the Landlord at the address for notices set forth in this Lease.

(D)The Letter of Credit shall provide that funds may be drawn under the Letter of Credit in amounts of up to \$ _____. The Letter of Credit shall expressly state that it is fully and freely assignable to any purchaser or other party receiving any interest in the Building or Property without consent or approval of the issuer thereof being required.

(E)Draws under the Letter of Credit may be made in one or more installments, from time to time, upon presentation by the Beneficiary at a location in the _____ area, of the original Letter of Credit (or a certified photocopy thereof) and an affidavit certifying either (a) that the Tenant is in default of this Lease past any applicable grace or cure period, or (b) that the Letter of Credit is due to expire in less than 30 days and the Tenant has not renewed or replaced such letter with a substitute meeting all requirements of this section.

Tenant shall be obligated to maintain the Letter of Credit in effect (by renewals or replacements satisfying the foregoing requirements, if necessary) for the entire Term of this Lease and for _____ months thereafter. In case any renewal or replacement is required, Tenant shall deliver to Landlord written evidence of such renewal or replacement at least 30 days prior to the expiration of the Letter of Credit. Upon the occurrence of a breach or default by Tenant under this Lease past any applicable grace or cure period, the Landlord shall be entitled to draw funds under the Letter of Credit. Upon expiration of the Term of this Lease, and the fulfillment by Tenant of all its duties and obligations hereunder, the original Letter of Credit shall be returned to Tenant.

C. Schedule 2.C

ASSIGNMENT & SUBLETTING PROVISIONS

§XX Assignment & Subletting.

xx.01 Transactions Covered. Any assignment by Tenant of this Lease or its rights hereunder, any subletting of the Premises and any license, mortgage, pledge or other transfer of any part of the Premises or any of Tenant's interests therein or under this Lease shall all be referred to hereinafter as a "Transfer." Furthermore, the sale, assignment or other transfer of any direct or indirect controlling interest in the Tenant (if a corporation), the sale, assignment or other transfer of any general partnership interest in Tenant (if a partnership), the sale, assignment or other transfer of any managing membership interest in Tenant (if a limited liability company), the sale of substantially all of Tenant's assets, and the merger or consolidation of Tenant into another organization, or the reorganization or dissolution of Tenant, after which Tenant shall not be the surviving corporation or partnership, shall each be considered a "Transfer" for the purposes of this Lease.

xx.02 Restrictions. Tenant shall not Transfer this Lease or the Premises without first obtaining the Landlord's prior written consent thereto, which consent [may be withheld by Landlord in its sole discretion] [which consent shall not be unreasonably withheld, conditioned or delayed]. In the event that Tenant proposes any Transfer, Tenant shall notify Landlord in writing at least 30 days before the date on which the Transfer is to be effective, and include with such notice (i) the name of the entity receiving such Transfer (the "Transferee"), (ii) a detailed description of the business of the Transferee, (iii) financial statements of the Transferee, which shall be audited statements if available or, if audited statements are not available, certified by the chief financial officer of the Tenant, (iii) all written agreements governing the Transfer, (iv) any other information reasonably requested by the Landlord with respect to the Transfer or the Transferee, and (v) a fee of \$ _____ to compensate Landlord for legal fees, costs of administration and other expenses to be incurred in connection with the review and processing of such documentation. Landlord shall respond to Tenant's request for approval or disapproval of the Transfer within 15 days after Landlord receives the request and all documents and information required above.

xx.03 Criteria for Approval. [Landlord agrees to not unreasonably withhold its consent to a proposed Transfer.] The parties acknowledge and agree that the Landlord may withhold its consent to a proposed Transfer for reasons which include, but are not limited to, the following:

(a) The Transferee is another tenant in the Building or otherwise currently involved in active negotiations with the Landlord with regard to the leasing of vacant space in the Building.

(b) The financial status or credit history of the Transferee indicates an inability to perform the monetary and/or non-monetary obligations of the Tenant under the Lease (in the case of any assignment) or the subtenant under the sublease (in the case of a sublease).

(c) The proposed use or overuse by the Transferee of the elevators, parking areas or other common areas of the Building.

(d) The proposed Transferee being in direct competition with, or otherwise incompatible with, other tenants in the Building.

xx.04 Recapture. In the event that Tenant requests approval of any Transfer of the Lease or Premises, Landlord shall have, in addition to the other rights set forth in this section, the right to (a) terminate this Lease, if the Transfer is in the nature of an assignment of the Lease, which termination shall be effective at the time indicated by Landlord to Tenant in a written notice of election to terminate, (b) terminate this Lease with respect to the portion of the Premises proposed to be subleased, if the Transfer is in the nature of a subletting, which termination shall be effective on the date the proposed subletting is to become effective, and with the rent provided herein to be adjusted proportionately with respect to any portion of the Premises not subject to such proposed subletting, or (c) sublet the Premises as subtenant, if the Transfer is in the nature of a subletting, in accordance with the terms of the proposed sublease. If requested by Tenant, Landlord shall either make its election or decline to make any such election in writing to Tenant given within 30 days after the Tenant's request. Notwithstanding the foregoing, in the event that Landlord exercises its right of recapture as described above, the Tenant shall have the right to rescind its request for approval of the subject Transfer, in which event the Landlord's exercise of the right of recapture shall be extinguished, provided that Tenant notifies Landlord of its election to rescind within 15 days after receiving the Landlord's notice of recapture.

xx.05 Permitted Transfers. Notwithstanding Section xx.02 to the contrary, Landlord's consent shall not be required with respect to any Transfer to an affiliate of Tenant (defined below), provided that (i) Tenant delivers to Landlord, at least 30 days prior to such Transfer, all of the documents and information described in clauses (i) through (v) of Section xx.02 above, (ii) in the case of a merger or other business combination, the gross assets and net worth of the Transferee immediately following the Transfer are greater than or equal to the gross assets and net worth of the Tenant immediately prior to the Transfer (as determined in accordance with GAAP accounting), (iii) such Transfer is not undertaken for the purpose of avoiding liability or recourse for the obligations of this Lease, (iv) the subject Transfer will not result in a material increase in the Operating Expenses incurred with respect to the Building, and (v) the subject Transfer will not result in a material increase in the burden on elevators, HVAC systems or other common facilities at the Building. For these purposes, the term "affiliate" shall mean any entity controlling, controlled by, or under common control with Tenant, and the term "control" shall mean the ability to exercise authority over management and operations either through ownership of 51% or more of the voting interests of the subject entity or through other similar means.

xx.06 Liability to Landlord. Tenant hereby agrees that notwithstanding anything in this Lease to the contrary, and regardless of whether or not Landlord's consent is required hereunder, no Transfer shall be valid or effective unless and until the Transferee agrees in a written document, in form

and substance satisfactory to Landlord, that the Transferee shall (a) in the case of a subletting of any part of the Premises, observe and perform all duties, obligations and liabilities of the Tenant under the terms of this Lease as such terms relate to the space subleased, or (b) in the case of all other Transfers, observe and perform all duties, obligations and liabilities of the Tenant under the terms of this Lease. In addition, no Transfer of any kind, regardless of whether or not Landlord's consent thereto is required hereunder, shall serve to relieve or release the Tenant in any way from full and direct liability for the timely performance of all of the Tenant's duties and obligations under this Lease.

xx.07 Excess Rents. In the event that Tenant effects any Transfer and at any time receives "Net Profit" from such Transfer, Tenant shall pay to Landlord 50% of all of such Net Profit, in installments, within 5 days after receipt by Tenant of each installment from the Transferee. The term "Net Profit" shall mean the extent to which (a) the sum of (i) all rent and other charges (or other consideration provided in lieu of rent) actually paid by the Transferee, minus (ii) the out-of-pocket costs to the Tenant of the Transfer, including leasing commissions, tenant improvement costs and legal fees (as calculated with the aggregate of such costs being amortized over the initial term of the Transfer), exceeds (b) the rent and other charges to be paid under this Lease.

xx.08 Recognition Agreements. Landlord agrees that in the case of a properly approved or permitted Transfer which is a sublease of a full floor in the Building, and within 15 days of written request by the Tenant or Transferee, Landlord shall execute and deliver a so-called "recognition agreement" in favor of such Transferee. Such recognition agreement shall provide, among other things, that upon any termination of the Lease, due to default of the Tenant or otherwise, the right of the Transferee to remain in possession of its premises shall not be disturbed, provided that (i) the Transferee shall attorn to the Landlord and, upon request of Landlord, enter into a direct lease with the Landlord, (ii) Landlord shall not be liable to such Transferee for any duties, obligations or liabilities of the Tenant as sublandlord under the respective sublease, (iii) the Transferee shall agree to pay to the Landlord a per square foot rental rate which is the greater of the effective per square foot rental rate set forth in the Tenant's lease or that provided in the sublease, and (iv) the Transferee or the Tenant shall pay any necessary and customary costs of demising the Transferee's premises separate from other space in the Building. The Tenant shall pay all costs and expenses incurred by Landlord in connection with the review, drafting and negotiation of any requested recognition agreement (including fees of attorneys or any other third party) as a condition to Landlord's agreement to execute such agreement.

D. Schedule 3.A(I)

RE-MEASUREMENT PROVISION

§ ____ Measurement of Space. In the event that any re-measurement of the Premises [(using Building Owners and Managers Association standards)] taken within 60 days after the Substantial Completion of the [Landlord's Work] [Tenant's Improvements] [Commencement Date] reveals that the actual rentable square footage is different than that set forth above in this Lease, then (a) the rentable square foot number set forth hereinabove shall be automatically adjusted to reflect the actual rentable square footage of the Premises based on such re-measurement, (b) the Base Rent (as is increased over the Lease Term) shall be adjusted for each year in the Lease Term at the per square foot rate applicable during each such year to reflect the actual rentable square footage of the Premises, and (c) the Tenant's Proportionate Share of Real Estate Taxes and Common Area Expenses shall be proportionately adjusted to reflect that portion of the rentable square footage of the Building actually represented by the Premises. All such changes shall be effective retroactive to the [Commencement Date], and within 30 days after such a re-measurement of the Premises is taken, the Tenant shall pay to the Landlord any shortfall in Rent, or the Landlord shall reimburse to the Tenant any overpayment of Rent (as the case may be), which resulted from the miscalculation of the size of the Premises. Also, Landlord and Tenant shall within such 30-day period enter into a written amendment to this Lease setting forth all such changes to the Lease.

E. Schedule 3.B

RIGHT OF FIRST OFFER PROVISION

§ Right of First Offer. Tenant shall have a [one-time] [recurring] right of first offer to lease [all (but not less than all) of the _____ rentable square feet of space located on the _____ floor of the Building and also shown on Exhibit A hereto] [any space in the Building previously occupied by another tenant but becoming available for lease after the date of this Lease] (the "Expansion Space"), subject to any rights or options of other tenants existing on the date of this Lease, and subject to the following additional terms:

(A) After the date on which the Expansion Space is to become vacant is known to Landlord with reasonable certainty, Landlord shall deliver to Tenant a notice offering such space to Tenant (the "Expansion Availability Notice"). Such Expansion Availability Notice shall include (1) the Base Rent to apply to the Expansion Space, which Base Rent shall be at a per square foot rate which is equal to the greater of (i) the market rate in effect for comparable space in the area of the Premises at the time (taking into account all factors, including the condition of the Expansion Space, any build-out allowances and other relevant factors), or (ii) the rate of Base Rent for the remainder of the Term under the Lease, (2) a statement as to whether the Landlord will offer any allowances for space improvements or other similar concessions, (3) the date on which the Tenant may occupy such Expansion Space, and (4) any other important terms upon which the Landlord is offering the Expansion Space to the Tenant.

(B) In order to exercise its rights under this section, Tenant must give Landlord written notice of its election to accept the offer (the "Expansion Acceptance Notice") within 10 days after receiving the Expansion Availability Notice. In addition, if Tenant does not accept Landlord's determination of the market rate of Base Rent contained in the Expansion Availability Notice, and only if Tenant states this fact in the Expansion Acceptance Notice, then Tenant shall have the right to have the market rate of Base Rent to apply to Tenant's leasing of the Expansion Space determined by a panel of 3 licensed real estate brokers or appraisers, one of whom shall be selected by Landlord within 5 days after delivery of the Expansion Acceptance Notice, one of whom shall be selected by Tenant within 5 days after delivery of the Expansion Acceptance Notice, and the third of whom shall be selected by the first two within 5 days after the first two are selected. Each broker or appraiser, within 10 days after the third such party is so selected, shall submit a determination of such market rate, and the average of the two closest determinations (or, if higher, the rate in effect with respect to the Premises) shall be binding on the parties for purposes of calculating rate applicable to the Expansion Space. Landlord and Tenant shall each pay the fee of the broker or appraiser selected by it and they shall share equally the payment of the fee of the third such party. If Tenant does not notify Landlord in the Expansion Acceptance Notice of its election to have the market rate determined by the independent panel, the rate set forth in the Expansion Availability Notice given under subsection (A) above shall be binding on the parties. Moreover, if either Landlord or Tenant fails to timely select its broker or appraiser by the time required above, and such failure continues for a period of 5 days following a written request for such appointment from the other party, then if such appointment still has not been made within 3 days after a second written notice demanding the appointment, the party not having made the required appointment will be

deemed to have accepted the market rate determination of the other party's appointed broker or appraiser.

(C) If Tenant timely accepts the Landlord's offer in accordance with subsection (B) above, then Tenant's leasing of the Expansion Space shall be under all terms of this Lease for the remainder of the Term, as supplemented by the terms of the Expansion Availability Notice, and except that (i) the Base Rent shall be as determined in accordance with the provisions above, and (ii) the fraction used for Tenant's Proportionate Share of Real Estate Taxes and Operating Expenses (and any other calculation predicated on the Premises' share of space in the Building) shall be increased proportionately to reflect the addition of the Expansion Space to the Premises. Furthermore, within 15 days after [the later of] the Expansion Acceptance Notice [or determination of the Base Rent to apply as described in subsection (A) or (B) above], the parties shall execute a written amendment to this Lease describing the addition of the Expansion Space to the Premises and setting forth the foregoing changes to this Lease.

(D) If Tenant fails to give notice accepting the Landlord's offer by the time required above, or if at the time Tenant accepts such offer or at the time Tenant's lease of the Expansion Space becomes effective the Tenant is in default of any term of this Lease (past any applicable notice and grace period), [or if this Lease is assigned by Tenant or the Premises sublet in whole or in part,] then Tenant's right of first offer provided in this section shall be automatically terminated and of no further force or effect, and Landlord shall have the right to lease the Expansion Space to any parties and upon any terms it sees fit.

F. Schedule 3.C

RELOCATION PROVISION

§ Relocation. The Landlord shall have the right [from time to time during the Term] [one time during the Term], at the Landlord's expense, to relocate the Tenant's Premises from its present location within the Building to another location within the Building having at least the same floor area, provided that the Landlord gives the Tenant written notice of the Landlord's intention to do so at least 60 days before undertaking such relocation. In such event, the Landlord shall, at the Landlord's expense, install within the Premises as so relocated improvements of the same quality and quantity as those made by the Tenant or the Landlord to the Premises, and on the completion of such installation shall cause the Tenant's machinery, furniture, fixtures and equipment within the Premises to be moved to the Premises as so relocated. Upon the completion of such relocation, this Lease shall automatically cease to cover the space constituting the Premises immediately before such relocation, and shall automatically thereafter cover the space to which the Premises have been relocated, as aforesaid, all on the same terms and subject to the same conditions as those set forth in the provisions of this Lease as in effect immediately before such relocation, and all without the necessity of further action by either party hereto. Also, the Base Rent shall be adjusted on the basis of the per square foot rates otherwise in effect under the Lease, and the Tenant's Proportionate Share of Real Estate Taxes and Operating Expenses shall be proportionately adjusted, to reflect any difference between the size of the Premises prior to relocation and that after relocation. The Landlord shall take reasonable steps to minimize the disruption to the Tenant's business during the course of any relocation following the Landlord's exercise of the rights in this provision. Within 15 days after the relocation is complete the parties shall enter into an amendment to this Lease in order to record in writing the change in the Premises, any changes in Rent, and any other changes resulting from such relocation.

G. Schedule 4.B(2)(e)

GROSS-UP PROVISION

To the extent that any vendor or supplier charges or other item of Operating Expense incurred in connection with the Building with respect to any Lease Year in the Term varies depending on the level of occupancy in the Building, then such item of Operating Expense shall be recalculated in a so-called "gross-up" so as to reflect the amount of such expense to be charged if the Building were [95%] occupied. In addition, to the extent any such item of Operating Expense is grossed-up for any particular Lease Year in the Term, then that portion of the Base Operating Expenses represented by the same item of expense shall also be grossed-up and adjusted to reflect the amount to be charged if the Building were [95%] occupied, for purposes of determining the Tenant's Proportionate Share of increases in Operating Expenses for such Lease Year in question. Likewise, the calculation of the Tenant's Proportionate Share of increases in Operating Expenses shall reflect the Operating Expenses for both the Base Year and the subsequent Lease Year as including the individual item of Operating Expense as so modified for both years.

H. Schedule 4.B(3)

PERCENTAGE RENT PROVISIONS

§ ___ Percentage Rent. In addition to the Minimum Rent described above, Tenant shall pay to Landlord "Percentage Rent" in each year of the Term as follows:

(A) Percentage Rent shall be paid quarterly as described in Section ___ below. The Percentage Rent for each quarter (or part quarter) shall be equal to the Percentage Rent Fraction of the amount (if any) by which Gross Receipts for the same period exceeds the Breakpoint for the same period.

(B) For these purposes, the following terms shall have the following meanings:

(1) The "Percentage Rent Fraction" shall be ___%.

(2) The "Breakpoint" shall mean a designated number for any respective period during the Term reached by dividing the Minimum Rent applicable pro rata to such period by the Percentage Rent Fraction.

(3) The term "Gross Receipts" shall mean any and all receipts and revenues from all business conducted at, upon or from the Premises by Tenant, all subtenants and assignees and all others, whether such Gross Receipts be evidenced by cash, check, credit, charge account, exchange or otherwise, and such Gross Receipts shall include but not be limited to amounts received from the sale of any foods, goods or other merchandise whatsoever, for services performed on the Premises or elsewhere at the Shopping Center, from vending or other machines, from the sale of lottery tickets, and from orders for food or services taken at the Premises (whether such orders are filled from the Premises or elsewhere). Gross Receipts shall not include (i) the amount of any sales or other tax imposed by any federal, state, municipal or governmental authority directly on sales and collected from customers, provided that the amount thereof is added to the selling price and paid by the Tenant to such governmental authority, or (ii) transfers of merchandise between different stores of Tenant, provided such transfers are not made to avoid liability for Percentage Rent. No income or other tax or other item of expense whatsoever shall be deducted from the amount of Gross Receipts which is used to calculate Percentage Rent hereunder. Each charge or sale upon installment or credit shall be treated as a sale for the full price in the month during which such charge or sale shall be made, irrespective of the time when Tenant shall receive payment (whether full or partial) therefore.

(C) For the purpose of ascertaining the amount payable as Percentage Rent, Tenant agrees to prepare and keep on the Premises for each year or part year during the Term accurate records which shall show inventories and receipts of all food, goods and other merchandise at the Premises and the Gross Receipts from the Premises on a daily basis. Tenant shall record at the time of each sale, in the presence of the customer, all receipts from sales or other transactions, whether for cash or credit, in cash registers having a cumulative total. Such registers shall be sealed in a manner, and shall have such other features, as are reasonably acceptable to Landlord. Tenant further agrees to keep on the Premises for each year during the Term the gross income, sales and occupational tax returns with respect to such years, as well as all pertinent original sales records. Pertinent original sales records shall include (1) cash register tapes, including tapes from temporary registers, (2) serially numbered sales slips, (3) the originals of all mail orders at and to the Premises, (4) the original records of all telephone orders at and

to the Premises, (5) settlement report sheets of transactions with subtenants, assignees and licensees, (6) the original records showing that merchandise returned by customers was purchased at the Premises by such customers, (7) such other sales records, if any, which would normally be examined by an independent accountant pursuant to generally accepted auditing standards in performing an audit of Tenant's sales and Gross Receipts, and (8) the records specified in (1) to (7) above of subtenants, assignees or licensees.

(D) Tenant shall submit to Landlord on or before the 15th day following the end of each month during the Term hereof (including the 15th day of the month following the end of the Term), a written statement signed by Tenant, certified by it to be true and correct, and showing in reasonably accurate detail the amount of Gross Receipts for the preceding month. Tenant shall submit to Landlord on or before the 30th day following the end of each calendar year a written statement signed by Tenant, certified by it to be true and correct, and showing in reasonably accurate detail and satisfactory in scope to Landlord the amount of Gross Receipts during the preceding year. If requested by Landlord, this annual statement shall be duly certified by independent certified public accountant of recognized standing, which certification shall be satisfactory to Landlord in scope and substance. The statements referred to herein shall be in such form and style and contain such details and breakdown as Landlord may reasonably require. Furthermore, Tenant hereby agrees that for each day that Tenant is delinquent in delivering to Landlord the required statement of Gross Receipts at the Premises, Tenant shall pay to Landlord an amount which is equal to \$25 in the first year of the Term, increased cumulatively by the percentage increase in the Consumer Price Index (as calculated by Landlord) in each subsequent year in the Term.

(E) Landlord and Landlord's authorized representative shall have the right to examine all of Tenant's records, inventories, merchandise and other business during regular business hours. In addition, and at its option, Landlord may at any reasonable time, upon 48 hours' prior written notice to Tenant, cause a complete audit to be made of Tenant's entire business affairs and records relating to the Premises for the period covered by any statement issued by Tenant as set forth above. If such audit shall disclose the actual Gross Receipts to be more than two percent (2%) greater than the Gross Receipts as reported by Tenant, then Tenant shall promptly pay to Landlord the cost of said audit in addition to the resulting deficiency in Percentage Rent. In addition, Landlord may at its option terminate this Lease upon five days' notice to Tenant if any such audit discloses willful or substantial inaccuracies on the part of the Tenant's reporting of Gross Receipts or, in any case, discrepancies of greater than five percent (5%).

I. Schedule 5.A(2)

COMMENCEMENT DATE PROVISIONS

(Where the landlord is responsible for the tenant space improvements.)

The term of this Lease ("Term") shall commence on a date (the "Commencement Date") which is the earlier of (i) _____, 2000 (the "Target Date"), (ii) the first date on which the Initial Improvements to the Premises described in Section ____ hereof are "Substantially Complete," or (iii) the date on which Tenant actually moves into occupancy of the Premises and begins to conduct business therein.

Landlord shall use commercially reasonable efforts to complete the Initial Improvements on or before the Target Date set forth in Section ____ hereof. However, Landlord shall have no liability to the Tenant hereunder if prevented from so completing the Initial Improvements due to causes of Force Majeure and/or Tenant Delay (as such terms are defined herein) which are beyond the Landlord's control. In such event, the Target Date (and, if applicable, clause (i) in the definition of Commencement Date set forth in Section ____ above) shall be automatically postponed for a period equaling the length of such delay of Force Majeure and/or Tenant Delay.

For purposes of this Lease, the term "Substantially Complete" shall mean (i) the Initial Improvements have been completed as required herein and sufficient for the Tenant to occupy the Premises and to undertake business therein, subject only to minor so-called "punchlist" items, (ii) the Architect shall have executed and delivered a certification that the Initial Improvements have been substantially completed in accordance with the construction drawings therefore and in compliance with all building and other codes, and (iii) the applicable agency of the local authorities has inspected the Premises and issued a certificate of occupancy permitting the Tenant's use and occupancy therein. Landlord shall notify the Tenant in writing upon its Substantial Completion of the Initial Improvements. Landlord and Tenant shall meet and inspect the Premises in person, and develop a mutually agreed-upon punchlist of minor items which remain incomplete or require correction (the "Punchlist"), all within 10 days after the Landlord's notice of Substantial Completion, and Landlord shall complete all Punchlist items within 30 days thereafter.

(Where the tenant is responsible for tenant space improvements.)

The term of this Lease ("Term") shall commence on a date (the "Commencement Date") which is the earlier of (i) that date which is _____ days after Landlord completes the "Landlord's Work" which is described in Section ____ hereof and delivers the Premises to Tenant free of debris and as ready for Tenant to begin its "Tenant's Work" described in Section ____ hereof, or (ii) the date on which Tenant actually moves into occupancy of the Premises and begins to conduct business therein.

J. Schedule 6.A(4)

WORK LETTER PROVISIONS

§ ___ Initial Improvements.

(A) Certain improvements shall be constructed in the Premises according to the space plan attached hereto as Exhibit ___ (the "Space Improvements") for the purpose of initially preparing the Premises for occupancy by Tenant, all to be paid for as provided in Section ___ of this Lease. Such Space Improvements shall be constructed either by Landlord or by Tenant, at the [Landlord's] [Tenant's] option, and in accordance with the following procedures:

(1) If such Space Improvements are to be constructed by Landlord, the following provisions shall apply:

(a) Landlord shall promptly after execution of this Lease engage an architect to prepare plans and specifications of the Space Improvements for Tenant's review and approval. Such plans and specifications shall be submitted to Tenant within 21 days after the date hereof, and Tenant shall review and either approve or notify Landlord of proposed changes thereto within 7 days after receiving same. [If no response is forthcoming from Tenant within this 7 day period, and such failure to respond continues for a period of 3 days after a second notice requesting approval (and explicitly stating that Tenant's approval will be deemed granted if Tenant fails to respond within 3 days), then such plans and specifications shall be deemed approved.] Landlord shall make any changes to such plans reasonably (and timely) requested by Tenant and necessary to make the plans and specifications conform to Exhibit ___.

(b) Promptly after the plans and specifications have been finalized, Landlord shall contract for the construction of such improvements and, if appropriate, engage a construction manager for oversight and supervision of the construction.

(c) Tenant and its agents and contractors shall have the right to enter the Premises prior to the Commencement Date for purposes of installing fixtures, provided that in doing so such parties shall not interfere with Landlord or its contractors constructing the Space Improvements, and further provided that prior to any such entry Tenant shall have obtained the insurance required under Section ___ hereof, and its contractors shall have obtained such liability, workmen's compensation and other insurance as is reasonably acceptable to Landlord. The Commencement Date shall not be deemed to occur upon such entry unless Tenant begins commencing its normal business operations within the Premises.

(2) If the Space Improvements are to be constructed by Tenant, the following provisions shall apply:

(a) Tenant shall promptly after execution of this Lease engage an architect to prepare plans and specifications of the Space Improvements for Landlord's review and approval. Such plans and specifications shall be submitted to Landlord within 21 days after the date hereof, and Landlord shall review and either approve or notify Tenant of proposed changes thereto

within 7 days after receiving such plans. [If no response is forthcoming from Landlord within this 7 day period, and such failure to respond continues for a period of 3 days after a second notice requesting approval (and explicitly stating that Landlord's approval will be deemed granted if Landlord fails to respond within 3 days), then such plans and specifications shall be deemed approved.] Tenant shall make any changes to such plans reasonably requested by Landlord or necessary to make the plans and specifications conform to Exhibit ____.

(b) Promptly after the plans and specifications have been finalized, Tenant shall solicit bids and enter into written contracts with a contractor or contractors for the construction of such improvements and with other professionals for appropriate services in connection therewith. The contractor(s) and professional(s) so engaged by Tenant, and the respective contracts between such parties and Tenant, shall be subject to Landlord's prior written approval, which shall not be unreasonably withheld. Additionally, each of Tenant's contract(s) with contractor(s) shall provide for, at minimum, a retainage or holdback of 10% of the total cost of the contract until completion of the work and shall require dual obligee surety bond(s) guaranteeing full payment and performance of the contract.

(c) Prior to commencing construction, Tenant shall obtain all building and other permits or licenses required by law for the work, and promptly after completion of such work, Tenant shall procure a certificate of occupancy for the Premises from the applicable governmental authorities.

(d) All such construction shall be overseen by Landlord through its construction manager. Tenant shall at all times permit Landlord and its construction manager to inspect the Premises and the Tenant's improvement work during construction. Landlord shall be permitted to charge a fee of ____% of all out-of-pocket hard costs and soft costs of the Space Improvements as compensation for this oversight and management by the construction manager.

(e) As stated in Section ____ hereof, Tenant and its agents and contractors shall have the right to enter the Premises prior to the Commencement Date for such construction purposes, provided that prior to any such entry Tenant shall have obtained the insurance required under Section ____ hereof, and its contractors shall have obtained such liability, workmen's compensation and other insurance as is reasonably acceptable to Landlord.

K. Schedule 6.C(3)

FORCE MAJEURE PROVISION

§ ___ Force Majeure. The term "Force Majeure", when used herein to describe the cause of any delay which is beyond the scope of responsibility or control of either the Landlord or Tenant, shall be deemed to mean any delay which is caused by (a) acts of God or extreme weather conditions beyond that which may be reasonably anticipated as to frequency, duration and severity in the normal season of occurrence, including periods of extreme weather materially impacting normal business operations in the area of the Project generally, floods, hurricanes, earthquakes or catastrophic storms, (b) enemy action, explosions, acts of sabotage, acts of civil unrest or other national or local emergency, such as riots, acts of terrorism, epidemics or health crisis, (c) condemnation, moratorium or other unforeseen governmental enactments first initiated after the date hereof, and (d) extreme shortages in building materials, labor strikes, failure or shortage of electrical power, water, fuel or other utility service, which are encountered in construction projects generally throughout the greater metropolitan area in which the Property is located (as opposed to the Project or any of the contractors, subcontractors or suppliers involved in the Project specifically). The term "Force Majeure" shall not include (i) delays in the planning, design, permitting or approval process with respect to the Project, (ii) delays directly or indirectly caused by either the Landlord or the Tenant, or any of their affiliates or any of the employees, agents, invitees, licensees or contractors of such parties, except in each case to the extent solely caused by one of the factors described in clauses (a), (b), (c) or (d) above in this paragraph, or (iii) any inability of a party to obtain financing or any other financial difficulty.

L. Schedule 6.D(2)

ALLOWANCE PAYMENT PROVISION

§___ All costs and expenses of designing and constructing the Tenant Space Improvements described in Section ___ above shall be paid as follows:

(1) Regardless of whether the Tenant Space Improvements are being constructed by Landlord or by Tenant, Landlord shall provide and pay an allowance (the "Allowance") of \$_____ per square foot of the Premises towards (i) the costs of designing the space plan in Exhibit ___ and all of the plans and specifications for the Tenant Space Improvements, and (ii) the costs of constructing the Tenant Space Improvements, including but not limited to all fees, costs and expenses paid under construction contracts and subcontracts, construction managers' fees, costs and expenses, the costs of materials, supplies, permits and other items, and any other out-of-pocket expenditures incurred in any connection with such construction. Such Allowance shall not be paid for any other costs or purposes, except that in the event the total costs of the Tenant Space Improvements described in clauses (i) and (ii) of this paragraph are less than the Allowance, the remaining amount of the Allowance, up to (but not exceeding) an amount of \$_____, may be applied toward the bona-fide out-of-pocket costs incurred by Tenant in moving to the Premises. Tenant shall pay any and all costs of designing and constructing the Tenant Space Improvements which are in excess of the Allowance.

(2) If the Tenant Space Improvements are to be constructed by Landlord, Tenant shall pay its pro rata share of all costs of the Tenant Space Improvements, in installments, within 15 days after each billing from Landlord (which billing shall not be more frequently than once per month). Such pro rata share to be paid by Tenant shall be based on the budget of such costs described in Section ___ above and shall equal the percentage share of the total budgeted cost amount represented by the amount by which such total exceeds the Allowance.

(3) If the Tenant Space Improvements are to be constructed by Tenant, Landlord shall disburse the Allowance in portions (but not more frequently than once per month) to pay for completed work, and directly to the professionals, contractors and other parties performing the work, upon presentation for each disbursement of the following:

- (a) A requisition substantially in the form of AIA Requisition Forms G702 and G703, including a description of all completed work for which payment is requested, the amount requested with a breakdown by each trade comprising the work, and the percentage of the entire project completed after taking into account all such work.

- (b) Approval by Landlord's construction manager of the requisition.
- (c) Conditional lien waivers from all parties for whom such payment is requested releasing all liens which may arise on account of the work performed by such parties to the date of the request for payment.
- (d) Unconditional lien waivers covering all work up to and including the immediately preceding payment.

Withheld from each disbursement shall be the applicable retainage, not to be less than 10% as provided hereinabove, which retainage shall be paid and disbursed upon the following:

- (i) Completion of the Tenant Space Improvements as required by the applicable contract(s).
- (ii) Delivery of unconditional lien waivers as described above for all work comprising the improvements.
- (iii) Issuance of a certificate of occupancy or other applicable approval by the local authorities permitting occupancy of the Premises by Tenant for business.

M. Schedule 8.C

SERVICE INTERRUPTION PROVISIONS

In the event that all, or any substantial portion (being defined as greater than 50% of the square footage), of the Premises is rendered legally untenable (being defined as unusable by tenant for basic business operations normally conducted in the space), due to the Landlord's failure to provide electricity or any other utility or service to be provided by the Landlord under this Lease, or due to the negligence or other willful misconduct of the Landlord's employees, contractors or consultants, and such untenability occurs for either a continuous period of more than 10 business days or an aggregate of more than 20 days in any one-year period, thereafter all Base Rent and Additional Rent hereunder shall abate, proportionately and on a per diem basis, from the portion of the Premises and for the number of days which is the Premises is so rendered untenable. Moreover, in the event that the entire Premises are rendered legally untenable, for any of the reasons stated in the immediately preceding sentence, and such untenability extends for a period of 90 continuous days, thereafter the Tenant shall have the right to terminate this Lease, provided that the Tenant does so by written notice to Landlord given prior to the date that the applicable service is restored such that the Premises may again become tenantable.

N. Schedule 10

INSURANCE AND INDEMNIFICATION PROVISIONS

§ ____ Tenant's Insurance. The Tenant shall procure and maintain, at its expense and throughout the Term, the following insurance:

(a) Commercial general liability insurance which (1) insures against claims for bodily injury, personal injury, advertising injury and property damage arising from the use, occupancy or maintenance of the Premises or any other portion of the Property by Tenant or any of its agents, employees, contractors, invitees and licensees, (2) insures without exclusion damage or injury arising from heat, smoke or fumes from a hostile fire, (3) has limits of not less than (i) \$1,000,000 per occurrence, (ii) \$2,000,000 general aggregate per location, (iii) \$2,000,000 products and completed operations aggregate, (iv) \$1,000,000 for personal and advertising injury liability, (v) \$50,000 for fire damage legal liability, and (vi) \$5,000 for medical payments, which minimum limits may be increased if recommended by Landlord's consultants or other insurance professionals consistent with then-applicable industry practices, (4) includes blanket contractual liability and broad form property damage liability coverage, and (5) contains a standard separation of insureds provision;

(b) Business auto liability insurance which insures against bodily injury and property damage claims arising out of ownership, use or maintenance of any auto with a combined single limit per accident of not less than \$1,000,000;

(c) Worker's compensation in statutory limits and employer's liability insurance with limits of not less than \$500,000 for each accident, \$500,000 for each employee for bodily injury by disease, and \$500,000 policy limit for bodily injury by disease;

(d) Umbrella excess liability insurance, in addition to and in excess of the commercial general liability, business auto liability and employer's liability insurance described above, which insures against claims for bodily injury, personal injury, advertising injury and property damage and having limits of not less than (i) \$5,000,000 per occurrence, and (ii) \$5,000,000 for the annual aggregate;

(e) All-risk property insurance covering all of Tenant's personal property, inventory, equipment, fixtures, alterations and improvements at the Premises up to the replacement value of such property; and

(f) Business income and extra expense insurance with limits of at least 100% of Tenant's gross revenue for a 12 month period.

Each liability insurance policy described above (except employer's liability policies) shall name Landlord, Landlord's agent and advisor, Landlord's property manager, and any Mortgagees (defined in §12.01 below), and expressly including any trustees, directors, officers, employees or agents of any such entities, all as additional insureds. Each property insurance policy described above shall name Landlord as loss payee with respect to any permanently affixed improvements and betterments to the Premises. All such policies shall (i) be issued by insurers licensed to do business in the state in which the Property is located, (ii) be issued by insurers with a current rating of "A-" "VIII" or better in A.M. Best's Insurance Reports, (iii) be primary without right of contribution from any of Landlord's insurance, (iv) be written on an occurrence (and not claims-made) basis, and (v) be uncancellable without at least 30 days' prior written notice to the Landlord and any Mortgagee. At least 15 days before the Commencement Date (or, if earlier, the date Tenant first enters into the Premises for any reason), Tenant shall deliver to the Landlord certificates of insurance satisfactory to Landlord for each such policy required above. Within 10 days after any such policy expires, Tenant shall deliver to the Landlord a certificate of renewal evidencing replacement of the policy. The limits of insurance required by this Lease or as otherwise carried by Tenant shall not limit the liability of Tenant or relieve Tenant of any obligations under this Lease, except to the extent provided in any waiver of subrogation contained in this Lease. Tenant shall have sole responsibility for payment of all deductibles.

§ ___ Landlord's Insurance. The Landlord shall maintain throughout the Term all-risk or fire and extended coverage insurance upon the Building in an amount equal to the replacement value thereof (or, in lieu thereof, a specified plan of self-insurance). The premiums for such insurance and of each endorsement thereto shall be deemed to be part of the Operating Expenses a share of which is to be paid by Tenant as Additional Rent hereunder. Furthermore, Tenant shall pay, as Additional Rent and as billed by Landlord, the entire amount of any increase in premiums for any insurance obtained by Landlord which occurs solely due to the particular use of the Premises by Tenant.

§ ___ Waiver of Subrogation. Notwithstanding anything to the contrary in this Lease, Landlord and Tenant each waives all rights to recovery, claims or causes of action against the other and the other's agents, trustees, officers, directors and employees on account of any loss or damage which may occur to the Premises, the Property or any improvements thereto or to any personal property of such party to the extent such loss or damage is caused by a peril which is required to be insured against under this Lease, regardless of the cause or origin (including negligence of the other party). Landlord and Tenant each covenants to the other that, to the fullest extent permitted by law, no insurer shall hold any right of subrogation against the other party. Landlord and Tenant each covenants to the other that all policies of insurance maintained by it respecting property damage shall permit such waiver of subrogation, and each party agrees to advise all of its insurers in writing of the waiver.

§ ___ Indemnification. Tenant hereby agrees to indemnify and hold Landlord and Landlord's agents and advisors harmless from and against any cost, damage, claim, liability or expense (including attorney's fees) incurred by or claimed against Landlord, directly or indirectly, as a result of or in any

way arising from the Premises or the Tenant's use and occupancy of the Premises or any common areas at the Property, except to the extent caused by the negligence or intentional misconduct of the Landlord or any its employees, agents or contractors.. Furthermore, Tenant hereby releases and absolves Landlord from any liability for theft, damage or other loss, regardless of the cause or reason, in connection with any furniture, fixtures, machinery, equipment, inventory or other personal property of any kind belonging to Tenant or to any of its employees, agents, invitees or licensees.

O. Schedule 13.B(1)-(5)

LANDLORD REMEDY PROVISIONS

§____ Remedies. Upon the occurrence of any Event of Default, the Landlord may take any or all of the following actions:

(A) Perform on behalf of and at the expense of Tenant any obligation of Tenant under this Lease which Tenant has failed to perform, without prior notice to Tenant, the total cost of which by Landlord, together with interest thereon at the rate of 12% per annum from the date of such expenditure, shall be deemed Additional Rent and shall be payable by Tenant to Landlord upon demand.

(B) With or without terminating this Lease and the tenancy created hereby, re-enter the Premises with or without court action or summary proceedings, remove Tenant, secure the Premises against unauthorized entry, and allow Tenant supervised access to the Premises to remove those items belonging to Tenant which are not the subject of a security interest by Landlord, all without resort to legal process and without Landlord being deemed guilty of trespass or becoming liable for any loss or damage occasioned thereby.

(C) With or without terminating this Lease, and from time to time, make such improvements, alterations and repairs as may be necessary in order to relet the Premises, and relet the Premises or any part thereof upon such term or terms (which may be for a term extending beyond the term of this Lease) at such rental or rentals and upon such other terms and conditions (which may include concessions, free rent and/or improvements) as Landlord in its sole discretion may deem advisable; and, upon each such reletting, all rentals received by Landlord shall be applied, first, to the payment of any indebtedness other than Rent due hereunder from Tenant to Landlord, second, to the payment of all costs and expenses of such reletting (including but not limited to brokerage fees, attorneys' fees and costs of improvements, alterations and repairs), third, to the payment of all Rent due and unpaid hereunder, and the balance, if any, shall be held by Landlord and applied in payment of future rent as the same may become due and payable hereunder.

(D) Sell at public or private sale all or any part of the fixtures, equipment, inventory and other property belonging to Tenant and in which the Landlord has a lien by grant from Tenant, statute or otherwise, at which sale Landlord shall have the right to become the purchaser upon being the highest bidder, and apply the proceeds of such sale, first, to the payment of all costs and expenses of seizing and storing such property and conducting the sale (including all attorneys' fees), second, toward the payment of any indebtedness, including (without limitation) that for Rent, which may be or may become due from Tenant to Landlord, and, third, to pay Tenant any surplus remaining after all indebtedness of Tenant to Landlord including expenses has been fully paid.

(E) Enforce any provision of the Lease or any other agreement between the parties by injunction, temporary restraining order or other similar equitable remedy, to which the Tenant hereby expressly consents and agrees.

(F) Exercise any other legal or equitable right or remedy which it may have by law or otherwise.

§ ____ Remedies Cumulative. No reentry or taking possession of the Premises by Landlord shall be construed as an election on its part to terminate this Lease unless a written notice of such intention be given to Tenant or unless the termination thereof be decreed by a court of competent jurisdiction. Notwithstanding that Landlord may have re-leased the Premises without termination, Landlord may at anytime thereafter elect to terminate this Lease for any previous default. If the Premises or any part thereof is re-leased, Landlord shall not be liable for, nor shall Tenant's obligations hereunder be diminished by reason of, any failure by Landlord to relet the Premises or any failure by Landlord to collect any rent due upon such reletting. No action taken by the Landlord under the provisions of this section shall operate as a waiver of any right which the Landlord would otherwise have against the Tenant for the Rent hereby reserved or otherwise, and the Tenant shall at all times remain responsible to the Landlord for any loss and/or damage suffered by the Landlord by reason of any Event of Default.

§ ____ Landlord's Lien. Tenant hereby grants to Landlord an express contract lien and security interest on all fixtures, equipment, inventory and other property which may be placed in the Premises or affixed or attached thereto and also upon all proceeds of any insurance which may be issued on account of damage to any such property. All exemption laws are hereby waived in favor of said lien and security interest benefiting Landlord. This lien and security interest is given in addition to any statutory lien benefiting Landlord and shall be cumulative thereto or alternative thereto as elected by Landlord at any time. If requested by Landlord, Tenant shall execute, deliver to Landlord and/or file at Tenant's expense with the public records Uniform Commercial Code financing statements in sufficient form to perfect the security interest hereby given. Landlord shall, in addition to all of its rights under the Lease, also have all of the rights and remedies of a secured party under the Uniform Commercial Code of the state in which the Premises are located. Notwithstanding the foregoing, the Landlord's lien created hereby shall be automatically subject and subordinate to any lien or security interest in the same property which is granted by the Tenant (i) any party which is leasing equipment and/or other portions of such property to Tenant, (ii) any party which is providing seller financing or purchase financing of such property to Tenant, and/or (iii) any financial institution providing a loan or loans to Tenant for which the Tenant's property is to be collateral securing repayment. Furthermore, within 10 days after written request, Landlord shall execute and deliver any separate agreement which is reasonably requested to provide separate evidence of such subordination.

P. Schedule 13.B(6)

DAMAGES PROVISION

§____ Damages. Upon any Event of Default, Tenant shall remain liable to the Landlord for the following amounts: (a) any Rent of any kind whatsoever which may have become due with respect to the period in the Term which has already expired, (b) any rental abatements or other free-rent concessions extended to Tenant under the Lease, (c) all Rent which becomes due during the remainder of the Term, (d) all costs, fees and expenses incurred by Landlord in leasing the Premises to others from time to time, including but not limited to leasing commissions, construction and other build-out costs, design and permitting costs and the like, and (e) all costs, fees and expenses incurred by Landlord in pursuit of its remedies hereunder, including but not limited to attorneys' fees and court costs. All such amounts shall be due and payable immediately upon demand by Landlord and shall bear interest at 18% per annum until paid. Furthermore, at Landlord's option, Tenant shall be obligated to pay, in lieu of item (c) above in this §____, an amount (the "Accelerated Amount") which is equal to (i) the present value of all Rent which would become due during the remainder of the Term, including all Additional Rent which shall be deemed to continue and increase over such remainder of the Term at the average rate of increase occurring over the then-expired portion of the Term, with such present value to be determined by discounting at an annual rate of interest which is equal to the bond-equivalent yield for the most recent auction of U.S. Treasury Bills with a 1-year maturity (the "Discount Rate"), less (ii) the fair market rental value of the Premises for the same period of the remainder of the Term, discounted at the Discount Rate, as calculated taking into account vacancy periods during re-marketing of the space, anticipated market rental rates and other factors, all as determined by Landlord, based on independent real estate professional(s) selected by Landlord. Tenant and Landlord acknowledge and agree that payment to Landlord of the foregoing Accelerated Amount is a reasonable forecast of the actual damages which will be suffered by Landlord in case of an Event of Default by Tenant, which actual damages are otherwise difficult or impossible to ascertain, and therefore such payment constitutes liquidated damages and not a penalty. Any suit or action brought by Landlord to collect any such liquidated damages shall not in any manner prejudice any other rights or remedies of Landlord hereunder.

Q. Schedule 14.B

ADR PROVISIONS

(Provision for mini-arbitration.)

In any case where Mini-Arbitration is expressly available under this Lease to resolve a dispute between the parties, either Landlord or Tenant may, upon written notice to the other, elect to submit the dispute to such Mini-Arbitration. Upon the giving of such a notice, Landlord and Tenant shall each, within 15 days after the notice, select an independent and unaffiliated arbitrator with professional experience in the subject matter of the Mini-Arbitration. The two arbitrators so selected shall, within 15 days after being selected, select a third independent arbitrator also having professional experience in the underlying subject matter. Each of the three arbitrators shall submit his or her determination as to (i) the monetary calculation or valuation (in the case of a monetary dispute), or (ii) how the dispute is to be resolved (in the case of a non-monetary dispute), all within 15 days after the third arbitrator is so selected. With respect to disputes of a monetary amount, the average of the two closest determinations among the three determinations by the arbitrators shall govern, and with respect to non-monetary disputes, the determination of the third arbitrator selected by the first two arbitrators shall govern (with the understanding that such third arbitrator may take into account how the first two arbitrators selected by the parties determined how to resolve the dispute). In the event that either Landlord or Tenant shall fail to timely select an arbitrator as required above, and such failure continues for a period of 15 days after written notice by the other party, then the determination by the sole arbitrator so selected shall be the determination which is binding on the parties. The parties agree that the final resolution of the dispute reached through such a Mini-Arbitration shall be binding on the parties and unappealable in court action or other litigation proceedings, except for court action which is necessary to enforce the resolution itself or to correct a manifest error.

(Provision combining mediation and arbitration.)

This Agreement shall be enforceable, and each party hereto shall have all claims upon breach or default by the other party, both at law and in equity, including specific performance (to which the parties hereby consent and agree). However, the parties agree that in the event of a disagreement or other dispute between the parties as to any matter governed by this Agreement, the parties shall, prior to filing any suit or other action in court, attempt to resolve such dispute through mediation. Such mediation shall be conducted through and pursuant to the rules and guidelines established by the American Arbitration Association ("AAA"), and the parties will pursue the mediation with promptness and diligence. If the dispute is not resolved within 30 days after written notice from either party describing the dispute and demanding mediation with respect thereto, for any reason, either party may submit the dispute to arbitration upon written notice of such election to the other party, in which event the parties shall attempt to resolve the dispute through arbitration. As with the mediation, such arbitration shall be conducted through and pursuant to the rules and guidelines established by the AAA, and the parties will pursue the mediation with promptness and diligence. If within 60 days after the notice electing arbitration, the parties still have not yet either (i) resolved the dispute, or (ii) agreed in writing to a formal arbitration procedure and timeline, for any reason, then either party may file suit in court with respect to the unresolved dispute, or take any other legal action, in its sole discretion. The parties agree that, other than the foregoing obligations with respect to mediating and arbitrating disputes, such arbitration (and the results thereof) shall be non-binding, and the parties shall not be prevented from filing suit for claims in court or from taking other formal legal action.

XVII. Endnotes

¹ See Schedule 2.A(1), “Non-Recourse Provision” for further examples.

² See Section XIII.C.2.d, “Set-Off.”

³ Even when the lease does not contemplate percentage rent as discussed in Section IV.B.3, “Percentage Rent.”

⁴ See Schedule 2.B(2), “Letter of Credit Provision” for an example.

⁵ Discussed in Section II.C.1.b, “Landlord Prerequisites” and Section II.C.1.c, “Landlord’s Approval.”

⁶ See Schedule 2.C, “Assignment & Subletting Provisions” for an example.

⁷ See Schedule 2.C, “Assignment & Subletting Provisions” for examples.

⁸ See Schedule 3.A(1), “Re-Measurement Provision” for a sample clause.

⁹ Other types of options, such as options to renew the length of the term of a lease, are discussed in Section IV, “Rent & Other Charges.”

¹⁰ See Schedule 3.B, “Right Of First Offer Provision,” for a sample ROFO for expansion space.

¹¹ See Schedule 3.C, “Relocation Provision,” for a sample relocation clause.

¹² See Section IV.B.2.b, “Proportionate Share,” for a discussion of operating expenses.

¹³ Discussed in more detail in Section IV.B.2, “Operating Expenses.”

¹⁴ See Schedule 4.B(2)(e), “Gross-Up Provision.”

¹⁵ See Schedule 4.B(3), “Percentage Rent Provisions.”

¹⁶ A concept which is discussed in Section VI.B.1, “Substantial Completion.”

¹⁷ See Schedule 5.A(2), “Commencement Date Provisions.”

¹⁸ All of which are discussed in Section VI.C, “Delays in Completion of the Initial Improvements.”

¹⁹ Lease commencement and the attendant sharing of risk is discussed in Section V.A.2, “Commencement Date.”

²⁰ These terms are also discussed in Section IX.A.1.a, “Office Leases.”

²¹ See Schedule 6.A(4), “Work Letter Provisions.”

²² See Section V.A.2, “Commencement Date.”

²³ See Schedule 6.C(3), “Force Majeure Provision.”

²⁴ See Schedule 6.D(2), “Allowance Payment Provision.”

²⁵ This will be the case with gross or full service leases discussed in Section IV.A.1, “Gross Leases.”

²⁶ Also discussed in Section III.E, “Rights To Other Building Amenities.”

²⁷ See Section III.D.1.d, “Indemnity,” and the accompanying provisions for a discussion of the space issues surrounding the installation of emergency generators.

²⁸ See Schedule 8.C, “Service Interruption Provision.”

²⁹ Sometimes these issues are addressed with “no-build” areas similar to the ones described in Section VII.A.2.e, “Sightline Covenants.”

³⁰ Discussed in Section XII, “Casualty & Condemnation Provisions.”

³¹ See Schedule 10, “Insurance and Indemnification Provisions.”

³² See Schedule 13.B, “Landlord Remedy Provisions.”

³³ See Schedule 13.B, “Landlord Remedy Provisions.”

³⁴ See Section V.B, “Options for Renewal or Early Termination of the Lease Term.”

³⁵ See Schedule 14.B, “ADR Provisions.”

TENANT'S CHECKLIST OF SILENT LEASE ISSUES

1. Alterations

- 1.1. **Acceptable Contractors.** Attach as an appendix a list of pre-approved contractors, architects, etc. If the landlord has approval rights, have the landlord pre-approve as many names as possible.
- 1.2. **Consent Requirements.** The landlord should agree to be reasonable about approving any nonstructural tenant alterations. Prohibit the landlord from requiring the tenant to make any changes in alterations that would increase their cost, except any changes necessary because the tenant's plans do not comply with law.
- 1.3. **When Consent Not Required.** Try to persuade the landlord to agree to limit any requirement for the landlord's consent to alterations. For example, the landlord's consent might not be required for decorative or minor (less than a stated cost?) alterations or partition walls. Changes in the economy and work structure may make it necessary for many tenants to have more flexibility than in the past to relocate partition walls or make other nonpermanent changes. If the tenant regards its space arrangements, designs, and office layouts as proprietary information, the tenant may want the landlord to let the tenant make any alterations permitted by law, with no need to obtain the landlord's consent or even to deliver plans to the landlord. (The preceding suggestion reflects concerns that were for the most part confined to "dotcom" tenants. The demise of so many "dotcom" tenants may minimize the likelihood that this issue will actually arise in future lease negotiations, but it may remain an important issue for some tenants.)
- 1.4. **Flexibility.** The tenant will want to maintain some flexibility in choosing its architects, engineers, other consultants, and contractors. It will not want to be limited to the landlord's approved list.
- 1.5. **Multiple Floors.** A multi-floor tenant may want the right to construct internal stairs and drill through floors for cabling. Such a tenant may also want the right to use the building's internal fire staircases for access between floors. When the landlord permits an inter-floor cut-through for a staircase, the landlord will generally require the tenant

to restore, either specifically or under a general alteration restoration clause. The tenant should seek to negate that requirement.

- 1.6. Risers, Etc.** The tenant may want to use riser spaces, shafts, chambers, and chases to run ducts, pipes, wires, and cables. Although, conceptually, limiting each tenant to its proportionate share of this space seems fair, such a limitation may not allow the tenant to meet its needs, especially if the landlord's building is inadequate (as a whole) to meet the needs of modern tenants. Try to have conduits and risers exclusively allocated to the tenant, not shared. At a minimum, try to control who else may use them, and how. Provisions concerning riser use may need to be coordinated with those concerning telecommunications access. (The entire area of telecommunications is one where many landlords ignore applicable provisions of federal law that mandate free access. Instead, landlords seek to impose restrictions and fees that may simply be void.)
- 1.7. Limit Fees.** If the tenant agrees to reimburse the landlord for fees of its architects, engineers, or other consultants in connection with the landlord's review of any alterations, the tenant will want to limit or negotiate those fees. More generally, assuming the tenant uses its own architect and the tenant's architect is competent and licensed, why should the tenant agree to pay the landlord's architect at all?
- 1.8. Time to Remove Liens.** If the tenant's work produces liens, the tenant will want enough time to remove them, taking into account procedural requirements of applicable law and related delays. The landlord should agree not to pay any lien that the tenant has bonded.
- 1.9. Use of Sidewalk.** A ground floor tenant may want the right to install awnings, canopies, and crowd control barriers on the sidewalk.
- 1.10. Americans with Disabilities Act of 1990 (ADA).** The tenant should have no duty to bring any elements of the existing building into ADA compliance (e.g., elevator buttons), unless (perhaps) the tenant actually alters that particular element of the building.

- 1.11. **Permits.** The landlord should agree to cooperate with the tenant in the process of applying for building permits and other governmental approvals for the tenant's work.
 - 1.12. **Right to Finance Alterations.** The tenant may want the right to finance alterations, perhaps even on a secured or quasi-secured basis. What cooperation will the tenant need from the landlord? What documents will the tenant's lender probably request? Require the landlord to assist as needed. If the landlord will not let the tenant grant liens to secure equipment financing, perhaps ask the landlord to provide the financing instead, with repayment built into the rent or documented separately.
2. **Alterations (Initial Occupancy)**
 - 2.1. **Landlord's Space Preparation.** The lease should define how the landlord will prepare the space for the tenant, including landlord's responsibilities for asbestos abatement or removal, demolition, re-fireproofing, leveling of floors if raw space, and closing of floor penetrations. Does the space contain any unusual existing improvements, such as vaults, that the tenant will want the landlord to remove? If the landlord's work is late or defective, treat this as a failure to deliver possession.
 - 2.2. **Consent to Tenant's Initial Work and Anticipated Work.** The landlord should consent in advance to the tenant's initial alterations and any anticipated future alterations.
 - 2.3. **Existing Violations.** The landlord should agree to cure any violations existing against the building that may prevent or interfere with the tenant's intended alterations.
 - 2.4. **Credit Issues.** Is the landlord creditworthy? If the landlord fails to build out or contribute to the tenant's work, what are the tenant's remedies? Most leases say that the landlord has no liability beyond its interest in the premises (if that). At a minimum, the tenant will want a right to offset against rent—with an interest factor—for any landlord contribution not paid or work not performed. If the landlord has a construction loan in place for the very purpose (in part) of paying for the tenant's improvements, the tenant might be able to obtain a direct right to receive those advances as part of negotiating the nondisturbance agreement with the lender.

- 2.5. Building Systems.** Are the existing building systems adequate? Should the landlord agree to complete any upgrades? When? Should the landlord construct any new installations outside the tenant's premises? What about HVAC, fire safety, or other system connections? Signage? Does the tenant have any special electrical requirements? Does the tenant require any space outside the premises to install electrical or other equipment for its own use? A backup generator?
- 2.6. Staging or Storage Area.** Will the tenant need any staging area, "lay-down" area, or storage area for its construction activities and move-in program? If the building has a loading dock or outside hoist, the tenant may want the right to some guaranteed usage or priority, particularly while it moves in and out of the building.
- 2.7. Substantial Completion.** If the landlord performs the tenant's initial alterations, "substantial completion" should require the landlord to have installed and activated all communications systems, utilities, and interior elevator service. Consider requiring the landlord to deliver a permanent certificate of occupancy, because a temporary certificate of occupancy, which expires after 90 days, may not suffice.
- 2.8. New York City Commercial Rent and Occupancy Tax.** New York City commercial tenants pay a "commercial rent and occupancy tax" that is almost unique to New York City. In a particularly formalistic application of that tax, city tax officials will impose a commercial rent tax on the rent that a tenant would have paid but for an express rent credit that the lease gives the tenant to compensate the tenant for work it performed to build out its space. The city treats that credit as if it were a "deemed" payment of rent, hence a taxable event. If the parties achieve the same economic result through a free rent period or some other dollar adjustment of the rent that is not expressly tied to the cost of the tenant's work, no commercial rent tax is due on the rent forgone. So a wise New York City tenant will ask for a free rent period or a general rent abatement rather than a rent credit tied in any way to the cost of the tenant's alterations.
- 2.9. Tax Implications of Build-Out Allowances.** When a landlord contributes funds to a tenant's alterations, that payment may create immediate taxable income to the tenant, though the landlord cannot recoup the same outlay except through depreciation on a

schedule of up to 39 years, regardless of the lease term. Only the Internal Revenue Service wins. The tenant may wish to negotiate instead that the landlord owns (and depreciates) the tenant's improvements for tax purposes, in exchange for some other benefit to the tenant. As an alternative, the parties might characterize the allowance as reimbursement for current expenses, such as the tenant's cost of moving, buying out its existing lease, or purchasing tangible personal property like furniture, fixtures, or equipment. Although the tenant may still suffer taxable income, the recharacterization will improve the landlord's position by giving the landlord either a current deduction or a much shorter depreciation period. The parties can shift this benefit to the tenant by adjusting other economies of the lease. Consider having an engineer or appraiser prepare a cost segregation study to determine which property can be depreciated over such shorter periods.

3. Assignment and Subletting Consents

3.1. Landlord's Consent. Ideally, allow the tenant to assign or sublet without the landlord's approval. At a minimum, such consent should not be unreasonably withheld. Try to provide that the landlord's consent will be automatically given if specified objectives and easy criteria (e.g., net worth, reputation, no felony convictions, experience, and proposed use) are met. Set standards for reasonableness. Rent should not be a criterion for approving subleases. (The tenant must keep paying rent no matter what.) Don't always assume the conditions and procedures for assignment and subletting should match. Even if the lease tightly restricts assignment, the tenant may be able to argue for greater flexibility on subletting.

3.2. Simple Approval Procedure. Make the approval process as simple and expeditious (and as early in the transaction closing process) as possible. Instead of requiring the tenant to submit to the landlord fully executed assignment or subletting documents, ask the landlord to agree to approve or disapprove the transaction in principle—before the tenant even starts its marketing—based solely on the tenant's anticipated pricing. As a fallback, defer the landlord's approval only until the tenant has delivered a term sheet, the identity of a proposed assignee or subtenant, and (in the case of an assignment only) copies of the proposed assignee's financial statements. These early

approval procedures are particularly important if the landlord can recapture the space upon any assignment or subletting.

- 3.3. Consent Form.** Attach as an exhibit the required form for the landlord's consent to any transfer. Goal: prevent the landlord from adding new conditions and restrictions when consenting to a particular transaction. Although such conditions and restrictions may be inconsistent with the lease, the tenant may agree to them because there is no choice or simply because the tenant is not paying careful enough attention at the time.
- Carve-Out for Affiliates.** Expressly permit any assignments and subleases to affiliates (defined as broadly as possible) or successors, or in connection with the sale of the tenant's business. If the tenant operates multiple locations, a "sale of business" should include the sale of a single location, or, worst case, some reasonable group of locations. Define "affiliate" to include trusts, estates, and foundations in which the tenant or its officers are involved. The lease should impose no burdens at all (brokerage commissions, recapture rights, etc.) for affiliate transactions.
- 3.5. Suppliers, Vendors, Customers, and Others.** Let the tenant sublet to its suppliers, vendors, or customers, as appropriate for the tenant's business convenience. Will the tenant or its principals form joint ventures or other new businesses (e.g., the formerly hot "Internet incubators") that should be able to share the tenant's space without any need for landlord approval?
- 3.6. Licensees.** The tenant should not need the landlord's consent to grant bona fide concessions or licenses.
- 3.7. Recapture Right.** If the tenant requests approval of an assignment or subletting, but the landlord elects to "recapture" the space, the tenant may want to have the right to withdraw the request. If the landlord elects not to exercise a recapture right, the landlord's consent to the proposed assignment or sublease should not be unreasonably withheld, conditioned or delayed.
- 3.8. Assignment/Sublet Involving Other Tenants.** The tenant should obtain the landlord's prior consent to any assignment or subletting between the tenant and other tenants in the building, whether the tenant is providing or receiving the additional

space. Ask the landlord to waive in advance (for the benefit of this tenant) any provisions in other tenants' leases that would prohibit or limit such transactions or discussions.

4. Assignment and Subletting Implementation

4.1. Assignor and Guarantor Protections. As a general legal proposition, when the tenant assigns the lease, the tenant remains liable for any default by the assignee, and even any default by a subsequent assignee. To facilitate future transactions, the tenant may want to try to mitigate that long-term post-assignment exposure (which may severely constrain the tenant's flexibility when negotiating a future assignment). Ideally, try to have the lease provide that both the assignor and any lease guarantor are released from liability if the tenant assigns the lease and satisfies certain conditions. (If the tenant cannot obtain this protection, then the tenant may ultimately need to structure any future lease transfer as a sublease.) As a backup, try to have the landlord agree to give any unreleased assignor and guarantor notice of any assignee's default and an opportunity to cure it. (In such a case, assignor and guarantor liability would terminate if the landlord did not give the notice.) An unreleased assignor and guarantor might also want a right to obtain a "new lease" if the landlord terminates the lease and the unreleased assignor and guarantor later performs the tenant's obligations. If the landlord and the assignee modify the lease, a typical boilerplate provision may say that the unreleased assignor (and its guarantor) are fully liable under the modification. Although such boilerplate may be appropriate in the context of an affiliate guaranty, it is not appropriate for an unreleased assignor of a lease. Insist that in such case the assignor's and guarantor's liability will never exceed what it would have been under the original lease.

4.2. Stock Transfers. If a lease treats an equity transfer as an assignment for consent purposes, the lease should not, then, treat it so for purposes of requiring the assignee to assume the lease, except where the equity consists of a general partnership interest in the tenant. (Many landlords' forms are written in a way that might require such an assumption of liability.) If the lease deems an equity transfer to constitute a lease assignment, the tenant may want to exclude any or all of the following: mergers, initial

public offerings, any change of corporate control of a substantial operating company, transfers of publicly traded stock, the sale of all or substantially all of the tenant's assets (excluding cash or cash equivalents on the tenant's balance sheet), transfers among affiliates, and any transfer resulting from an exercise of remedies by a bona fide pledgee.

- 4.3. Assignment of Security Deposit.** A tenant will want the right to assign the security deposit to any assignee of the lease. If the security is a letter of credit, the landlord should cooperate in substituting one letter of credit for another if the tenant assigns the lease or merely changes banks.
- 4.4. Confidentiality.** The landlord should agree to keep confidential any financial information that a possible assignee or tenant furnishes. The landlord should agree to sign a standard confidentiality agreement if a prospective assignee or subtenant requests it. Such an agreement would include a requirement to return any confidential information if a transaction dies. Similar requirements should apply for final sublease documents delivered to the landlord.
- 4.5. Splitting the Lease.** The tenant may want the right to sever a large lease into two or more separate and independent leases, to facilitate assignment in pieces—a more flexible exit strategy.
- 4.6. Protections for Subtenants.** The landlord should agree to give “nondisturbance” or “recognition” rights to subtenants if the tenant satisfies certain tests. The lease should also give subtenants as much flexibility as possible—perhaps the same flexibility as the tenant—regarding future assignments and subletting.
- 4.7. Participation in “Profits.”** If the landlord will participate in any “profits” the tenant realizes from assignment or subletting, define the tenant's costs as broadly and inclusively as possible, including brokerage commissions, professional fees, build-out, costs (including rent payable to the landlord) of carrying the space vacant during a reasonable marketing period, any free rent period, transfer taxes, cost of furniture included in the transaction, and the unamortized balance of the tenant's original improvements to the space. Try to let the tenant claim all these deductions at the

beginning of the sublease term, rather than amortize them (typically without interest) over the term of the sublease. The tenant's profit participation payments to the landlord should be due only to the extent the tenant actually receives the anticipated "profit." If the subtenant or assignee defaults, the tenant should be able to stop paying and perhaps insist on the right to recalculate any payments already made.

- 4.8. Multiple Lease Transfers.** If the landlord is entitled to a "profit" payment for any assignment or sublease, the tenant may want to negotiate a "basis adjustment" in the case of future transactions. For example, suppose an assignee pays \$1 million for a lease assignment, and the landlord receives 50 percent of that payment. What happens when the new tenant, the assignee, later assigns that lease again? At that point, the landlord has already "taxed" the first \$1 million of increased value of the tenant's leasehold. The lease should let the assignee treat that lease purchase payment as part of the assignee's cost of the lease when subleasing or assigning to someone else. The tenant's deductions should include any consideration the tenant paid to acquire the lease, straight-lined over the remaining term of the lease.
- 4.9. Bills and Administration.** If the tenant sublets, try to have the landlord agree to bill the subtenant directly for any services the landlord provides to the subtenant, and any other landlord sundry charges that apply to the subleased part of the premises. Although the tenant cannot expect to be relieved of liability for these charges if the subtenant does not pay, the tenant can save time and effort by extricating itself from the billing process. The same goes for any other function—e.g., requesting overtime HVAC or other building services—where the tenant might otherwise act as a mere communications channel between the subtenant and the landlord. The tenant, however, will want to see copies of bills and notices of unpaid amounts to avoid unpleasant surprises.
- 4.10. Transfer Defaults.** Try to persuade the landlord to commit to providing notice and an opportunity to cure if the tenant violates a lease restriction on transfer. Just like any other default under the lease, here cure could consist of rescission of the transfer. Why should this particular default always constitute an automatic event of default?

4.11. Guarantor. If the tenant can assign without the landlord's consent, the tenant also needs the right to replace any guarantor with a replacement guarantor that meets certain criteria. If the assignee delivers such a replacement guarantor—or if the landlord consents to an assignment without requiring a new guarantor—the first guarantor should be released automatically.

5. Bills and Notices

5.1. Attorneys and Managing Agents. Let attorneys and managing agents give notices on behalf of their clients. This should apply not only to any attorney or managing agent identified in the lease, but also to any future replacement, whether or not the party making the change has formally notified the other party of the change.

5.2. Copies. If the landlord gives the tenant any notice, the landlord should agree to give a copy to the tenant's central leasing personnel, and perhaps to other specified recipients (counsel and the like). If the tenant delivered a letter of credit in place of a security deposit, backed by a reimbursement agreement signed by a third party (e.g., the tenant's venture capitalist), then the landlord should also agree to give that third party a copy of any notice from the landlord, or at least any notice of default.

5.3. Delivery. The landlord should deliver bills and notices by personal service or nationally recognized overnight courier. State when notices become effective.

5.4. Notice Until Lease Commencement Date. Until the lease commencement date, the landlord should deliver all notices to the tenant's existing address, not the premises.

5.5. Delivery Notices. Require the landlord to provide written notice of delivery of any part of the premises. The premises should not be deemed delivered until the tenant has received that notice and, perhaps, a certain period of time has elapsed. (The tenant is often not ready to begin using the space immediately. The more process and the more delay the tenant builds into the rent commencement date, the less rent the tenant will need to pay for space it is not ready to use.)

5.6. Deemed Waivers. If the tenant will be deemed to have waived any claims because of its failure to assert them within a specified period (e.g., objections to the landlord's

delivery of the premises), then the lease should require the landlord to remind the tenant of the deemed waiver provisions as part of the notice that triggers the waiver.

6. Building Security

- 6.1. **Description of Program.** Describe (and require the landlord to provide) a security program (including package scanning and messenger interception, lobby attendant, the tenant's own lobby desk, security guards, keycards, night access doors, and specified operating hours), in accordance with criteria specified in the lease.
- 6.2. **Tenant's Security.** Let the tenant establish its own security system and connect that system to the landlord's system. The tenant may want the ability to install blast-resistant glass or film on exterior windows.
- 6.3. **New Measures.** The landlord should be required to obtain the tenant's consent for any new security measures (e.g., messenger interception) or changes in existing measures. The tenant should also seek the right to require subsequent changes to the landlord's security program if the tenant determines changes are appropriate. A tenant's exercise of these consent or control rights should impose no liability on that tenant for criminal actions of third parties or other adverse events.

7. Consents

- 7.1. **Quick Exercise.** The landlord should be required to grant or deny any required consent quickly. Silence should be deemed to constitute consent after a stated period. (As a compromise, the tenant might agree to remind the landlord of the response deadline in its consent request and/or to give a reminder notice if the landlord has not responded within a certain time.) Any failure to consent must specify all grounds for that failure. Those grounds must be reasonable.
- 7.2. **Use of Name.** The landlord should consent to the tenant's use of the building's name and likeness in the tenant's promotional and publicity materials.
- 7.3. **Site Plan.** For new construction, the tenant may want the right to consent to the landlord's site plan (particularly as it relates to parking) and any changes.

- 7.4. Press Releases.** The landlord should obtain the tenant's approval of press releases, tombstones, and announcements about the lease. The landlord should not disclose any terms of the lease without the tenant's consent.
- 7.5. Pre-Consent.** Are there any future changes in the tenant's needs for which the tenant wants the landlord's consent today in the lease (e.g., a pending merger, change of name, change of business)?
- 7.6. Consent.** Insist that no landlord consent may be unreasonably withheld, conditioned or delayed.
- 7.7. Tenant Consent Rights.** Does the tenant anticipate any matters for which the landlord should seek the tenant's consent (e.g., changes in building security)? Indicate in the lease that such consent will be required.
- 7.8. Damages.** For unreasonable denial of consent, try to trim back the standard lease language by which the tenant waives any right to recover damages. Perhaps the tenant should be able to obtain damages up to a specified dollar amount. The tenant's position is particularly compelling where the lease requires the landlord's consent in connection with the sale of the tenant's business, and the landlord withholds consent—in violation of the lease—and thus derails the tenant's entire transaction.

8. Defaults and Remedies

- 8.1. Notice and Opportunity to Cure.** The tenant should have the right to notice of, and the opportunity to cure, any monetary or other default.
- 8.2. Default Triggered by Bankruptcy.** Although "ipso facto" clauses are typically unenforceable against a debtor-tenant, beware of any event of default triggered by someone else's bankruptcy, for example, that of a guarantor. A landlord can typically declare and enforce any such event of default against the tenant without a problem.
- 8.3. Limitation on Landlord's Remedies.** Limit the landlord's remedies (for example, to exclude lease termination or eviction) for defaults or disputes below a threshold level of materiality. Why should the risk of lease termination hang over the tenant for every possible lease default or alleged default, and hence almost every conceivable (even

minor) dispute with the landlord? Also ask the landlord to waive any right to recover consequential damages from the tenant.

- 8.4. Nonmonetary Defaults.** The tenant might want to eliminate all “nonmonetary” defaults. This can be accomplished by requiring the landlord to convert any “nonmonetary” default into a monetary default by curing it and sending the tenant a bill for reimbursement (a provision common in old Woolworth’s leases—though apparently it was not enough to save the chain from oblivion). As an alternative, provide that so long as the tenant remains current in its monetary obligations, the landlord cannot exercise certain remedies (e.g., lease termination) for a nonmonetary default until the landlord has obtained a court order. (In practice, a court will often put the landlord in the same position anyway, regardless of what the lease says, such as through the “Yellowstone” procedure in New York.)
- 8.5. Future Equipment Financing.** Require the landlord—as well as its mortgagee—to waive or subordinate any statutory or other liens on fixtures, equipment, and other personal property of the tenant, either in all cases or if the tenant’s asset-based lender requests it. To allow such a lender to exercise its remedies and remove any financed equipment, the landlord should also agree to enter into a landlord’s consent, to give the lender (for example) a brief lease extension if the lease terminates and the right to conduct an auction on the premises.
- 8.6. Holdover Rent for Partial Months.** Prorate holdover rent on a per diem basis for partial months. (As a practical matter, that may be the single most important concession for a tenant to request in the typical “boilerplate” of any lease, which will usually impose a month’s holdover rent for a day’s delay in moving out.) Consider building in a short-term right to hold over at the same rent, to give the tenant some flexibility in case of delays in relocating.
- 8.7. Mitigation of Damages.** The landlord must seek to mitigate damages. (New York still imposes no such requirement on commercial landlords.) For example, the landlord must try to relet the premises. If the landlord does mitigate its damages, it must credit any money collected against the tenant’s liability.

- 8.8. Waiver of Self-Help.** Ask the landlord to waive any right of self-help (to retake possession) and any right to lock out the tenant.
- 8.9. Acceleration of Rent.** If the landlord has the right to accelerate all rent as liquidated damages, first try to eliminate this remedy. If you can't, seek the following: (1) the tenant gets credit for fair and reasonable rental value, and (2) the highest possible discount (for example, prime rate rather than 4 percent per annum).
- 8.10. Default by Subtenant.** Extend the tenant's cure period in the case of nonmonetary subtenant defaults to allow the tenant time to enforce the sublease and, if necessary, obtain possession of the subleased premises.
- 8.11. Statute of Limitations.** Limit the landlord's right to collect unbilled rent once a certain amount of time has passed (e.g., eighteen months).
- 8.12. Piercing the Veil.** Require the landlord to waive any theory that might let the landlord "pierce the corporate veil" of the tenant named in the lease. The landlord should acknowledge it has no claims against the tenant's principals or affiliates under any circumstances (including tort-based theories relating to the lease or the premises), except to the extent they have actually signed a guaranty.
- 9. Casualty**
- 9.1. Right to Terminate.** If a material casualty occurs and the landlord either cannot or does not restore the premises within a specified time period, or if the casualty occurs during the last two or three years of the lease term, let the tenant terminate the lease.
- 9.2. Adverse Impact on Business.** Provide that the tenant can terminate the lease or abate rent if a casualty or other event (e.g., a terrorist attack affecting some other building)—or restoration from a casualty—causes any temporary or permanent material change in the tenant's permitted use (e.g., loss of nonconforming use status), access, parking, traffic volume, pedestrian volume, or visibility of the premises.
- 9.3. Extent of Restoration; Interaction with Loan Documents.** Ideally, require the landlord to restore in all cases—whether or not the landlord has adequate insurance proceeds, i.e., whether or not it has adequately insured the building. Beware of the

terms of subordination, nondisturbance and attornment agreements, which may, in effect, modify the restoration requirements of the lease to conform to those of the loan documents. If the tenant negotiates a broad obligation to restore but the landlord's loan documents let the lender take the money and run, then the tenant loses if, as is often the case, it agreed in an subordination, nondisturbance and attornment agreement that the loan documents would govern. A major tenant will usually not tolerate this result.

- 9.4. Abatement During Restoration.** Try to abate rent, escalations, alteration fees and any other payments during all restoration—both the landlord's and the tenant's—especially if major fixtures need to be restored. The landlord should refund prepaid rent and other items. These measures will often be a “win-win” for both parties, because the landlord can often insure the loss (on a property-wide basis) more easily and economically than each tenant individually.
- 9.5. Other Premises.** If a casualty affects only improvements outside the tenant's premises, the landlord cannot terminate the tenant's lease unless the landlord: (1) makes the tenant whole, and (2) terminates all other similarly situated leases.
- 9.6. Landlord's Waiver of Right to Sue.** Even without a waiver of subrogation, the landlord should agree not to sue the tenant for negligently causing a casualty that a typical casualty insurance policy would have covered.
- 9.7. Lease Extension.** Ask the landlord to agree to extend the lease termination date to compensate the tenant after a loss, for any period when the tenant could not use and occupy the premises. Even if the lease terminates, if the premises are tenantable and may legally be occupied, seek some short extension of the term to give the tenant additional time to operate and ease the transition to new premises.
- 9.8. Time to Restore.** Negate (or limit) any landlord right to obtain an extension of time to restore in the case of a force majeure event.

10. Condemnation

- 10.1. Partial.** Require the landlord to restore the premises in the case of a partial condemnation, at least to the extent of available condemnation proceeds. If the partial

condemnation affects the premises or more than _____ percent of the whole building, the tenant may still want the right to terminate the lease.

- 10.2. Separate Claim.** A tenant wants to be able to submit a separate claim to the condemning authority for: (1) the value of the leasehold estate, and (2) moving expenses, trade fixtures, goodwill, advertising and printing costs, phone lines, and damages for interruption of business. Landlords and lenders rarely tolerate item (1), but may accept it provided that the tenant's award does not diminish sums payable to the landlord and its lender.
- 10.3. Physical Impairments.** The tenant may want a right to terminate or abate rent if any condemnation, including a road widening or other change, materially and adversely affects the tenant's business, such as by impairing parking, access (e.g., loss of curb cuts), traffic volume, or visibility.

11. Electricity

- 11.1. Totalized Submeter Readings.** The readings from multiple submeters should be totalized, using a third-party service and appropriate security controls to limit access to submetering equipment and computers.
- 11.2. Usage Survey.** Allow either party, not just the landlord, to initiate a usage survey.
- 11.3. Rate for Submetered Electricity.** The tenant should pay for submetered electricity using the same tariff under which the landlord purchases electricity. If the landlord purchases electricity from a private provider, the rate the tenant pays should not exceed the public utility's rate.
- 11.4. Sufficient Wattage.** The landlord should assure the tenant that the existing electrical system provides enough power for the tenant's present and anticipated needs.
- 11.5. Additional Electrical Capacity.** The tenant should be able to obtain more electrical capacity if needed, quickly, at a defined or ascertainable cost. The landlord should reserve a certain number of watts per foot for the tenant, even if the tenant will not be using it initially. (If the tenant later needs more electricity but the building has no

available capacity, the resulting delays in obtaining additional capacity may hurt the tenant's business.)

- 11.6. Location for Power Delivery.** Specify the delivery point for electrical power.
- 11.7. Tenant's Emergency Generator.** Allow the tenant to install an emergency generator and fuel tank (or other arrangements for fuel storage and refueling). Allocate ownership, responsibilities (including responsibilities for regular testing and refueling), and costs between the landlord and the tenant. The tenant should have no duty to remove this equipment at the end of the term.
- 11.8. Backup Electrical Operation.** The landlord should give the tenant prior notice before any scheduled electrical shutdown or testing of the landlord's emergency generators. Limit the frequency of such shutdowns and the periods when the landlord can test its emergency generators. (These generators, when running, can produce background noise about as subtle as jet engines.)
- 11.9. Building Generator.** Give the tenant the right to use the building generator. The landlord should reserve a certain amount of generator capacity for the tenant and agree to keep the fuel tanks full.
- 11.10. Capacity.** The landlord should allow the tenant to reserve additional riser space and additional capacity in the buss duct or other main electrical distribution system.
- 11.11. Retroactivity.** Try to limit the period during which the landlord can retroactively bill the tenant for increased rates or usage.

12. Elevators

- 12.1. Freight Elevators for Moving.** Ask to use the freight elevators without charge to move in and move out. The tenant should seek the use of several elevators—e.g., all the passenger elevators in the building—on weekends and at night for the same purposes. Ideally, all this elevator usage should be free.
- 12.2. Night Service.** The lease should provide that “night service” for elevators (restricted or limited service) cannot begin before a specified time. Require a minimum number of elevators to be in service at all times.

- 12.3. Changing Elevator Banks.** Prohibit the landlord from reconfiguring elevator banks. If the tenant's space is the first stop, it should remain so.
- 12.4. Exclusive Service.** The tenant may want exclusive elevator service for certain floors. The tenant may want cars not being used to be parked at, or returned to, the tenant's floor for the tenant's convenience.
- 12.5. Routine Repairs.** Require the landlord to perform routine elevator repairs and maintenance only outside business hours.
- 12.6. Waiting Time.** Specify the maximum average waiting time for elevators.
- 12.7. Security Measures.** The tenant should have approval rights over the institution and modification of elevator security measures, including 24-hour keycards and turnstiles to the elevator area. Does the tenant want to require any such measures?
- 12.8. Service Contract.** Require the landlord to maintain an elevator service contract that obligates the maintenance contractor to respond to a stuck elevator within ___ minutes.

13. End of Term

- 13.1. Duty to Restore.** The tenant will want to disclaim any obligation to restore (i.e., remove the tenant's alterations) at the end of the term. As a compromise measure, the tenant might agree to remove any tenant's improvements that are unusual, particularly difficult to remove, or improperly made, or if the landlord reasonably required restoration as a condition to consenting to the tenant's work. But what's "reasonable"? Instead, try to specify an objective test for determining what the tenant must remove. Require the landlord to give a reminder notice at least ___ months, but no more than ___ months, before the end of the term if the landlord intends to enforce the restoration requirement.
- 13.2. Restoration.** If the tenant must restore, then let the tenant: (a) perform any necessary restoration work rather than paying the landlord to do it; (b) enter the premises for some reasonable period after the end of the lease term as needed; (c) during the post-term restoration period, pay only an equitable per diem payment rather than holdover

rent; and (d) meet only a “substantial completion” standard rather than a higher standard that might apply to delivery of new space. Once the tenant notifies the landlord the work is done, the landlord should have a short time to object; silence should be deemed approval. Require the landlord to specify all objections, and in reasonable detail, within the objection period. If the landlord’s objections are minor and the tenant resolves them within a reasonable period, the tenant should no longer be required to pay any rent during that reasonable period.

- 13.3. Condition of Returned Premises.** The tenant should have no duty to return the premises in any particular condition. For example, it should have no obligation to replace a worn-out compressor in the last year of the term.
- 13.4. Removal of Personal Property.** Allow the tenant to enter the premises for a short time after the lease expires in order to remove the tenant’s personal property.
- 13.5. Demolition Clause.** If the tenant cannot negotiate away a “demolition” clause, then the landlord should not be able to terminate under that clause unless the landlord: (1) gives reasonable notice; (2) acts in good faith; (3) terminates the leases of all other tenants; (4) has entered into a binding noncancellable demolition agreement; (5) has obtained a demolition permit; and (6) deposits the lease termination payment in escrow.
- 13.6. “For Rent” Signs.** The landlord should not post “for rent” signs until the term has actually ended.
- 13.7. New Location Sign.** For a reasonable time after the lease has terminated, the tenant may want to be able to install a sign directing customers to the tenant’s new location.
- 13.8. Prepaid Rent.** Upon any termination not arising out of the tenant’s default, the landlord must promptly refund prepaid rent and other payments together with accrued interest and an administrative fee if not paid promptly.
- 13.9. Holdover Rent.** Holdover rent should not apply for some limited period when the parties are negotiating a lease extension in good faith for the premises or for space in another building. Try to eliminate holdover rent at any time when a new tenant is not ready to occupy the premises. Also, try to negotiate the right to a short-term lease

extension to avoid holdover rent problems or if a retail tenant wants to stay through the holiday season.

- 13.10. Subtenant Problems.** Sometimes a tenant cannot vacate solely because a subtenant fails to surrender its subleased premises. To protect the tenant in such a case, try to limit the tenant's liability, by having it apply only to the part of the premises that the subtenant failed to surrender or, at most, to the entire floor that includes those premises. Absent such a concession, the tenant may be liable for holdover rent for the entire leased premises, even though the tenant has moved out and the subtenant's holdover affects only a tiny corner of one floor.¹
- 13.11. Receipt and Release.** Require the landlord to issue a receipt and release upon request at the end of the lease term.

14. Escalations (Generally)

- 14.1. Proportionate Share Computation.** In computing the tenant's proportionate share, if the rentable square footage (the numerator) includes the tenant's share of the common areas, confirm that the denominator also includes all the common areas. If the square footage of the building is increased, the denominator should increase accordingly. Exclude basement/mezzanine space from the numerator. Avoid contributing to the landlord's land banking or costs of carrying dead space.
- 14.2. Over-reimbursement.** Do all of the tenants' percentages add up to 100 percent, or is the landlord being over-reimbursed for escalations? Are the anchor tenants paying their share, or is that share being shifted to the other tenants?
- 14.3. Mixed Uses.** In a mixed-use building (including office with retail on the ground floor), are all tenant types being treated the same way or at least equitably? Should they be? Should certain parts of the project be excluded from the tenant's escalation formulas?

¹ Tenants need to understand this risk when evaluating prospective subtenants and negotiating subleases. As one way to mitigate the risk, the tenant might have the sublease expire six months before the main lease, at which point the subtenant would be required to deliver appropriate estoppel certificates and other assurances (an increased security deposit?) regarding its obligation to vacate, and the sublease might convert to a license arrangement. A strong tenant might ask the landlord to bear the risk of subtenant holdover.

More generally, the existence of multiple uses in the same building can make any allocations much harder to understand and much more subjective (i.e., it creates much more room for abuse, and makes the abuse that much harder to find). If possible, the tenant should contribute only to an allocation of costs within the particular single-use component of the project that the tenant actually occupies.

- 14.4. Occupiable Space.** The lease should allocate escalations based on *occupiable* space (as the denominator), not *occupied* space. Let the landlord pay the full operating costs for all unoccupied space.
- 14.5. Multiple Escalations.** The lease should not allow multiple escalations that give the landlord duplicative recoupment of a cost increase, or double-count any charges included in operating expenses or elsewhere. For example, the marketing director's salary should be either an operating expense or a charge to the marketing fund, but not both. Anything treated as "real estate taxes" should not also be treated as "operating expenses." These principles can be expressed both generically and/or by combing through and comparing the various definitions.
- 14.6. Lease Termination During Calendar Year.** Apportion escalations in the event that the lease terminates during a calendar year. (Otherwise, the landlord could argue that annual calculation procedures obligate the tenant to contribute to an entire year's escalations.)
- 14.7. "Base Year."** Any "base year" should fully include all expenses. Were any expenses not yet being fully incurred? Did any exclusions apply? Was the landlord not providing full building services?
- 14.8. Cap on Escalations.** The tenant might try to negotiate an annual limit on escalations—either a specific dollar figure, a percentage, a percentage of CPI, or the comparable cost increases in a "basket" of comparable buildings, if such information can be obtained.
- 14.9. Free Rent Period.** Does the "free rent" period apply to escalations or just base rent?
- 14.10. "Porter's Wage" Escalation.** For "porter's wage" escalations, the lease should exclude fringe benefits and the value of "time off." Try to limit the measure to reflect

only the base hourly rate. If fringe benefits cannot be excluded, try to define how they are calculated.

- 14.11. Consumer Price Index Adjustment.** For a consumer price index (CPI) adjustment, the lease should measure any increase consistently from the starting year of the lease, rather than from the preceding year's CPI. The adjustment clause should specify exactly which CPI index is being used and what happens if that index stops being issued.
- 14.12. Escalations Below Base.** State that if an escalation amount falls below the original base, the tenant should receive a credit against fixed rent.
- 14.13. Fixed Rent Increases.** To avoid controversy over calculating escalations, consider negotiating fixed rent increases in place of all pass-throughs of expenses.
- 14.14. Waiver of Escalations.** Escalations should be deemed waived if not billed within a certain period.

15. Estoppel Certificates

- 15.1. By Whom.** Both the landlord and the tenant should agree to furnish estoppel certificates. (How often?)
- 15.2. Who Can Rely.** Make sure subtenants and assignees can rely on the landlord's estoppel certificate, not just lenders.
- 15.3. Form.** Attach an acceptable form of estoppel certificate as an exhibit to prevent subsequent issues. Limit the assurances the tenant must provide, both substantively and by adding "knowledge" requirements and as many other qualifiers as possible. Avoid restating the terms of the lease; tell the lender to read the lease and rely on the estoppel certificate only for comfort that the lease has not been secretly amended.
- 15.4. Legal Fees.** Should the landlord reimburse the tenant for its legal fees in researching and preparing future estoppel certificates?
- 15.5. "Knowledge."** Qualify appropriate sections of any estoppel certificate to apply only to the tenant's knowledge, especially for issues involving additional rent. Alternatively, the tenant should reserve its rights on these claims. A typical 10-day requirement to

deliver an estoppel certificate is too short for the tenant to conduct adequate due diligence to knowingly surrender claims involving complicated and potentially debatable billing of operating expenses and utility charges. This is particularly true when the tenant is a large company.

- 15.6. Conflict of Terms.** If the estoppel certificate and the lease conflict, the lease should govern. The delivery of an estoppel certificate should not be deemed to waive or modify any rights or remedies of the signer.
- 15.7. Failure to Sign.** Negate any liability of the tenant (e.g., claims of “tortious interference”) if the tenant does not sign the estoppel certificate. Limit the landlord’s remedy to an injunction, a deemed estoppel, or a nuisance fee.

16. Failure to Deliver Possession

- 16.1. Remedies.** Let the tenant terminate or receive a substantial rent abatement if the landlord does not deliver possession by a certain date (also try to get day-for-day—or better—rent credit for the delay). Consider requiring the landlord to pay for or provide temporary space or pay the tenant’s holdover damages in its present space. If the lease sets a formula for any payment or credit to the tenant for delayed delivery, courts may test it as “liquidated damages,” although when a New York court recently did so, that particular ruling was reversed on appeal. Just in case, though, add the typical recitations that attempt to validate any liquidated damages clause.
- 16.2. Lender’s Approval.** If the lease is conditioned on a lender’s (or any other) approval, set an outside date for approval and let the tenant terminate if the landlord misses that date. Try to have the landlord deliver the approval when the parties sign the lease, particularly if the tenant is under timing pressure to resolve its occupancy arrangements.
- 16.3. Termination of Lease.** If the tenant terminates the lease because the landlord does not timely deliver possession, the landlord should refund all payments and redeliver any other documents (such as letters of credit) delivered on lease signing. Also ask the landlord to agree to compensate the tenant for the tenant’s costs.

- 16.4. Late Delivery of Premises.** The landlord should push back all rent abatements and adjustments as well as the expiration date (and base years, at some point) if the landlord delivers the space late.
- 16.5. Seasonal Businesses.** For seasonal businesses, the tenant may not want to be obligated to initially open for business during its slow season. Try to control periods or dates during which the landlord may deliver the premises. A certain day of the week? Not during the holiday season?

17. Fees and Expenses

- 17.1. Reasonableness.** Limit fees and expenses to those which are reasonable, actual, and out-of-pocket. Do not agree to allow fees “as set by landlord” or as “modified from time to time” or “based on landlord’s standard schedule.” The tenant should not be required to pay fees for any review of plans or possible subtenants by the landlord’s internal personnel, even if those persons are professionals.
- 17.2. Legal Fees and Expenses.** Exclude legal fees and expenses relating to a claimed default if no default exists or the landlord otherwise does not prevail.
- 17.3. Reimbursement to Prevailing Party.** Make the obligation to reimburse attorneys’ fees run both ways. Whoever prevails should recover attorneys’ fees, including the value of in-house counsel’s time.

18. Heating, Ventilation, Air Conditioning

- 18.1. Specifications.** Specify required HVAC service, with variations by day of week and season, both during and outside business hours. Require the landlord to air-condition all interior public areas. Obtain the right to test air quality from time to time.
- 18.2. Rates.** The lease should state the rates (and the basis of rates) for overtime HVAC. Squeeze out any profit component. If the landlord later charges any other tenant a lower rate, this tenant should get the benefit of that lower rate.
- 18.3. Allocation of Charges.** Allocate overtime HVAC charges among multiple simultaneous users.

- 18.4. Notice for Overtime.** Minimize or eliminate any prior notice requirement for overtime HVAC.
- 18.5. Discount.** Give the tenant a discount on overtime HVAC if the tenant commits in advance to specified levels of usage.
- 18.6. Miscellaneous Issues.** Should the tenant have the right to install supplemental HVAC? How much condenser water must the landlord provide? Chilled water? Who owns the equipment? Who pays costs? Who must repair/restore? Should the tenant be able to reconfigure building standard HVAC as needed for supplemental service? Will the tenant need access to fresh-air louvers? Where?
- 18.7. Water Treatment.** Require the landlord to add appropriate chemicals to any HVAC-related water lines, to prevent pipe corrosion and system breakdowns. The landlord should maintain records of these treatments and give them to the tenant upon request.

19. Inability to Perform

- 19.1. Force Majeure.** Give force majeure protections to the tenant, not just the landlord. The landlord must give notice of a force majeure event within a specified time, or lose the right to claim such event as force majeure. Any delays that result from a contractor that the landlord required the tenant to use (or perhaps even merely approved) should constitute force majeure.
- 19.2. Right To Cure.** Let the tenant cure the problem if the landlord fails to perform—even if that failure is caused by force majeure. If the landlord fails to reimburse the tenant's cure costs, then let the tenant offset rent. Consider the interaction between this rent offset and any rent abatement arising from casualty and condemnation.
- 19.3. Force Majeure Exceptions.** Although force majeure clauses always have a certain logic and fairness to them, should the tenant always allow the landlord the potentially open-ended extensions of time that a force majeure clause might justify? If the lease requires the landlord to restore after casualty within a certain time, should the landlord be entitled to an endless extension of time? What about delivery of the premises? What about maintenance of the roof? At some point, the force majeure clock should

stop ticking or the “rent abatement” clock should start ticking, perhaps at double speed—even for force majeure delays.

20. Insurance

- 20.1. Common Standard.** The tenant should have no obligation to provide more insurance than similar tenants customarily maintain in similar buildings, or to provide insurance at rates that are not reasonable.
- 20.2. Type of Insurance.** Allow the tenant to carry blanket insurance, self-insure, or use a “captive” carrier. In the case of a large corporate tenant, the insurance requirements should conform to the tenant’s company-wide insurance program.
- 20.3. Waiver of Subrogation.** Insurance policies should contain a waiver of subrogation clause. The lease should then contain matching waiver and release language.
- 20.4. Property and Liability Insurance.** The landlord should carry property and liability insurance, and provide evidence of such insurance on the tenant’s request.
- 20.5. Effect of Sublease.** To the extent that the tenant subleases the premises, the lease should state that the subtenant’s insurance coverage and insurance certificates (if otherwise substantially in compliance with the lease) will meet the tenant’s insurance obligations.
- 20.6. Landlord’s Deductible.** A major tenant may care about the size of the landlord’s deductible (both a minimum and a maximum) and how that deductible will be funded in the event of a casualty. Whose risk is the deductible? Will that payment constitute an operating expense?
- 20.7. Insurance Advice.** Send the insurance and casualty provisions of the lease to the tenant’s insurance adviser for review and comment.
- 20.8. Terrorism Insurance.** To the extent that the definition of “operating expenses” includes insurance the landlord obtains, decide how to treat the cost of terrorism insurance for purposes of the base year. Given the gyrations in cost and availability of terrorism insurance, any base year since September 2001 may include an artificially high or artificially low cost for terrorism insurance. As one solution, the tenant might exclude

terrorism insurance from operating expenses completely. Make it the landlord's problem as a risk of owning real estate.

21. Landlord's Access to Premises

- 21.1. Prior Notice.** How much and what type of prior notice should the landlord give to gain access to the tenant's premises?
- 21.2. Purpose of Access.** Limit the landlord's access to certain defined purposes (e.g., repairs, inspection, or to show the premises to prospective future tenants within the last ___ months of the term only).
- 21.3. Frequency.** Limit how often the landlord can enter the premises.
- 21.4. Sensitive Areas.** Should the lease prohibit or restrict the landlord from entering "special spaces" (bank vault, securities vault, network control rooms, and the like) for cleaning and other purposes? If the tenant regards its entire operation as proprietary and "top secret," then perhaps the lease should not allow the landlord access at all, absent an emergency.
- 21.5. Time of Access.** Should access be limited to certain hours (business hours, after hours)?
- 21.6. Authorized Personnel.** Precisely who among the landlord's employees, agents, and contractors should have access?
- 21.7. Presence of Tenant's Representative.** The tenant may want its representative to be present whenever the landlord is on the tenant's premises. This is particularly important in any area where the tenant has sensitive, dangerous, or expensive personal property.
- 21.8. Disruption and Security.** Require the landlord to minimize interference with the tenant's business and comply with the tenant's reasonable instructions and security requirements, even if this requires the landlord to use overtime labor.
- 21.9. Placement of Pipes and Conduits.** If the landlord wants to reserve the right to install pipes and conduits, the tenant may want to limit exactly where—such as only within

existing walls or above ceilings. Should the landlord be required to minimize any damage associated with the installation or maintenance of these conduits?

- 21.10. Storage of Materials.** If the landlord stores materials in the premises for making repairs, limit that right to apply only to those materials necessary for repairs within the premises. This can be particularly problematic if the premises includes a terrace—a tempting storage area for long-term exterior projects. In any case, the landlord should store materials in the premises only for short periods.
- 21.11. Repair Work Outside Business Hours.** If the landlord's work in or affecting the premises will cause inconvenience, noise, odors, or the like, the landlord should work only outside business hours. If the tenant needs the landlord to repair any critical area or function quickly, require the landlord to do so, even if the landlord must hire overtime labor.
- 21.12. Hazardous Materials.** If the landlord will use hazardous materials for any work in or affecting the premises, the landlord should agree to notify the tenant in advance and provide "material safety data sheet" disclosures.

22. Leasehold Mortgages and Tenant's Financing

- 22.1. Landlord's Consent.** Ask the landlord to consent in advance to the tenant's grant of leasehold mortgage(s). The leasehold mortgagee should have the rights to: (1) receive notice of default from the landlord, (2) cure, and (3) obtain a new lease from the landlord if the original lease terminates (other than a scheduled termination in accordance with its terms).²
- 22.2. Equity Pledges.** If the tenant's owners pledge their equity as collateral for a loan, the pledgee may want protections under the lease like those afforded a leasehold mortgagee.

² For the lease to be truly "mortgageable," it needs much more than this. See Joshua Stein, "Model Leasehold Mortgagee Protections," *The ACREL Papers* (Oct. 1999).

22.3. Financing, Generally. Does the tenant anticipate entering into any other financing arrangements that might affect the landlord, the lease, or the premises? If so, consider adding appropriate language to the lease to preserve the tenant's flexibility.

23. Maintenance and Cleaning

23.1. Structural Repairs. Require the landlord to maintain and repair the "structure" of the building (including the roof, the foundation, and other structural elements) and maintain and repair common areas, parking lots, garages and sidewalks. Define "structural" (broadly) to avoid future disputes over what it means. Try to have it cover as much of the building as possible except improvements unique to a particular tenant.

23.2. Building and Systems Maintenance. The landlord should maintain electrical, plumbing, sewage, HVAC, and other building systems, at least to the point of entry into the premises. Consider whether to require the landlord to maintain service contracts. Let the tenant and its advisers inspect building systems.

23.3. Standard for Maintenance. The landlord should maintain the building and common areas (including any empty shop spaces, and all common areas on any multi-tenant floor, whether or not fully occupied) in an attractive and first-class manner. "Maintenance" should include provision of security. Require the landlord to repaint and recarpet periodically.

23.4. Cleaning Standards. Specify standards for the landlord's cleaning services, both within the premises and in common areas. Limit the scope of possible "extras." Try to define the pricing of "extras." Cleaning standards are an economic issue. Review and negotiate them accordingly. If the cleaning standards say the landlord does not need to clean any "computer areas," how much space will this exclude for a modern office? If the landlord wants to disclaim any responsibility for cleaning of certain areas (food preparation, etc.), obtain a credit for the value per square foot of the "building standard" cleaning not provided. As an alternative, ask the landlord to give the tenant an allowance. Then the tenant should only be responsible to pay for any cleaning that is above standard (considered for the space as a whole).

23.5. Cleaning Hours. Specify the earliest time at which cleaning may commence.

- 23.6. **Right to Terminate.** The tenant may want to be able to terminate the landlord's cleaning services and take over cleaning of all common areas or just the premises, with a rent credit.
- 23.7. **Garbage Removal.** Define the location, access, timing, and other arrangements for garbage removal. The landlord should provide separate recycling containers or areas.
- 23.8. **Repairs Covered by Insurance.** Require the landlord to make repairs—even if otherwise the tenant's obligation—where the need arises from an event covered by insurance that the landlord carried or should have carried.

24. Operating Expenses—Calculation and Auditing

- 24.1. **Statement by Professional.** An independent managing agent or (better) a certified public accountant should prepare the statement of operating expenses. Attach as a lease exhibit the landlord's operating expense statements for the preceding few years. Ask the landlord to confirm that: (a) these were the statements actually used for pass-throughs to existing tenants; and (b) future operating expenses will be calculated the same way.
- 24.2. **Time for Revision.** Set a time limit for the landlord's revisions to operating expense statements—and make that limit subject to a “time of the essence” qualifier.
- 24.3. **Gross-Up.** In any year the building is not fully occupied, operating expenses are often “grossed up” as if the building had been fully or nearly fully occupied during the entire year. Confirm that the base year and adjustment year are treated consistently and that the “gross-up” calculations make sense.
- 24.4. **Timing of Operating Expense Statement.** The landlord should provide the annual operating expense statement within a reasonable time (90-180 days) after year-end, especially when the tenant pays monthly operating expense escalation estimates on account.
- 24.5. **New Expense Items.** If the landlord later incurs new categories or items of expense that were not being incurred when the lease was signed (e.g., a new earthquake insurance program or expanded security), ask the landlord to “gross up” the base year

to reflect what this expense would have been if the landlord had already been incurring it the day the lease was signed.

- 24.6. Right to Review and Challenge.** The tenant should have the rights to examine and question the landlord's operating expense calculations. Those rights should survive termination of the lease. The lease should give the tenant reasonable time to: (1) notify the landlord it wants to audit expenses; (2) conduct and complete the audit; and (3) specify if, and how, it contests the landlord's calculations. Avoid any schedule that requires the tenant to provide more detail than is reasonable at any particular stage of the process. If the tenant discovers egregious errors, let the tenant reopen operating expenses from earlier years, even if the time to do so has otherwise expired.
- 24.7. Books and Records.** Require the landlord to keep books and records, for a specified number of years, in a single place under a unified system.
- 24.8. Base Year.** The audit right should include the base year, expiring no earlier than the expiration date for the right to audit the first operating year. The tenant may wish to audit the base year at the same time that it audits the first operating year.
- 24.9. Landlord's Responsibility for Audit Cost.** The landlord should pay the cost of audit (credit it against the next month's rent) if the audit discloses an overcharge of more than ___ percent.
- 24.10. Most Favored Nation; Landlord's Discovery of Error.** If some other tenant's audit discloses a discrepancy, the landlord should automatically give this tenant the benefit of any resulting adjustment to operating expenses—even if this tenant does not ask for it. If the landlord forgets to do so, the landlord must pay interest at a penalty rate. Also, if—on a particular issue—the landlord makes a better deal with any other tenant, this tenant should get the benefit. If the landlord fails to timely disclose the better deal to this tenant, the landlord should pay a penalty (but don't call it that).
- 24.11. Choice of Auditing Firm.** The lease should not limit the tenant's right to engage a firm of its own choosing (e.g., a contingent fee lease auditor) to examine the landlord's books and records.

- 24.12. Parking Lots.** Treat the cost of filling potholes and restriping as an operating expense, but resurfacing as a capital expense to be borne by the landlord without reimbursement. Require resurfacing at least once every ___ years. Exclude any parking lot maintenance costs for at least ___ years after the commencement date.
- 24.13. Tenant-Specific Exemptions.** Look for justifications to support exemption from particular expenses (e.g., elevator expenses for a ground floor tenant).
- 24.14. Confidentiality.** If the landlord requires the tenant to agree to sign a confidentiality agreement regarding any future lease audit, insist that the form of agreement be attached to the lease, or that the agreement be built into the lease. Either approach avoids the risk of extended delays in trying to negotiate a confidentiality agreement when the need arises.
- 24.15. Credit.** Try to get credit for any income the landlord derives from common areas (e.g., signage).
- 24.16. New Buildings.** Part of the business negotiation of a lease in a new building will be the negotiation of a fair base year. The parties are both at greater risk since there is no operating history. The parties may need to adjust the base year to a year (or average of several years) in which the landlord has achieved a certain occupancy level (e.g., 100 percent).

25. Operating Expenses—Exclusions

The tenant may desire to exclude at least the following from operating expenses:

- 25.1. Above-Standard Cleaning.** Costs of cleaning portions of the building that have cleaning requirements higher than the tenant's (e.g., cleaning some other tenant's employee cafeteria).
- 25.2. Americans with Disabilities Act.** ADA compliance costs, particularly when triggered by the operations of other tenants.
- 25.3. Advertising.** Advertising expenses, including the cost of maintaining any Web site.
- 25.4. Art.** The purchase or maintenance of any artwork or sculpture.

- 25.5. Breach of Lease.** Costs incurred because any party breaches any lease.
- 25.6. Capital.** Costs that under generally accepted accounting principles consistently applied would be considered capital or are otherwise outside normal costs and expenses in connection with the operation, cleaning, management, security, maintenance, and repair of similar buildings; or as an alternative perhaps allow capital expenditures if (1) the tenant approves any expenditure above a certain level, or (2) an expenditure is justified by the cost of repairs or undertaken to reduce operating expenses, and then only to the extent that the landlord demonstrates actual reduction.
- 25.7. Collateral Source.** Any cost reimbursed by insurance proceeds (or that would have been so reimbursed, if the landlord had carried customary insurance), any condemnation award, or an indemnification from any third party.
- 25.8. Contributions.** Any charitable or political contributions the landlord might decide to make.
- 25.9. Development-Related Payments.** Exactions paid to any governmental body or community organization, including those for infrastructure, traffic improvements, curb cuts, roadway improvements, transit costs, “impact fees,” and so on.
- 25.10. Environmental.** Costs of testing for, handling, remediating, or abating asbestos and other hazardous materials or electromagnetic fields, or the cost to remove chlorofluorocarbons (CFCs) or accomplish other future retrofitting driven by as-yet-unknown future environmental concerns, or to purchase environmental insurance.
- 25.11. Excessive Management Fees.** Management fees in excess of those charged in comparable buildings, particularly where the property manager is an affiliate of the landlord.
- 25.12. Executive Salaries.** Salaries for officers above the level of building manager.
- 25.13. Fines.** Fines and penalties the landlord must pay as a result of failure to comply with law, code, etc.
- 25.14. Food Court.** Costs related to food court tenants to the extent they exceed normal costs (or allocate food seating area as tenant space).

- 25.15. Holidays.** Any holiday decorations or gifts (or impose a reasonable limit).
- 25.16. Construction.** The cost to perform initial construction and to correct initial construction defects (and such costs for any future alterations or additions).
- 25.17. Mall Advertising.** Retail tenants should consider trying to opt out of any mall advertising program, or cap the amount of their contribution.
- 25.18. Negligence.** Costs incurred as a result of the landlord's negligence.
- 25.19. Other.** Next year's newest area of legal concern (for inspiration, check the latest new and improved carve-outs from "nonrecourse" treatment in mortgage finance transactions).
- 25.20. Ownership-Related Costs.** Ground rent; mortgage interest, principal and transaction costs; build out of tenant space; clean-up of the landlord's construction projects of any kind; and general and administrative expenses (overhead).
- 25.21. Payments to Affiliates.** Fees and expenses paid to the landlord's affiliates in excess of market rates. (But what's market and how do you know? The tenant may want preapproval rights.)
- 25.22. Professional Fees.** Brokerage fees and commissions; legal fees and expenses to negotiate and enforce leases; accounting fees.
- 25.23. Costs Related to Other Tenants.** Any costs for a service not provided to this tenant and included in its rent (for example, the incremental cost of a higher level of service provided to office or retail tenants); reimbursed or reimbursable by specific tenants other than through pro rata rent escalations (e.g., fees for excessive use of utilities); or caused by the acts or omissions of particular other tenants.
- 25.24. Telecom Installation.** Either exclude costs or offset against the income the landlord receives.

26. Options

- 26.1. Additional Space.** The tenant may want an option, right of first refusal or right of first offer for additional space.

- 26.2. Sublet Excess Space.** As a fallback, consider negotiating a wide-open right to sublet excess space until needed (if this makes business sense under the circumstances).
- 26.3. First Refusal Mechanics.** For a right of first refusal, seek a “second bite at the apple” if the landlord later decides to market the space in smaller pieces or on different terms than originally contemplated. Also, scrutinize the conditions that trigger the right of first refusal. Landlords’ form leases often let the tenant exercise a first refusal right only if the space has become “vacant and available.” What does this mean? If the landlord negotiates a new lease for the space before an old lease expires, does that new lease mean the space is not “vacant and available”? The test should be whether an existing lease will expire or terminate, or has expired or terminated. The landlord should agree not to negotiate any extension or renewal that could impair the tenant’s claims to the space.
- 26.4. Excess Space Notices.** Whether or not the tenant has pre-emptive rights to extra space, the landlord should agree to advise the tenant regularly of any space that becomes available, giving as much notice as reasonably possible under the circumstances.
- 26.5. Early Termination Options.** The tenant may want early termination options, either complete or partial (“shed rights”).
- 26.6. Renewal Option.** Often tenants will seek a right to renew the term. In such cases, the tenant must scrutinize and confirm it can live with whatever conditions, requirements, and procedures the landlord tries to attach to the renewal option. Landlords have been known to require that rent can never go down during the renewal term and the renewal right can be exercised only by the initial tenant. Know the renewal rent before the option exercise is final and binding. Try to time the process to give the tenant time to move if the rent, as finally determined, is unacceptable.
- 26.7. Appraisal.** If rent during the option term depends on an appraisal, allow the tenant to withdraw its option exercise if the tenant disapproves of the new rent as finally determined. Set objective appraisal criteria. Does the definition of “fair market rental value” make sense? Does it give the landlord “credit” for value-enhancing measures

(e.g., a tenant improvement allowance) that the landlord will not in fact deliver to the tenant? If the tenant won't be receiving such an allowance, the definition of "fair market rental value" should not pretend otherwise.

- 26.8. Purchase Option.** The tenant may want the right to purchase the building if the landlord intends to sell it or if the equity owners of the landlord intend to sell a substantial portion of their equity. If the landlord converts the building to a condominium, the tenant may want the right to purchase one or more units.
- 26.9. Reminder Notices.** Require the landlord to send reminder notices of any upcoming option exercise deadline, but not more than _____ days, or less than _____ days, before the deadline. Extend the deadline and the lease expiration date if the landlord delays sending notice.
- 26.10. Short-Term Extension.** Try to negotiate the right to a short-term lease extension (at the tenant's option) to avoid holdover problems if the tenant suffers delays in moving.
- 26.11. Base Years.** For any lease renewal, reset the base years for escalations.
- 26.12. Rule Against Perpetuities.** Consider the possible impact of the rule against perpetuities on any option rights in the lease or ancillary to the lease.
- 26.13. Option Timing.** Scrutinize time periods for any option, and confirm that the tenant will be able to take the actions required within each time period. Do all the time periods work together?

27. Parking

- 27.1. Specific Requirements.** Define the location, number, and pricing (or assurance of no fee) for parking spaces (reserved and unreserved). Attach a parking diagram as an exhibit. Prohibit the landlord from changing the parking arrangements without the tenant's consent. The tenant may want to seek some reserved, covered, indoor, or otherwise "premium" parking spaces.
- 27.2. Bicycles and Motorcycles.** The landlord should provide parking for bicycles, mopeds and motorcycles in a convenient location.

- 27.3. **Building Expansion.** If the landlord expands the building, the parking ratio shouldn't worsen.
- 27.4. **High Parking Uses.** The tenant may wish to prohibit nearby high parking uses (e.g., movie theater, trade school, restaurant), although some of these uses are now regarded as less objectionable than in the past.
- 27.5. **Location/Quantity of Employee Parking.** Insist that the landlord enforce employee parking restrictions against other tenants.
- 27.6. **Snow.** Require the landlord to clear snow from, and otherwise maintain, the parking area.
- 27.7. **Lighting.** Set standards for lighting of common areas and parking decks (especially important to a 24-hour operation).
- 27.8. **Patterns.** Prohibit the landlord from interfering with or changing traffic patterns in the parking lot areas.
- 27.9. **Fences.** The tenant may want the right to require the landlord to install a fence to segregate parking areas from adjacent heavy-usage facilities.

28. Percentage Rent

- 28.1. **Rent Abatements.** Rent abatements or other rent reductions should not reduce percentage rent breakpoints (to avoid an anomaly where the breakpoint drops because of negotiated rent abatements, resulting in percentage rent payments increasing by a like amount).
- 28.2. **Partial Year Gross Sales.** Annualize first year and last year gross sales, with a seasonal adjustment, to prevent excessive percentage rent if the tenant opens or closes in its peak season.
- 28.3. **No Partnership.** State that the parties do not intend to establish a partnership or joint venture.
- 28.4. **Exclusions from "Gross Sales."** Depending on the type of business, the lease should exclude or subtract certain items from "gross sales," such as: sales made by

concessionaires, sales not in the ordinary course of business, sales to employees up to a certain percentage or only if at a discount, sales taxes, refunds, returns, credit card fees, custom tailoring, and monogramming. The tenant will want to avoid any suggestion that the landlord can collect percentage rent on the tenant's catalog or Internet sales.

- 28.5. Time Limits.** Impose time limits on the landlord's right to audit. Prohibit use of contingent fee auditors.
- 28.6. Revenue Maximization.** The tenant should avoid any obligation to operate or to "maximize" revenues. The tenant should not make any representation concerning the volume of its business. Expressly negate any "implied" obligations along these lines.
- 28.7. Special Categories.** The tenant may wish to negotiate a lower percentage rate for particular low-margin activities or categories of sales.
- 28.8. Free Rent.** Any free rent period should abate percentage rent, too.
- 28.9. Use.** Tie percentage rent to the tenant's use of the premises. What happens if the tenant assigns to another operator with a different use? Request that assignment be permitted even if the percentage rent changes, provided the assignee agrees to pay at least the same total rent as the assignor did in its last year of operation.

29. Quiet Enjoyment

- 29.1. No Default.** Beware of "quiet enjoyment" conditioned on no default. Condition quiet enjoyment instead only on the landlord's not having terminated the lease.
- 29.2. Sidewalk Sheds and Scaffolding.** The tenant may want the right to reduce the rent if a sidewalk shed, fence, or scaffolding for any construction project in the building impairs access or visibility. For any such installation: (1) try to set limits (duration; minimum clearance; cannot block windows; just posts for 30 feet up, then roof above posts; frequency; purpose); (2) seek the right to install advertising signs at the landlord's expense and at no charge to the tenant; (3) prohibit any other advertising signs; and (4) require the landlord to remove promptly all unauthorized postings or

graffiti on any sidewalk shed or similar temporary fence and to light the underside of any installation described in this paragraph.

29.3. Dumpsters, Staging Areas, Lay-down Areas. Try to control where the landlord may install these items. Prohibit them in parking areas.

29.4. Remedies. If the landlord breaches the covenant of quiet enjoyment, the tenant cannot easily prove the amount of the injury or damages. Consider providing for liquidated damages or some other mechanism to quantify damages. Include recitations to validate any liquidated damages formula.

30. Radius Clauses

30.1. Physical Scope. Try to limit the physical scope of any radius clause—ideally, to only a mile or two, depending on the site and the tenant’s plans.

30.2. Exclusions. If the tenant must agree to a radius clause, carve out: (1) existing stores; (2) any new stores purchased in a future corporate transaction; (3) relocation of existing stores within any retail property where the tenant is already doing business; and (4) any stores operated by any possible future acquiror of the tenant’s business.

30.3. Termination. Try to terminate the radius clause at a certain date or if the tenant has achieved a certain level of percentage rent.

30.4. Near End of Term. In the last few years of the lease term, the radius clause should terminate, to facilitate a graceful shift to a new location. In the alternative, allow the tenant to open a new store nearby provided that the tenant protects the landlord from any decrease in percentage rent during the remaining lease term.

31. Real Estate Tax Escalations

31.1. Definition of Property. Confirm that the property to which the real estate tax escalation applies does not include other parcels or improvements.

31.2. Substitute or Additional Taxes. Devote close attention to how “substitute or additional taxes” are defined. Confirm they are truly appropriate for pass-through to the tenant.

- 31.3. Landlord's Tax Protest.** For the base year, review any landlord tax protest filing to understand the landlord's theories for low value. Will those theories inevitably vanish next year, producing built-in increases? In the lease, express the base-year real estate taxes as "\$___ per square foot." Avoid referring to the taxes payable in a particular tax year, because such a reference could increase escalations if the landlord successfully protests base-year taxes.
- 31.4. Installment Payments.** Require the landlord to pay real estate taxes in installments, as taxes are due. In any event, calculate tax pass-throughs as if the landlord were paying in installments over the longest period allowed.
- 31.5. Special Assessments.** The landlord should pay special assessments in installments and treat them as taxes only to the extent they fall within the lease term.
- 31.6. Right to Contest.** Require the landlord to contest taxes or, if the landlord does not, give the tenant the right to do so in the landlord's name or in the tenant's own name, as necessary. Check statutory and case law requirements as to who may contest taxes. For example, in New York a tenant who leases only part of a building lacks standing to contest taxes. Whether the tenant leases only part of the building or the whole thing, any tax contest will still require cooperation, and delivery of necessary information and signatures, by the landlord. Require the landlord to contest taxes if a certain proportion of tenants so request. Require the landlord to warn the tenant of any tax contest deadline to give the tenant enough time to contest if the landlord does not wish to do so.
- 31.7. Tax Refunds.** Require the landlord to pay the tenant its share of tax refunds promptly, even if the lease has expired. The landlord should also notify the tenant of any such refunds promptly when received. If the landlord fails to do so, or must be reminded, then the landlord should pay a penalty interest rate or some multiple of the amount due to the tenant. (Landlords have been known to forget to give former tenants their share of any subsequent refunds of real estate taxes they paid. This can produce a nontrivial profit center for the landlord, and an issue in negotiating a subsequent purchase and sale of the building.)

- 31.8. Tax Protest Costs.** Any contingent fees paid to real estate tax counsel should be arm's length and commercially reasonable. The landlord should not collect a separate "management fee" for its services in contesting real estate taxes.
- 31.9. Base Year Reassessment.** If the base year is reassessed downward, reduce base rent by the amount of the tax savings.
- 31.10. Abatement or Deferral Program.** If any tax abatement or deferral program might be available, the landlord should agree to apply for it. The risk of loss of tax abatements already granted (e.g., for failure to comply with governmental procedures) should belong to the landlord, not the tenant. For any future abatement or deferral programs, negotiate whether the benefits belong to the landlord or the tenant and, if the latter, identify exactly what cooperation the landlord must provide and when. How exactly does the application process work? Beware of repricing the base rent in a way that indirectly returns to the landlord any benefits that the tenant expected to obtain. (Some argue that the value of every geographically targeted benefit program will simply be negotiated into rents and hence land value within the targeted area, and therefore have no effect except to increase land values in that area.)
- 31.11. Artificially Low Assessments.** If, under local assessment rules, the first year's free rent produces an artificially low tax assessment that year, the assessment may automatically rise by the same amount in future years. The tenant may then, over the years, pay extra tax escalation payments far beyond the value of the free rent. This depends very much on local tax assessment procedures.
- 31.12. Exclusions.** Real estate tax escalations should exclude: penalties and/or interest; excise taxes on the landlord's gross or net rentals or other income; income, franchise, transfer, gift, estate, succession, inheritance, and capital stock taxes; taxes on land held for future development ("out parcels"); increases in real estate taxes resulting from construction during the lease term if not done for the benefit of tenants generally, or if it does not create additional proportionate rentable area; termination of interim assessment; loss or phase-out (whether or not scheduled) of abatement or exemption; corrections of underpayments in previous periods; acquisition of development rights

from other property; increases resulting from the landlord's failure to deliver required information to the taxing authority or other failure to comply with the taxing authority's requirements; and, if possible, sale of the property. If the landlord transfers unused development rights in a way that reduces the landlord's net real estate tax expense, confirm that the tenant will participate in any savings that result.

31.13 New Buildings. Depending on when in the progress of the building project the lease is being negotiated, the tenant should confirm that the base year will reflect complete construction and full assessment of the building. This may require a retroactive adjustment of base taxes, depending on how the particular jurisdiction handles new construction.

31.14 Reduced Taxes. If real estate taxes ever fall below base-year taxes, give the tenant a credit against base rent.

32. Representations and Warranties

The tenant may wish to ask the landlord to provide representations and warranties, including the following:

32.1. Asbestos and Hazardous Materials. The premises are free of asbestos and other hazardous materials. The landlord should provide any document required to confirm this, for purposes of building permit applications (such as a New York City ACP-5 form showing that the tenant's work will be a non-asbestos job). The landlord should indemnify the tenant against liability arising out of any environmental conditions that existed before the tenant took possession, whether or not the landlord caused them.

32.2. Certificate of Occupancy. Attach a true and correct copy of the certificate of occupancy as an exhibit. The landlord should represent that the tenant's use as permitted under the lease won't violate the certificate of occupancy or the landlord's other leases or agreements.

32.3. Commissions and Brokerage Fees. The landlord has paid or will pay all brokerage fees and commissions for the lease. If the tenant cares about its relationship with the broker, the tenant may want the right to offset rent and pay the broker if the landlord does not.

- 32.4. Impact and Hookup Fees.** The landlord has paid or will pay all impact fees, hookup charges, and other governmental exactions imposed on the project (and will not recapture them through any escalation).
- 32.5. Rights of Third Parties.** The landlord's entry into the lease does not violate any rights of third parties (such as the prior tenant who was evicted from the space; other tenants in the building, etc.).
- 32.6. Submetering.** Equipment is in place and in good working order for any submetering of utilities the lease contemplates.
- 32.7. Utilities.** Adequate utility locations and capacity are available both within the building and at the premises.
- 32.8. No Violation.** The premises are subject to no outstanding violation of any code, regulation, ordinance, or law, and the landlord should cure existing violations at the landlord's expense (not recaptured through any escalation).
- 32.9. Validity of Lease.** Each party represents and warrants to the other that the lease has been duly authorized, executed and delivered, and is valid and binding.
- 32.10. Zoning.** The property is properly zoned and the tenant's permitted use under the lease is legal.
- 32.11. Construction Plans.** Landlord plans no construction at the property.
- 32.12. Parking.** The landlord has received no notice of any condemnation of any parking, and the landlord plans no changes in parking or circulation.

33. Requirements of Law

- 33.1. Responsibility for Compliance.** The landlord should be responsible for compliance with existing and new laws (including ADA) if the compliance applies generically to the property (e.g., "mere office use") or the need to comply existed before the lease was executed.
- 33.2. New Requirements.** The landlord should comply with any new legal requirement if the potential noncompliance did not result from the tenant's actions, and failure to

comply may impair the tenant's alterations or use in the manner the lease contemplates.

- 33.3. Permits.** The landlord should cooperate in obtaining permits, such as by signing applications and providing necessary existing information, all within a short turnaround time. Require the landlord to be responsible for ADA and all other baseline legal compliance.

34. Restrictions Affecting Other Premises

- 34.1. Competing Stores.** Consider prohibiting the landlord and its affiliates from renting to competing tenants within a certain area, particularly where the landlord operates its properties under an identifiable brand name (a new trend).
- 34.2. Use of Building.** Prohibit the landlord from changing the use of the overall building or any part of it—such as turning the older and less rentable half of a regional mall into a call center. Restrict the type of retail tenancies or other uses in the building (e.g., no fast food). Consider issues of density, traffic, parking, demographics, compatibility, likelihood of picketing or controversy, security concerns, and other potential problems affecting building use and other tenants.
- 34.3. Prohibited Uses.** For retail properties, prohibit flea markets, carnivals, petting zoos, clothing drop-off boxes, kiosks (especially if competitive or within __ feet of the entrance or windows of the premises), drive-up booths, and the like, elsewhere on the landlord's property, including common areas. For office buildings, prohibit uses that attract large volumes of people, particularly if incompatible with first-class business offices (e.g., welfare offices, public auction houses, etc.).
- 34.4. Additional Construction.** Limit the location and type of any additional construction the landlord can perform (e.g., on "out parcels").
- 34.5. Minimum Operating Hours.** Establish minimum operating hours for the property as a whole or for specific other tenants.

- 34.6. Landlord's Activities and Kiosks.** Limit the landlord's activities and installations (e.g., kiosks) on the sidewalk (or common area of a mall) within a specified area near the premises.
- 34.7. Scope of Restrictions.** To the extent that the lease restricts the landlord's activities, consider how broadly those restrictions should apply. Ideally, they should affect both the existing structure and any future expansion in which the landlord has any interest (or for which the landlord or an affiliate presently controls the site). Try to have the landlord agree not to enter into a reciprocal easement agreement or otherwise facilitate any nearby construction by others unless the counterparty agrees to honor the same restrictions.
- 34.8. Public Areas.** The tenant should control (or have the right to require, within reason) future changes to public areas, lobbies, elevators, parking lots and other common areas. Require the landlord to renovate and update these areas periodically to keep them consistent with first-class standards as they change from time to time. Require tenant approval for the plans for all such work, or at least the visible part (e.g., finishes) of the landlord's work.
- 34.9. Exclusive Uses.** The tenant may want exclusive rights for certain uses.

35. Rules and Regulations

- 35.1. Nondiscriminatory Enforcement.** Require the landlord to impose and enforce its rules and regulations in a nondiscriminatory way. If the tenant so requests, the landlord should impose and enforce those rules and regulations against other tenants.
- 35.2. New Rules.** New rules should be reasonable and of the type customarily imposed for similar buildings. New rules should require the tenant's approval. If the landlord wants to give the tenant a short period to object to any new rules, insist that the landlord give the tenant formal notice of any new rule, along with a reminder of the short period in which the tenant may object.

36. Sale of Property

- 36.1. Assumption of Obligations.** The purchaser should assume all obligations—including all existing undischarged obligations—of the landlord, including the obligation to return the tenant's security deposit and refund any previous rent overcharges. Some landlord's lease forms say that the old landlord is not responsible, but neither is the new one.
- 36.2. Transfer of Security Deposit.** Require the landlord to transfer the security deposit to any purchaser of the property, and assure that the purchaser gives the tenant a written confirmation of receipt. Insist that the tenant have the right to offset rent if the landlord does not comply with these requirements.
- 36.3. Rental Payments to Purchaser.** The tenant should not be required to pay rent to a purchaser until the tenant has received notice of the sale and purchase.

37. Security Deposit

- 37.1. Interest.** Require the landlord to hold the security deposit in an interest-bearing account with all interest to be paid to the tenant. Many landlords require an administrative fee (similar to that mandated by statutes in New York). Agree on its amount.
- 37.2. Letter of Credit.** The tenant should be entitled, at any time, to substitute a letter of credit or other alternative form of security. If the tenant thereafter fails to maintain the letter of credit, the landlord should be free to draw, but such failure should not constitute a lease default and the tenant should continue to have the right to deliver a letter of credit. If the lease no longer requires a letter of credit at some point, require the landlord to sign whatever cancellation documents the letter of credit issuer requires.
- 37.3. Return.** The landlord should promptly return the security deposit after the lease expires.

37.4. Reduction. Let the tenant reduce the security deposit over time, at least if the tenant is not in default. If the tenant has any concern about the landlord's creditworthiness, such reductions are particularly desirable in the last year or two of the lease term.

38. Services by Landlord

38.1. Existing Systems. Let the tenant use existing cabling and other systems including chases (channels on the underside of the floors). The landlord should agree not to damage or remove such systems.

38.2. Performance Standards. Set performance standards or criteria for any landlord services (e.g., comparable to those provided in a "basket" of other buildings). Provide that if the building experiences an unreasonable number of false alarms or life safety system breakdowns or problems, the tenant can perform an audit (perhaps at the landlord's expense) and require changes.

38.3 Service Shutdowns. Limit the landlord's ability to shut down building services, particularly for essential tenant functions (e.g., heating, ventilation and air-conditioning [HVAC] or electricity for data center). Require ample prior notice, and let the tenant reschedule the shutdown.

38.4. Management Company Replacement. The tenant may want a right to require the landlord to replace the management company or the leasing broker if specified standards are not being met.

38.5. Windows. Allow the tenant to abate rent if windows are bricked up or covered over for any reason. The landlord should install (and repair/replace) sunscreen or other film on windows if needed, or at least give the tenant the right to do so.

38.6. Promotional Fund. Should the landlord agree to operate—or not to operate—any promotional association, fund, or other similar activities? Should the lease require that all other tenants participate?

38.7. Non-Occupancy Credits. If the tenant is not in occupancy, the landlord should give the tenant credit for any variable costs that the landlord avoids (e.g., cleaning). (Such a

provision appears in some government leases, but rarely, if ever, in commercial leases.)

- 38.8. Receipt of Deliveries.** Specify the location, arrangements, timing, and fees (none) for the tenant's receipt of deliveries. Coordinate with the security program as necessary.
- 38.9. Contact Person.** Require the landlord to designate a single exclusive (or at least "primary" or "backup") contact person for all questions, problems, and issues regarding the premises, together with a 24-hour emergency telephone number to call if problems arise outside business hours.
- 38.10. Overtime Services.** The cost of any overtime services should be shared with any other tenants using such services at the same time. The tenant should receive a "most favored nation" rate.
- 38.11. Lobby or Parking Lot Renovations.** If the landlord undertakes lobby or parking lot renovations, the landlord must complete them quickly and give the tenant access to the premises equivalent to that which existed before work began. The landlord should shield from view any unsightly construction areas. Prohibit any construction work during the tenant's peak months of business.

39. Signage and Identification

- 39.1. Signage Requirements.** The lease should describe the signage requirements (for lobby, floor lobbies, elevators, exterior entry areas, driveways, roadway pylons, rooftop, common areas, and other exterior locations) for the tenant and any subtenant(s). The tenant should be able to make future changes in its signage. Make the tenant's signage rights as transferable as any other rights under the lease. Use of logo or distinctive company typeface should also be permitted.
- 39.2. Other Parties' Signage.** Establish requirements for, and otherwise set controls for, other tenants' signage and the landlord's overall signage program (including future changes).
- 39.3. Signage Position.** Does the tenant want the top position on any pylon sign? Second from top? Largest position on any other sign(s)?

- 39.4. Name of Building.** Prohibit the landlord from naming the building after the tenant, any other tenant, or any competitor of the tenant. Does the tenant want affirmative naming rights? Prohibit the landlord from using the tenant's name in any landlord advertising.
- 39.5. Directory Entries.** Require the landlord to provide building directory entries for the tenant and any subtenant or assignee. If the landlord tries to limit those entries, do those limitations make sense? Does the tenant contemplate needing directory entries for parties other than the tenant and its subtenants or assignees, such as joint ventures or other new entities? Consider prohibiting any other tenant from being more visible or using its logo in the building directory unless this tenant has the same right. Don't limit the number of the tenant's listings if the landlord uses a computerized directory.
- 39.6. Flagpoles.** The tenant may want the exclusive right to use any flagpoles at the property.
- 39.7. Billboards.** Prohibit the landlord from installing billboards or other signs anywhere on the premises or outside the windows of the building, even if such billboards or other signs are allegedly transparent from the interior of the building.

40. Subordination and Landlord's Estate

- 40.1. Proof of Fee Estate.** The landlord should represent that it owns the fee estate. Perhaps attach a copy of the landlord's deed as an exhibit.
- 40.2. Nondisturbance Agreement from Mortgagees and Ground Lessors.** The landlord should, at lease signing, deliver a nondisturbance agreement from all mortgagees and ground lessors. Attach the form of nondisturbance agreement to the lease and require future mortgagees to sign it at the closing of their loans. Beware of allowing the landlord to deliver such an agreement after the lease has been signed, with a right for the tenant to terminate if it is not timely delivered. In practice, such a right will rarely be exercised (which may say something about the practical importance of these agreements).
- 40.3. Conditions for Subordination.** If the lease is "subordinate," subordination should be conditioned on the landlord's having delivered specified nondisturbance protections

from holders of senior estates (e.g., in the form attached to the lease). Don't settle for "best efforts." The tenant cannot be obligated to "subordinate" to any mortgage if such mortgage is subordinate to any mortgage or any other lien that has not given the tenant nondisturbance protections. (Foreclosure on that latter, more senior, mortgage could wipe out both the more junior mortgage and the tenant.)

- 40.4. Debt Service Should Not Exceed Rent.** When the tenant leases all or most of the space or an entire building, the tenant may want the landlord to agree that the debt service payable under any fee mortgage will not exceed the rent under the lease.
- 40.5. Negotiations of Nondisturbance Agreements.** Require the landlord to reimburse the tenant for legal fees for any negotiations of nondisturbance agreements.
- 40.6. Compliance with Mortgages.** Avoid any covenant to be bound by (and do nothing to violate) any present or future mortgages. Such a provision may amount in part to an "end run" around negotiated nondisturbance rights and priorities as well as other lease provisions.
- 40.7. Rent Redirection Notice.** If the landlord's lender delivers a rent redirection notice to the tenant, state that the tenant may comply without liability even if the landlord disputes its lender's right to deliver the notice.
- 40.8. Landlord's Lender's Approval Rights.** Understand the approval rights of the landlord's lender under its loan documents (e.g., assignment, subletting, lease amendments, etc.) and try to trim back if excessive. Ask the lender to pre-approve as much as possible. Ask the landlord to agree never to enter into any loan arrangements (or amendments to existing loan documents) that would prevent the landlord from agreeing to subsequent minor or ministerial amendments of the lease, excluding any that could materially adversely affect the lender.
- 40.9 Definition of Landlord.** Include successors and assigns in the definition of "Landlord."
- 40.10 "Replacement" Mortgages.** If the tenant agrees to be "subordinate" to mortgages—without nondisturbance protection—in any way that might come back to haunt the tenant (for example, casualty and condemnation issues), limit the "subordination" to

refer only to any mortgages that are currently in place, and not to any replacement or future mortgages.

41. Tenant's Remedies Against Landlord

- 41.1. Set-Off and Termination.** The tenant may cure the landlord's defaults (after notice), set off the cost of cure (with interest) against rent, and terminate the lease. The tenant can set off against rent for claims against the landlord or any judgment against the landlord that is returned unsatisfied (or, if the landlord is in bankruptcy, then based upon the mere filing of a claim in the bankruptcy). The tenant may want similar remedies if any representation or warranty by the landlord is inaccurate. Review the assumptions that support the tenant's decision to enter into the lease. For example, let the tenant terminate if the nearby courthouse, train station, or other business-driving installation moves or closes. Let the tenant terminate if the municipality enacts a minimum wage law and it affects a substantial portion of the tenant's employees.
- 41.2. Abatement.** The tenant may want the right to abate the rent if essential building services (access, electricity, other utilities, elevators, air-conditioning, etc.) are disrupted, or if the landlord is in default for longer than a specified period (after notice?). Trigger rent abatement rights based upon ____ or more days of problems during any ____ day period, rather than requiring that any single problem must continue for ____ days before the tenant may abate. If any such rent abatement continues for more than a certain period, then let the tenant terminate.
- 41.3. Self-Help.** The tenant may want emergency self-help rights (including the right to install temporary equipment or service arrangements) if a water leak, power failure, or communications failure imperils the tenant's computer systems, communications systems, or other mission-critical equipment or operations. Allow only a very short period before this self-help right accrues for any fundamentally important function of the tenant, such as the tenant's network control center or computer system. The landlord should reimburse the tenant's reasonable self-help expenses.
- 41.4. Payment No Waiver.** The tenant's payment of rent with knowledge of a landlord default should not waive the default.

41.5. “Exculpation” Clause. Where an “exculpation” clause limits the landlord’s liability to the landlord’s interest in the property, try to include the following within the definition of the landlord’s interest in the property: rental income, insurance proceeds, escrow funds, condemnation awards, the landlord’s interest in security deposits, and sales and refinancing proceeds. For certain major landlord obligations—e.g., completion of build out or return of a security deposit—consider whether “exculpation” makes sense or whether, to the contrary, the tenant should insist on some level of creditworthy assurances from someone beyond a single-asset landlord.

42. Use

42.1. Any Lawful Use. Try to allow “any lawful use” or at least “any lawful retail/office use” of the premises.

42.2. Permitted Uses. Describe permitted uses generically to avoid restricting future use by a subtenant or assignee (e.g., “medical or other health practitioner’s offices” or “executive offices” rather than “podiatrist’s offices” or “main headquarters of XYZ Corp.”). If the tenant anticipates making unusual uses of the space (e.g., for basketball courts, pets, bicycles hanging from the ceiling, sleeping facilities, etc.), confirm that the lease and applicable law will not prohibit these uses.

42.3. Future Change of Use. Build in flexibility for future change of use if any possibility exists of a change in circumstances (e.g., likely technological obsolescence of the tenant’s business).

42.4. Incidental Uses. Obtain pre-approval for incidental uses, such as automated teller machines, food, training, duplicating, ancillary retail, gym, day care, other amenities, network control center, etc. If necessary, the tenant can usually agree that these facilities will be open only to the tenant’s employees and invitees who are already on the premises to do business with the tenant.

42.5. Duty To Operate; Recapture. The tenant would prefer to have no duty to open or operate, implied or otherwise. If the landlord counters with a request for a recapture right if the tenant goes dark for a specified period, carve out permitted closures (e.g.,

in the case of a force majeure event, alterations, inventory-taking, other brief closings). Limit the time within which the landlord may decide to recapture.

- 42.6. Satellite Dishes and Antennas.** The landlord should allow the tenant to install satellite dishes and antennas on the roof, either at no charge or for a defined or ascertainable charge. Allow the tenant to relocate this equipment if necessary to improve performance. The landlord should agree that future rooftop users will be prohibited from interfering with the tenant's use.
- 42.7. Rooftop, Generally.** The tenant may also want the right to install its own backup generators, supplemental air-conditioning, and other equipment on the roof. If this will require structural reinforcement, the landlord should consent to it, and ideally pay for it. For any rooftop equipment, the tenant will also want the landlord's consent, without charge, to the running of any wires, cables, connections, and lines between the premises and the tenant's rooftop equipment. A tenant will prefer not to be obligated to remove any rooftop equipment or connecting lines at the end of the term.
- 42.8. Use of Sidewalks and Exterior Areas.** Will the tenant need to use the sidewalk or the exterior of the building for special events, temporary installations, or other purposes? Exterior loudspeakers? Exterior laser or light displays?
- 42.9. Conflict with Other Leases.** The lease should not say that the tenant's use may not conflict with other leases or mortgages—unless this lease defines exactly what those other leases or mortgages prohibit.
- 42.10. Common Facilities.** Allow the tenant to use building common facilities, such as cafeteria or health clubs, auditoriums, conference facilities, and common lavatories if the premises does not include lavatories. The lease should state the minimum operating hours (24 hours in the case of lavatories and other essential facilities) and standards for common facilities and any cost for such uses.
- 42.11. Exclusive Use.** The lease should give the tenant the exclusive use of terraces or other identified outdoor space or facilities adjacent to the tenant's premises. The landlord should maintain and clean these areas according to specified standards.

- 42.12. 24-Hour /365-Day Access.** The tenant should obtain 24-hour access, 365 days a year, via elevator or (if the elevator is broken) stairway.
- 42.13. Reception, Security, Other Facilities.** Will the tenant want to install any reception, security, package handling, messenger, or other facilities in the lobby, basement, ground floor, or other common area of the building?
- 42.14. Storage Areas.** In addition to the premises, the tenant may want to lease storage space available in the building. Any such arrangements should be coterminous with the lease and not, for example, a revocable license.
- 42.15. Competitors.** Even for nonretail space, try to prohibit the landlord from leasing space in the building to the tenant's competitors (creating a risk of a competitor's taking the tenant's staff, customers, or clients).
- 43. Utilities, Generally (Excluding Electricity)**
- 43.1. Entry Point.** The landlord should bring all utilities to a defined entry point on the perimeter of the premises.
- 43.2. Special Requirements.** Require the landlord to allow the tenant or its service providers to install T-1 lines, multiple points of entry, and other special telecommunications facilities, including cabling and connections from service providers to the premises.
- 43.3. Free Choice of Carrier.** Allow the tenant to use any carriers or utilities it wishes for telecommunications and other services. The landlord must, without charge, cooperate as needed, such as by signing papers, providing closet space in the basement, and providing information. Requirements of federal law may actually mandate some of the foregoing. The tenant's counsel should check just what is required and what must be negotiated.
- 43.4. Excess Capacity.** If generators or fuel systems in the building have excess capacity, require the landlord to preserve that excess capacity (without allocating it to other tenants) to maximize the backup value of those systems to this tenant.

43.6. Alternative Providers. Limit the landlord's right to change power or telecom providers.

44. Miscellaneous

44.1. Right To Remeasure. Allow the tenant to remeasure the square footage of the premises when the landlord has finished its work (at least in a new building).

44.2. Rent Commencement. The tenant should not pay rent until particular anchor tenants are open for business; the landlord has finished specified construction, including common areas; and the landlord has paid the tenant the agreed construction cost reimbursement.

44.3. Limited Liability. Limit the tenant's liability and the liability of the tenant's general partners to their interest in the lease. Allow for release of departing or deceased partners.

44.4. Confidentiality. If the lease requires the tenant to give the landlord any financial, sales-related, or other sensitive information about the tenant, the landlord should agree to keep it confidential.

44.5. Adjacent Work. If a third party will pay compensation for inconvenience caused by work on an adjacent or nearby site, should the landlord or the tenant receive it?

44.6. Initial Criteria and Specifications. State the criteria and specifications for the landlord's initial construction of the building, common areas, parking lot, and so forth.

44.7. Engineering Issues. Work with the tenant's engineers and other consultants to identify needs, standards, and specifications for all building services and the landlord's alterations.

44.8. Cost of Capital Improvements. If the estimated cost of any capital improvement or replacement for which the tenant is responsible exceeds a specified amount (perhaps varying based on the remaining term of the lease), then allow the tenant to terminate the lease or require the landlord to contribute to the cost. The contribution should be based on the expected useful life of the improvement or replacement relative to the remaining term of the lease.

- 44.9. Other Business Relationships.** Do the landlord and the tenant have any other relationship (e.g., purchase and sale of a business) that might give rise to tenant claims against the landlord, which the tenant should be entitled to offset against rent?
- 44.10. Change in Zoning.** Allow the tenant to terminate if a change in zoning or other law (or inability to obtain or maintain necessary permits or adequate parking) prevents or impairs the tenant's operation of its business, in whole or in part.
- 44.11. Other Tenants' Closure.** The tenant may want the right to terminate the lease (or pay only percentage rent) if specified other retail tenants shut down. This could even apply to an office building if occupancy drops to a level where the tenant's staff feels uncomfortable working in the building even if the landlord continues to provide services.
- 44.12. Strike.** If a strike occurs, the landlord should agree to establish a separate gate for the striking union to minimize any interference with the tenant. If the landlord or any other tenant uses a labor force that causes disharmony with the tenant's labor force, require the landlord to remove the former labor force from the building. (Most leases express only the converse proposition.)
- 44.13. Hoist.** The tenant may want the right to install and/or use one or more outside hoists. Conversely, the landlord should agree to remove promptly any hoist that the landlord installs for construction.
- 44.14. Work Outside Premises.** What construction projects or alterations might the landlord undertake outside the leased premises that might cause the tenant concern or hurt the tenant's business? Try to identify them and negotiate appropriate restrictions or rent credits.
- 44.15. Indemnification.** The tenant should be responsible only for the direct consequences of its own acts and omissions. Keep any indemnity narrow. Negate tenant liability for consequential damages.
- 44.16. Board Approval.** If the tenant will require its own internal board or other approval to ratify a contemplated transaction, provide for such condition in all letters of intent, term sheets, leases, and other documents.

- 44.17. Warranties.** If the landlord has the benefit of any warranties for the building, the tenant may want to be a beneficiary of those warranties and have the right to enforce them directly against the warrantor.
- 44.18. Relocation.** If the tenant agrees to give the landlord a right to relocate the tenant, require: (1) that the new premises must be physically higher (or no more than ___ floors lower) than the existing premises; (2) that the landlord must pay all direct and indirect relocation costs (e.g., new letterhead, announcements, rewiring costs); (3) that the configuration, size, and layout of the new premises must meet the tenant's reasonable approval; (4) that the tenant need not relocate until the new premises are fully built out at the landlord's expense; (5) a free rent period; and (6) that if the landlord exercises the relocation right, the tenant can terminate the lease, particularly if less than ___ years remain in the term.
- 44.19 Recapture.** If the landlord recaptures the premises for any reason, the landlord should reimburse the unamortized cost of the tenant's furniture, furnishings, equipment and improvements. Any recapture notice by the landlord must be accompanied by mortgagee consent to be effective.

45. Due Diligence

As noted above, this checklist should not be regarded as exhaustive or complete. This is particularly true as it applies to the following list of "due diligence" that the tenant's counsel may wish to perform:

- 45.1. Existing Condition of Premises.** Is the existing condition of the premises satisfactory? What personal property is included? Should the landlord be required to remove—or be required to leave in place—any existing improvements?
- 45.2. Title Search.** Perform a title search and review, or an on-line search to confirm ownership of the fee (easily available in many areas). Review the landlord's certificate of occupancy. Consider performing other municipal searches.
- 45.3. Square Footage.** Calculate the actual square footage and scope of the premises. Do all of the landlord's exclusions of space from the premises make sense? For example, should the elevator lobby be part of the premises?

- 45.4. Special Permits.** Do any unusual uses require special permits or that special measures be taken to obtain necessary permits (e.g., liquor licenses, sidewalk cafes)? How long will that process take, and what will it require? What other permits might the tenant need, such as public assembly?
- 45.5. Ventilation.** Does the space provide adequate ventilation, or adequate pathways for the tenant to install new ventilation?
- 45.6. Escalations.** The tenant—and particularly its accounting and leasing personnel—may want to consider at least the following due diligence issues regarding escalations:
- (A) **Capital Projects.** What capital projects are underway or contemplated today? Does the tenant agree with how the landlord plans to treat them?
- (B) **Historical Operating Expenses.** What are the historical amounts for operating expenses and taxes? Review the underlying financial information, presentation, characterization, and documents, including sample escalation statements.
- (C) **Pre-Programmed Increases in Tax Assessment.** Investigate any built-in future increases in the tax assessment (e.g., termination of interim assessment, upcoming loss or phase-out of existing abatement or exemption). Is the building fully assessed?
- 45.7. Telecommunications Capacity.** Investigate available capacity and pathways for telecommunications and other utilities.
- 45.8. Technological Requirements.** Check the tenant's network and other technological requirements.
- 45.9. Rooftop.** Check lines of sight for a rooftop satellite dish or antenna. Can the roof support any heavy equipment the tenant will install?
- 45.10. Present Occupancy.** What is the present occupancy of the premises to be leased? What is the practical likelihood of delays in possession?
- 45.11. Tenant's Existing Lease.** Review the existing tenant's lease for expiration date, holdover penalties, etc.

- 45.12. Disposition of Present Premises.** What are the tenant's plans for disposing of the premises it now occupies? Does the tenant understand any uncertainties and risks in that process?
- 45.13. Engineering.** The tenant's engineers should consider a range of issues, including the adequacy, directness, and feasibility of pathways for utilities and services for the premises, sight lines for the tenant's satellite dishes, and more mundane issues such as floor load capacities.
- 45.14. Security.** Is the landlord's security program consistent with the tenant's desires?
- 45.15. Submeter.** If the premises are submetered, does any submeter serve space outside the premises?
- 45.16. Operating Requirements.** Does the tenant have any unusual operating requirements, procedures or expectations? A certain level of loading docks, freight elevators, security guards, or lobby operations? Anything outside the premises? Identify these and state them in the lease.
- 45.17. Environmental Concerns.** Consider whether an environmental review is necessary.

46. Preliminary Arrangements and Considerations

- 46.1. Brokerage.** Is the brokerage agreement in place and are the commission negotiations completed?
- 46.2. Term Sheets and Letters of Intent.** Attorneys should deal with term sheets and letters of intent early in the lease negotiation process to raise and resolve major issues while it is relatively easy (and inexpensive) to do so.
- 46.3. Tax Incentives.** Can the tenant qualify for any tax incentives, abatements, deferrals, rebates, subsidies, or other governmental benefits? Check the timing requirements and pitfalls for any application (e.g., a tenant must sometimes apply before "committing" to the new location).
- 46.4. Premises Off the Market.** During the lease negotiations, ask the landlord to agree to remove the space from the market and not to negotiate with other parties for a

specified period. Should the parties agree to a break-up fee? A reimbursement of expenses and attorneys' fees if the deal dies?

- 46.5. Tenant's Professionals.** Select, coordinate, and negotiate the contracts of the tenant's other professionals: architect, broker, engineer, facilities consultant, signage designer, space planner, and so forth. Try to get architects started early. Architects usually cost less than either lawyers or rent. The tenant's architect should review the lease while it is being negotiated.
- 46.6. Tenant's Procedures.** Understand the tenant's (and the landlord's) internal approval procedures, including any documentation requirements and likelihood for delay.
- 46.7. Backup Lease Negotiations.** Consider negotiating multiple leases at the same time (though perhaps at various stages of negotiations) to be able to recover quickly if the lease negotiations for a particular premises break down or the landlord decides to lease to some other tenant.

47. Lease-Related Closing Documents

At closing, any significant lease transaction may require a number of documents other than the lease itself. Counsel should resolve these documents as part of the process of negotiating the lease. They might include any of the following:

- 47.1. Memorandum of Lease.** Mention any "exclusive use" rights and other lease provisions that restrict the landlord's activities on other premises. Record the memorandum against all affected real property (e.g., "out parcels").
- 47.2. Nondisturbance Agreement.** See the "lender's form" nondisturbance agreement as soon as possible, so it can be negotiated and signed along with the lease. Attach it as an exhibit as the standard for future nondisturbance agreements.
- 47.3. Recognition Agreement and Estoppel from Ground Lessor.** If the landlord actually leases the building from a third party (a "ground lease"), any space tenant may want appropriate protections and assurances from the underlying fee owner.

- 47.4. Written Authority for Agent.** If the landlord's agent signs the lease (or any future amendment or estoppel certificate), the landlord should deliver a copy of a written authorization to sign.
- 47.5. Additional Consents.** Does the landlord need any consents or approvals? This is especially important if the landlord is a governmental entity or charity. Approvals could be internal or require cooperation from lenders, ground lessors, or other third parties. The landlord should represent and warrant that it needs no further consents or approvals, and deliver copies of any necessary consents or approvals at closing.
- 47.6. Opinion of Landlord's Counsel.** Such an opinion could be limited to authorization and execution and related issues, without entering the morass of issues raised by "enforceability."
- 47.7. Transfer Taxes.** Beware of transfer taxes generally. The calculation and allocation of any transfer taxes on the creation of the lease (including the treatment of any transfer of personal property) should be embodied in a closing document. Remember that in New York a lease coupled with a purchase option may be subject to transfer tax. Transfers of personalty may attract a sales tax. Prepare all necessary transfer tax returns, including required calculations and exhibits (e.g., copy of the entire lease, if required).
- 47.8. Title Insurance.** Consider obtaining a policy of leasehold title insurance.
- 47.9. Unusual Security Arrangements.** Unusual security arrangements—letters of credit, delivery of marketable securities, and the like—should be structured and documented. The landlord's lender and conceivably other third parties may also need to get involved in these discussions. Those third parties may ultimately become the "critical path" to signing the lease.
- 47.10. Leasehold Insurance.** Consider separate casualty insurance coverage for a valuable leasehold. If the lease requires insurance, comply with those requirements (e.g., insurer's ratings, additional insureds).
- 47.11. Landlord's Approval.** Request the landlord's approval of plans and specifications for initial work (if not attached as an exhibit to the lease).

- 47.12. Diagram of Premises.** The lease should have an exhibit consisting of a precise diagram of the premises. Confirm that the tenant, the broker, and other advisers reviewed and approved the diagram.
- 47.13. Guaranty.** Any guaranty of a lease will raise its own issues. A discussion of these issues is beyond the scope of this checklist.
- 47.14. Internal Approvals.** Request any documents necessary to evidence the tenant's internal approval of the contemplated lease (resolutions, consents, or the like).
- 47.15. Brokerage Commission.** Request evidence of payment of any brokerage commission.

48. Post-Closing Items

Like any other real estate transaction, a tenancy under a lease may require post-closing legal attention in order for the tenant to preserve its rights. The following are a few items that the tenant's counsel may want to handle or at least mention to the tenant:

- 48.1. Advice and Administration Memo.** The tenant may desire its counsel to prepare a memorandum to summarize any proactive and nonobvious actions the tenant should take to protect its position under the lease. Such a memo might, for example, describe the deadlines and process for objecting to the landlord's delivery of the space; escalation statements; or provision of building services.
- 48.2. Ticklers for Deadlines.** The tenant may want to make tickler file entries for tax protest deadlines, option and/or renewal exercise dates, letter of credit renewal dates, and any other deadlines.
- 48.3. Filings, Etc.** If the lease contemplates the tenant will make any nonintuitive filings, or take any other nonstandard actions, the tenant's counsel may wish to bring those matters formally to the tenant's attention. This list might also include any necessary filings for available governmental incentives.
- 48.4. Escalation Audits.** Note the deadlines to initiate any audit of the landlord's operating expenses or other escalations. For the first year of operating expenses, audit not only the operating expenses for that year but also for the base year.

- 48.5. Tax Protests.** The tenant should understand the deadlines for tax protests and any actions the tenant should take to preserve and exercise any rights to require the landlord to protest taxes.
- 48.6. Options; Rent Adjustments.** The parties should memorialize all option terms and rent adjustments in writing.
- 48.7. Estoppel Certificates.** If the landlord asks the tenant to sign an estoppel certificate, the tenant should take it seriously, start researching the facts immediately, and take advantage of the opportunity to put pressure on the landlord to solve any problems that the tenant identifies. Courts do take estoppel certificates seriously. The tenant should not simply “sign and return.” If the lease allows the tenant to require estoppel certificates of the landlord, the tenant may occasionally wish to do so, just to avoid future issues or surprises.
- 48.8. Future Lease Transactions.** Any future lease amendments (or negotiated termination of the lease) may require the landlord’s mortgagees’ consent.
- 48.9. Effect of Memorandum of Lease.** If the tenant recorded a memorandum of the original lease, then New York law in effect requires an amendment to the memorandum to be recorded (and accompanying transfer tax returns to be filed) whenever the parties amend the lease. Even if the amendment changes nothing that the recorded memorandum of lease disclosed, New York law requires the additional recording to give notice of the mere fact that the lease was amended. The tenant should insist on such an additional recording. For simplicity, both the landlord and the tenant may prefer to embody any future amendment in a single recorded document, assuming nothing in it must stay confidential.
- 48.10 Notices.** Keep track of changed notice addresses and notify parties of any change to the tenant’s notice address.
- 48.11 Nondisturbance Agreements.** If a future mortgage lender requires the tenant to sign a nondisturbance agreement for a closing, insist that the agreement not become effective unless the lender signs and returns it to the tenant at closing or within a short time thereafter.

LANDLORD'S CHECKLIST OF SILENT LEASE ISSUES

1. Alterations

- 1.1 Completion Bond.** Before the tenant undertakes alterations estimated to cost above \$____, require the tenant to deliver a bond or letter of credit in an amount equal to ____ percent of the estimated cost. If the landlord doesn't require such a measure because of the tenant's great credit, consider rescinding that concession if the tenant's credit changes or if the tenant assigns the lease.
- 1.2 Restoration.** State that the landlord's consent to any alteration does not waive the tenant's obligation to remove it and restore the premises at the end of the term.
- 1.3 Artists' Rights.** Prohibit the tenant from installing any artwork that could give the artist a right under federal law to prevent the artwork from being removed.
- 1.4 Third-Party Fees.** Require the tenant to reimburse the landlord for its architect's and other professional fees in reviewing plans and specifications.
- 1.5 Supervisory Fee.** Provide that the landlord may charge a supervisory fee for supervising the making of alterations and reviewing environmental conditions. The landlord's wage schedule or standard rates in effect from time to time is prima facie evidence of reasonableness.
- 1.6 ADA.** Require tenant's alterations to comply with The Americans with Disabilities Act of 1990 (ADA).¹
- 1.7 Labor Harmony.** The tenant's obligation to maintain labor harmony should relate not merely to construction, but also to any other activities at the property.
- 1.8 Exterior Hoist.** If the tenant wants to use a hoist outside the building, all lease provisions, rules, and regulations that govern alterations and activities within the premises should also apply to the hoist. Require the tenant to remove the hoist by a certain date. Should the landlord have the right to "free rides" on any such hoist? If other tenants complain about the hoist or even try to claim rent offsets because of it, the

¹ 42 U.S.C. §§12101-12213.

tenant should indemnify the landlord. If the landlord has installed the hoist, provide for scheduling, charges, and the right to remove it.

- 1.9 Tenant's Records.** Consider requiring the tenant to maintain records of the costs of its improvements for six years. This information may help in real estate tax protest proceedings.
- 1.10 Warranties.** Require the tenant to provide a warranty on completed restoration work or at least an assignment of any warranty it receives from its contractor. If the tenant surrenders space, (either at the end of the term or because the tenant reduces its occupancy), require the tenant to assign to the landlord any warranties the tenant received for any improvements or equipment surrendered.
- 1.11 Modifications to Plans and Specifications.** If the tenant modifies its plans and specifications after the landlord approves them, the alterations as modified should still meet a certain level of quality, whether or not the landlord can control changes.
- 1.12 Plans and Specifications.** Require the tenant to deliver plans and specifications (initial and as-built) in a specified (or more current) computer aided design (CAD) format using naming conventions and other criteria as the landlord approves or requires.
- 1.13 Activities Outside Premises.** If the lease lets the tenant perform any alterations outside the premises (e.g., cable or riser installations, or changes in elevator operation), then require the tenant to comply with all the same requirements that would govern alterations within the premises.

2. Assignment and Subletting: Consent Requirements

- 2.1 Change of Control.** Treat a change of control of the tenant (unless a public company) as an assignment. To monitor, require the tenant to: (a) represent and warrant current ownership structure when the parties sign the lease, to establish a baseline and define "change of control"; (b) deliver an annual certificate from its accountant or attorney confirming the tenant's then-current ownership structure; and (c) report any change of control. Do not refer only to corporations, partnerships, and limited liability companies. The restriction on transferring equity should apply even to future entity types not yet known.

- 2.2 Continuing Status as Affiliate.** If the lease allows “free transfers” to the tenant’s affiliates, require that the assignee or subtenant thereafter remain an affiliate throughout the lease term. If affiliation ceases, the tenant must notify the landlord (but the landlord should not assume the tenant will remember to do so). At that point the transaction becomes a prohibited transaction requiring the landlord’s consent and may, if not cured, become an event of default.
- 2.3 Restriction.** Prohibit assignments/sublets to existing tenants in the building or for less than fair market rent or the present rent. Prohibit the tenant from subleasing to any entity (a) that occupies any other building the landlord (or its affiliate?) owns within a specified area, or (b) with whom the landlord is actively negotiating or has recently negotiated. Consider prohibiting any assignment/sublet to (1) any party with whom the landlord (or its affiliate) is in litigation (or its affiliate), or perhaps even any party with whom other landlords have had significant litigation; (2) a controversial entity such as a terrorist organization even if for a permitted use; or (3) specified entities or their affiliates (such as a chain store or multi-site restaurant operator that may have become notorious for its aggressive litigation programs against landlords). On the other hand, the landlord may prefer not to limit itself to any particular grounds for disapproval and rely instead on its right to “reasonably” reject proposed transactions on grounds such as those suggested in this paragraph. This approach has the disadvantage, though, of creating an amorphous factual issue that may that may require litigation to resolve.
- 2.4 Future Sublease-Related Transactions.** If the tenant sublets in compliance with the lease, future transactions might arise from that subletting. Therefore, require the tenant to obtain the landlord’s approval for any future modification or termination of a sublease, any recapture, or any assignment by the subtenant.
- 2.5 Discretionary Consents.** If the business agreement between the parties does not require the landlord to be reasonable about assignment or subletting, simply ban both—instead of requiring “consent in Landlord’s sole discretion”—to avoid possible claims of an implied obligation to be reasonable. Also try to negate any implication that the landlord must at least consider whatever proposal the tenant presents.

- 2.6 Prohibit Collateral Assignment of Lease.** Any prohibition against assignment and subletting should also prohibit any collateral assignment of the lease (i.e., mortgaging, encumbering, or hypothecating the lease).
- 2.7 Assignment/Sublet of Other Tenants' Leases.** Even if other tenants' leases permit assignable or subletting, ask this tenant to agree not to accept an assignment of any other tenant's lease or a subletting of any of its premises in the building without the landlord's consent.
- 2.8 Diplomatic Immunity.** Even if the landlord has agreed to be reasonable in granting its consent, prohibit assignment/subletting to any person entitled to claim diplomatic immunity, or to any domestic or foreign governmental entity.
- 2.9 Fixture Financing.** Prohibit the tenant from financing its fixtures, or impose appropriate protective conditions upon any such financing arrangements.

3. Assignment and Subletting: Implementation

- 3.1 Tenant's Profit.** If the tenant must pay the landlord a share of the consideration or other profit the tenant receives from a subletting or assignment: (a) the landlord can audit the tenant's books and records; (b) any tenant revenue attributable to rent concessions under the lease belongs entirely to the landlord (a proposition that has a ring of fairness to it, but may reverberate with a dull thud); (c) if the tenant does not furnish the necessary information for the landlord to calculate assignment/subletting profits, the landlord may estimate and the tenant must pay the estimated amount until a correct amount is established; (d) the landlord may condition the closing of any assignment/subletting transaction on the tenant's acknowledging the amount of the landlord's profit participation and making any payments due on closing that transaction; (e) the landlord may collect profit payments from the assignee or sublessee if the tenant fails to pay; and (f) for a sublease, amortize the tenant's transaction costs over the term of the sublease rather than up front. Consider requiring the tenant to pay the landlord's share of sublet profits in a present valued lump sum at sublease execution.
- 3.2 Assignor Guaranty.** As a condition to any assignment that the lease allows, consider requiring any unreleased assignor—and any guarantor of the lease—to deliver a

guaranty with full suretyship waivers or at least an estoppel certificate to confirm the signer remains liable. In either case, state that any future changes in the lease obligations do not exonerate the guarantor, but the guarantor is not responsible for any incrementally greater obligations.

- 3.3 Subtenant Nondisturbance.** If the landlord agrees to provide nondisturbance or recognition rights to subtenants, require that the “nondisturbed” (or “recognized”) subleases satisfy clear and objective standards. Before agreeing to nondisturb (or recognize) any actual or potential sublease, the landlord must ask whether it is willing to be “stuck with” that sublease and all its terms if the main lease terminates. The landlord may want to require minimum rents, a certain form of sublease, arm’s-length negotiations, a reasonable configuration (at least a full floor?), and other characteristics. If the tenant occupies multiple floors, try to limit the nondisturbed space to full floor(s) at the top or bottom of the tenant’s stack. Subtenant nondisturbance or recognition agreements can create issues similar to partial release clauses in mortgages (concern about cherry picking and/or destruction of expected value), and opportunities for fraud or abuse. Any landlord obligation to deliver agreements to protect subtenants should be conditioned on the absence of any default under the main lease. If the landlord does agree into enter a nondisturbance agreement with any subtenant, the landlord may want to hold the subtenant’s security deposit and may want the tenant to reimburse the landlord’s legal fees in reviewing the sublease and negotiating the nondisturbance agreement.
- 3.4 Contiguous Subleased Floors.** Consider requiring sublet floors to be contiguous—ideally at the top or bottom of the tenant’s stack. Perhaps require that any subleasing maximize contiguity (in some defined way), to facilitate future transactions and flexibility.
- 3.5 Recapture Right.** If the tenant wants to sublease any space, give the landlord a right to recapture that particular space. If the tenant wants to sublease 50 percent or more of its space, also give the landlord a recapture right for the *entire* leased space. If the landlord exercises any recapture right, consider requiring the tenant to pay the landlord a brokerage commission equal to what the tenant would have paid a third party to broker

a comparable transaction. For any partial recapture right, require the tenant to pay for any demising wall or other space separation expenses that may arise. These could include code compliance expenses to establish a legally separate occupancy.

- 3.6 Transactional Requirements.** For any assignment/sublet, independent of any consent requirements, the tenant must also satisfy certain conditions (e.g., permitted use, reputation and net worth of assignee/subtenant, no violation of exclusives) and delivery of certain documents satisfactory to the landlord (e.g., assignee/subtenant's certified financial statements, unconditional assumption of the lease, reaffirmation of guaranties).
- 3.7 Prohibited Use.** Even if the tenant has certain rights to assign or sublet, the new occupant should expressly remain bound by the use clause in the lease. Although that proposition may seem self-evident, courts may infer some unintended flexibility on use if the parties negotiate a right to assign or sublet.
- 3.8 Rent Increase upon Assignment.** If the tenant assigns, let the landlord increase base rent to fair market. When assigning a lease with percentage rent, consider resetting the base for the rent calculation—either to current market or, in the case of retail space, the sum of existing base rent plus the average percentage rent for some specific period before the assignment. (Anemic percentage rent will, however, often correlate with a tenant request to assign or sublet.)
- 3.9 Leasing Agent.** Require the tenant to designate the landlord's managing agent as leasing agent for any contemplated assignment or sublet.
- 3.10 Processing Fee.** Charge a processing fee for any assignment/subletting, payable when the tenant submits an application.
- 3.11 Advertisements.** The landlord should have the right to pre-approve any advertisements for assignment or subletting.
- 3.12 ADA.** Prohibit any assignment or sublet that triggers incremental ADA compliance requirements in the building or by the landlord in the premises.
- 3.13 Confidentiality.** Require the tenant to keep confidential the terms of any assignment or sublease, particularly if the tenant's pricing is below current market (or the landlord's conception of current market) or the landlord's asking price for direct space.

3.14 Partial Subleases. Wherever the lease refers to subletting, it should refer to a subletting of “all or any part of” the premises, because a bare reference to subletting may let the tenant argue that the provision relates to a sublet of the entire premises only. This is yet another example of how a literal and narrow reading (or the possibility of a literal and narrow reading) produces ever-longer legal documents.

3.15 Breach of Anti-Assignment Covenant. A breach of the covenant not to assign the lease without the landlord’s consent should create an automatic event of default, not merely a generic default for which the tenant might have a cure period.

4. Bankruptcy

4.1 Multiple Leases. If the same tenant leases multiple locations, try to structure the transaction as a single combined lease for all locations to prevent the tenant from cherry picking in bankruptcy. If the landlord must use multiple leases, try to provide cross-defaults and give all the leases the same date.

4.2 Shopping Center Premises. Bankruptcy Code § 365² gives a landlord greater rights upon a tenant’s bankruptcy if the landlord’s building is a “shopping center.” But the statute does not define “shopping center.” Within reason and the bounds of good taste, the landlord can perhaps include favorable language in the lease to confirm that the building is a “shopping center.”

4.3 Characterize Tenant Improvement Contribution as Loan? To the extent that the tenant’s rent represents reimbursement to the landlord for tenant improvements, consider restructuring such payments as payments on a loan, independent of the lease, evidenced by a note. Require the tenant to pledge (at least) its leasehold as security. This structure may give the landlord an argument to avoid Bankruptcy Code limitations on the landlord’s claim for “rent,” although the landlord would then face all the risks of being a secured or unsecured creditor instead. The landlord’s choice of poison will vary with the circumstances, but the landlord and its counsel may want to consider the issue in structuring the lease.

2 11 U.S.C. § 365.

4.4 Letters of Credit. If the tenant delivers a letter of credit in place of a security deposit for more than a year's rent, consider the effect of Bankruptcy Code § 502(b)(6).³ Check the drawdown conditions of the letter of credit to confirm that the landlord has the right (though not the obligation) to draw on the letter of credit if the tenant files bankruptcy, even if the tenant is totally current in its rent obligations.

5. Bills and Notices

5.1 Who May Give Notices. State that the landlord's counsel or managing agent (as engaged from time to time) may give notices for the landlord.

5.2 Tenant's Notices. Copies of notices from the tenant (or perhaps just notices of alleged landlord defaults) should also go to the landlord's counsel.

5.3 Next Business Day Delivery. Define "overnight" delivery as "next business day" delivery, to avoid occasional case(s) saying "overnight" doesn't mean any particular number of nights (more bad cases producing ever-longer documents).

5.4 Routine Rent Bills. Avoid any suggestion that the landlord cannot send routine rent bills by ordinary mail and only to the tenant (no copies to, e.g., counsel).

6. Compliance with Laws

6.1 Notice. Require the tenant to give prompt notice to the landlord of any violation of any legal requirement that applies to the premises or the building.

6.2 Legally Required Improvements. Require the tenant to perform all improvements to the premises required by law. If the tenant resists (as the tenant probably will, and should), consider limiting the tenant's obligation to future enacted laws. (The tenant will probably still resist and the parties will probably reach the usual negotiated outcome in any space lease. The landlord will bear the risk of present and future laws that generally govern similar buildings and generic occupancies like the tenant's. The tenant will be responsible for legal requirements that arise from the tenant's nongeneric or unusual use of the space.)

3 11 U.S.C. § 502(b)(6).

- 6.3 ADA.** If the tenant uses the premises as “public accommodation” or for any other use that triggers extra ADA requirements in the building, the tenant should pay for the work necessary to bring the premises into compliance with such legal requirements.
- 6.4 Definition.** Define “Laws” broadly to include future enactments and amendments, insurance regulations and requirements, utility company requirements, administrative promulgations, and recorded declarations.

7. Consent

- 7.1 Reasonableness.** When the landlord agrees to be “reasonable,” set criteria for reasonableness. Any mortgagee’s disapproval of a matter should automatically constitute a “reasonable” basis for the landlord to withhold consent. Without some criteria or clear flexibility for the landlord, the interpretation of “reasonableness” can result in a litigation that will often be stacked in favor of the tenant.
- 7.2 Scope of Consent.** Any consent applies only to the particular matter under consideration.
- 7.3 Deemed Consent.** If the landlord has agreed that failure to grant or withhold consent within ___ days is deemed consent, try to: (a) have this concept apply only in particular areas (e.g., consents to transfers), (b) require a reminder notice before the deemed consent arises, and (c) require both the original notice and the reminder notice to state conspicuously (in all capital boldface letters) that the landlord must respond within that period and what happens if the landlord does not.
- 7.4 Expenses.** Require the tenant to pay any expenses the landlord incurs, including legal costs, in connection with any consent.
- 7.5 Conditions to Consent.** Even when the landlord has agreed to be reasonable about a consent, build in conditions such as no pending default. Require the tenant to deliver an estoppel certificate and copies of all relevant documents. Set other requirements tailored to the particular consent at issue. Remember that the landlord may forget to impose any such requirements as a condition to the consent when issued.

- 7.6 No Representation.** Make clear that the landlord's consent to anything is not a representation or warranty that the matter consented to complies with law or will meet the tenant's needs.
- 7.7 Survival of Conditions to Consent.** Whenever the tenant must satisfy certain conditions to obtain the landlord's consent (or to take any action without the need for the landlord's consent), consider as a general proposition whether the lease should require the tenant to cause those conditions to remain satisfied even after the consent is granted or the action is taken.
- 7.8 Limitation of Remedies.** The lease should say that the tenant's only remedy is specific performance—not monetary damages—if the landlord wrongfully withholds consent (e.g., acts unreasonably after agreeing to act reasonably). Backup position: Require expedited arbitration, perhaps with the potential arbitrator(s) designated in the lease.

8. Default

- 8.1 Guarantor's Net Worth.** Provide that a decline in a guarantor's net worth or the bankruptcy of a guarantor (either an express guarantor or an unreleased assignor of the lease) is an event of default. This should be perfectly enforceable against a tenant.
- 8.2 Cross Defaults.** Provide for cross defaults as against other leases with the landlord or its affiliates, or even against other obligations of the tenant or its affiliates.
- 8.3 Default Notices.** Provide that default notices need not specify cure periods.
- 8.4 Impairment of Business.** Define an event of default to include events (beyond the usual insolvency list) that may indicate the tenant is getting ready to shut down. These might include the tenant's announcing that it will make substantial distributions/dividends outside the ordinary course of business; shutdown of other locations; suspension or termination of a substantial part of the tenant's business; or layoffs.
- 8.5 No Right to Cure Event of Default.** Once an event of default has occurred, should the tenant have a wide-open cure right even after a cure period has already lapsed? Whenever the landlord can exercise remedies "if an event of default shall have occurred

and be continuing,” this language effectively gives the tenant an open-ended right to cure the event of default. Does the landlord really want that?

8.6 Discount for Timely Payment. Consider increasing “face rent” in the lease by ___ percent; provided, however, that if the tenant pays by the ____ day of the month, the tenant is entitled to a discount equal to the overstated portion of the rent.

8.7 All Rent Due at Signing. Consider requiring the tenant to pay all rent for the term of the lease at signing, but the landlord agrees to accept monthly installment payments only so long as no event of default exists.

9. Destruction, Fire, and Other Casualty

9.1 Rent Abatement. Limit the tenant’s rental abatement right to the amount of rental income insurance proceeds the landlord receives under the landlord’s casualty insurance. (A landlord must, however, carefully coordinate any such provision with the insurance program for the property, to prevent surprises and problems.)

9.2 Time to Restore. If the landlord has the right or obligation to restore after casualty, measure any deadline from the landlord’s receipt of insurance proceeds—not from the date of casualty.

9.3 Termination Right; Limitation on Restoration. Provide no right (or a limited right) for the tenant to cancel upon casualty. To the extent the lease requires the landlord to restore, impose appropriate conditions, including recovery of adequate insurance proceeds.

9.4 Tenant Waiver. Require the tenant to waive the provisions of New York Real Property Law § 227 (which allows a tenant to terminate a lease in the event of a casualty that renders the premises untenable), and comparable provisions in other states.

10. Development-Related Issues

10.1 Air and Development Rights. If the project includes development rights from other locations, should the landlord include them as part of the definition of the project? The answer may vary depending on state and municipal laws. Have the tenant waive any right to object to any merger or transfer of development rights, and agree to sign any zoning lot merger if requested to do so.

- 10.2 Landmark District; Historic Designation.** If the building is located in a landmark district or similarly protected area and local law (e.g., New York City law) requires it, include in the lease a notice of such landmark status. The tenant should agree: (a) not to file for historic designation of the premises, and (b) to oppose any such designation if the landlord so requests.
- 10.3 Relocation Right.** Give the landlord the right to relocate the tenant to comparable premises in the building or in some other specific building the landlord or its affiliate owns.
- 10.4 Demolition.** Allow the landlord to terminate the lease after reasonable notice if the landlord intends to demolish the building. Set as low as possible a standard for the landlord to satisfy. For example, avoid any requirement that the landlord must be unalterably committed to demolition or must have terminated other leases or obtained a demolition permit. Give the tenant incentives to cooperate. Set up a process so the landlord will find out quickly whether the tenant will try to fight the early termination of the lease. For example, the lease can require the tenant, promptly after receiving a termination notice, to deliver an estoppel certificate and an increased security deposit. Pay the tenant a demolition fee only if the tenant vacates strictly on time.
- 10.5 Building Name and/or Address.** Allow the landlord to change the name or address of the building. Require the tenant to refer to the building only by whatever name or address the landlord gives it.
- 10.6 Construction Restrictions.** State that nothing in the lease limits by implication the landlord's right to construct or alter any improvements anywhere on the landlord's property. If the lease does contain any such restrictions, state that they are limited to their express terms.
- 10.7 Building Standard Specifications.** The landlord should reserve the right to modify building standard specifications.

11. Electricity

- 11.1 Change of Provider.** State that if the landlord changes the electricity provider for the building, the tenant must use the new provider, to the extent legally allowed, even if the tenant directly meters its own consumption.
- 11.2 Delivery of Electrical Service.** The tenant should comply with electrical conservation measures and any limits on power grid availability.
- 11.3 Electrical Service.** If the tenant's space is directly metered, require the tenant to keep the landlord informed of the tenant's electrical consumption, with copies of bills. This may facilitate the landlord's long-term planning of electrical service for the building.

12. End of Term

- 12.1 Obligation to Restore.** Require the tenant to restore the premises at the end of the term. That obligation should survive expiration or sooner termination of the lease. Provide that if the tenant does not complete restoration or other end-of-term activities (e.g., remediation?) by the expiration date, the tenant must pay holdover rent until completion.
- 12.2 Landlord's Property.** At the landlord's option, the tenant should leave behind any improvements, fixtures, or personal property that the landlord paid for (including through a rent abatement).
- 12.3 Cables, Conduits.** The landlord should retain ownership of all cables and other wiring in the building. Require the tenant to remove cables, conduits, wires, raised floors, and rooftop equipment at the end of the lease term either in all cases or at the landlord's request. Require the tenant to indemnify the landlord from all liability in connection with that removal.
- 12.4 Holdover.** Consider providing that if the tenant fails to vacate the premises at the end of the term, the tenant must pay the greater of: (a) ___ percent of final adjusted rent under the lease and (b) [150 percent] of fair market rent as a use and occupancy charge. Calculate the charge on a monthly basis for an entire month for every full (or partial) month the tenant holds over.

- 12.5 Tenant Waiver.** Have the tenant waive the provisions of any civil procedure rule that would allow a court to issue a stay in connection with any holdover summary proceedings the landlord might institute. (In New York, refer to New York Civil Practice Law and Rules section 2201.)
- 12.6 Abandoned Personalty.** State that upon lease termination, any personalty in the premises is deemed abandoned and the tenant must pay to remove and store it.
- 12.7 Consequential Damages.** If the tenant holds over, the tenant should agree to pay all damages the landlord incurs, including consequential damages such as the loss of the next prospective tenant.
- 12.8 Time of Essence.** State that “time is of the essence” with respect to the tenant’s obligation to vacate the premises.

13. Environmental

- 13.1 Reports; Inspections.** The tenant should agree to deliver, or reimburse the landlord’s cost to obtain, updated environmental reports. State that the landlord has the right to inspect the premises if the landlord reasonably believes that a violation of environmental law exists, all at the tenant’s expense.
- 13.2 High-Risk Uses.** For a gas station or other high-risk use, consider: (a) establishing an environmental baseline by undertaking a sampling plan before occupancy (this will establish what problems, if any, already exist); (b) requiring periodic monitoring, especially at locations where groundwater might be readily affected, and along perimeter areas where migrating oil can be detected; (c) obtaining an indemnification that is both very broad (all environmental risks) and very specific (particular environmental issues arising from the tenant’s particular business); (d) requiring the tenant to post a bond if the tenant cannot obtain environmental liability insurance; (e) if underground tanks already exist, requiring the tenant to (1) accept the tanks “as-is,” (2) comply with all applicable laws, including obtaining all permits (as well as annual registration and recertification), (3) post all state-required financial assurances, (4) maintain, repair and replace, if required, all tanks, and (5) maintain all required records and inventory controls.

- 13.3 Required Tank Removal.** The landlord might want the right to perform a further environmental assessment at the end of the term, and require the tenant to remove any tanks and perform any required remediation.
- 13.4 Landlord Indemnification.** If the landlord agrees to indemnify the tenant for past environmental problems, limit this indemnification to any liability that exists under present law based on present violations. Exclude any liability arising from future laws or amendments of existing laws.
- 13.5 Interior Air Quality.** Disclaim any landlord liability for bad air or “sick building syndrome.” Also state that the landlord may prohibit smoking anywhere in the building or at adjacent sites.

14. Escalations

14.1 Operating Costs.

- (A) *Reality Connection.* When negotiating the operating cost escalation clause, confirm that the clause, particularly as negotiated, matches the landlord’s actual practices in operating the building, so the landlord can actually make the necessary calculations and adjustments.
- (B) *Off-Site Costs.* Avoid limiting “operating costs” to those incurred physically within the particular building. The landlord may incur off-site operating costs, such as in a multi-use project (e.g., holiday decorations in a central plaza) or for off-site equipment, installations, traffic improvements, shuttle bus services, or the like to benefit the building.
- (C) *Use of Generally Accepted Accounting Principles (GAAP).* In defining operating “costs” (not “expenses,” perhaps an accounting term of art), try not to refer to GAAP. The term often arises in two places: (a) when defining what the landlord can pass through to tenants; and (b) when excluding “capital” items. Regarding (a), GAAP requires matching of revenue and expenses, perhaps forcing the landlord to reduce costs by any related income received. Examples: recovery of heating, ventilation, and air conditioning (HVAC) overtime costs from tenants (not all of this is actually

expended, such as amortization of an energy management system); telecommunications (revenue from rooftop antennas); and parking garage income. Regarding (b): (1) Positive for landlords—the American Institute of Certified Public Accountants (AICPA) is reviewing disparity of practice as to capitalization and expense, and this may help landlords pending issuance of a formal statement, and (2) Negative for landlords—GAAP may treat preventive maintenance as “capital.”

- (D) *CAM*. Avoid the term “CAM” (common area maintenance) because operating cost escalations cover far more than common area maintenance.
- (E) *Major Repairs*. Do not necessarily limit multiyear amortization of large repair costs to “capital” items. Particularly if leases limit escalations or if the landlord is concerned about base years for new leases, the landlord may want the ability to spread major noncapital repair costs over multiple years.
- (F) *Broad Definition of Costs*. Consider any special characteristics of the property that may lead to landlord costs outside the escalation definitions in the lease. For example, if a reciprocal easement agreement imposes costs similar to real estate taxes or operating costs, expand the appropriate definition to include them.
- (G) *Timing*. Try not to agree to tight time limits (or, worse, a “time-is-of-the essence” provision) for the landlord’s obligation to provide operating statements. The landlord should, of course, try to be timely, based on cases that have required such timeliness based in part on an inferred “fiduciary duty” because the landlord controls the information.
- (H) *No Fiduciary Duty*. Negate any fiduciary duty regarding operating cost escalations and their administration.
- (I) *Reserve Charge*. To avoid the common arguments about how to treat “capital” items, consider establishing an annual per square foot capital reserve charge. The landlord would not need to account for these funds and the lease would define categories of “capital type” costs to which tenants

need not contribute. (If, however, this reserve charge stays constant from year to year, including the base year, then the landlord will never be able to collect a penny of escalations under the typical pass-through of only increases in operating costs. Therefore, make it a separate additional charge.)

14.2 Audit Issues (Operating Costs).

- (A) *Condition for Audit.* Allow the tenant to audit operating costs only if those costs increase more than a specified percentage over a specified prior year or base year.
- (B) *Auditors.* Prohibit contingent fee auditors. If the landlord agrees to reimburse audit costs (such as if the tenant's audit reveals a certain level of mistakes), then negate any reimbursement to contingent fee auditors. Consider requiring a national CPA firm. Insist that such firm agrees to notify the landlord of any undercharges or errors in the tenant's favor that the audit discloses.
- (C) *Costs of Audit.* Ask the tenant to pay for the landlord's out-of-pocket costs in connection with any audit of operating costs (e.g. photocopying, staff time, document retrieval, accountants' time spent answering inquiries, etc.).
- (D) *Confidentiality.* Require the tenant to sign a confidentiality agreement satisfactory to the landlord for any audit and its results before disclosing any records or information to the tenant or to a lease auditor. The agreement should, among other things, prohibit the tenant and its advisors from disclosing the existence of any audit or any of its results, particularly to other tenants in the building. The tenant's breach of the confidentiality agreement should constitute an incurable default under the lease.
- (E) *Limits.* Limit timing, frequency, and duration of audits.
- (F) *Inspection Restrictions.* Allow the tenant (or its representative) to examine specified books and records only, and only for a specified period, but

prohibit copying. Require that any audit comply with the landlord's reasonable requirements and instructions.

- (G) *Threshold for Payment.* If overcharges (net of undercharges) total three percent or less of total annual operating costs (a generally accepted definition of "materiality"), then the tenant should not receive any adjustment or reimbursement of its audit costs. Define carefully the factor to which the lease applies the three percent factor. Use as large a number as possible. For example, refer to three percent of gross annual operating costs rather than three percent of the tenant's escalation payment.
- (H) *Dispute Resolution.* Provide a private and final mechanism (e.g., arbitration) to resolve disputed operating costs.
- (I) *Claims.* Require specificity, completeness, and finality in any tenant claim of discrepancy or error.

14.3 Other Escalations.

- (A) *Porter's Wage.* Include fringe benefits and all other labor costs. The wage rate used should not reflect "new hire" or other transitional wage rates.
- (B) *Consumer Price Index.* Use the Consumer Price Index for all Urban Areas (CPI-U) index. Many believe that this index has historically increased faster than the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) index.

14.4 Generally.

- (A) *No Decrease.* Escalation formulas should never allow rent to go down.
- (B) *Examples.* For any complex or intricate escalation formula, consider adding an example, but don't make the numbers dramatic.
- (C) *Liability for Refunds.* The landlord's liability for any refund of overpaid escalations should terminate after a specified number of years (and automatically upon any sale of the building?), to prevent open-ended obligations or issues upon a sale of the building.

- (D) *Survival; Timing.* Limit the time during which the tenant may challenge any escalation. (Be careful, though. The tenant may try to make this reciprocal for the landlord's billings.) All the tenant's obligations regarding escalations should survive the expiration or sooner termination of the lease.

15. Estoppel Certificates

- 15.1 Lender Requirements.** In defining the scope of an estoppel certificate, allow the landlord to require any additional information a lender might request.
- 15.2 Ratify Guaranty.** Allow the landlord to obtain a confirmation/ratification of any guaranty, not merely an estoppel certificate from the tenant.
- 15.3 Exhibit.** Attach form of estoppel certificate as lease exhibit (conform to typical lender requirements), but build in flexibility for future lender requirements.
- 15.4 Estoppels.** Require the tenant to agree to deliver future estoppel certificates at any time on the landlord's request. Provide that such certificates shall bind the tenant whether or not the landlord can demonstrate detrimental reliance. (Is such a concept enforceable?)
- 15.5 Reliance.** Allow reliance by prospective purchasers, mortgagees or any participant in a future securitization, including rating agencies, servicers, trustees, and certificate holders.
- 15.6 Failure to Respond.** Establish specific meaningful remedies for failure to sign an estoppel certificate within a short period. These might include: deemed estoppel; a power of attorney to execute it for the tenant; or a nuisance fee (e.g., \$100 per day).
- 15.7 Attach Lease.** Require the tenant (if asked) to attach a copy of the lease and all amendments to any estoppel certificate.
- 15.8 Legal Fees.** If the landlord agrees to give an estoppel, require the tenant to pay the landlord's legal fees and expenses.

16. Expansion/Renewal Options

- 16.1 Timing.** Make time of the essence for exercising any option or right of first refusal. Say that timely notice is an agreed and material condition of exercise. Recognize that the courts sometimes validate late exercise after the fact. Perhaps provide for a protective

rent adjustment in this case (e.g., to fair market if the lease would not otherwise require fair market rent).

- 16.2 Multiple Bites at the Apple.** If the landlord offers “first refusal” space and the tenant does not take it (or if the tenant declines to exercise an option), then for a specified number of months deem the tenant to have waived any first refusal rights (and any options that would otherwise apply), at least where they relate to comparable space, broadly defined.
- 16.3 Timing.** Make the exercise deadline early enough to give the landlord time to relet if the tenant does not exercise its option. Coordinate the timing with other leases to facilitate assembling large blocks of space, if the landlord wants to do so. A landlord usually wants plenty of lead time and notice, but may want to give the tenant as little lead time and notice as possible, to maximize the landlord’s flexibility in dealing with unexpected changes in occupancy.
- 16.4 Coordination of Options.** Time the exercise and lapse dates for options so that adjacent blocks of space may become available to the landlord at the same time.
- 16.5 Update Due Diligence.** Reconfirm the due diligence requirements (e.g., financial statements) for the tenant.
- 16.6 Option Subject.** Make any expansion option subject to existing exclusives and renewal clauses of other tenants. Avoid overlapping expansion options. Limit the tenant’s remedy if the landlord inadvertently allows overlapping options.
- 16.7 Carveouts from Purchase Rights.** If the tenant negotiates an option or right of first refusal to purchase, exclude: (a) foreclosure or its equivalent; (b) any subsequent conveyance; (c) transactions between the landlord and affiliates or family members; (d) other permitted transactions, such as transfers of passive interests or creation of preferred equity for mezzanine lenders (and any exercise of remedies by the lender); and (e) if the tenant “passes” on its pre-emptive right, then all subsequent transactions.
- 16.8 Conditions.** Condition any option exercise on the tenant’s: (a) not being in default (and not potentially being in default) both on the exercise date and on the effective date, and perhaps even for ____ years before the exercise date; (b) not having assigned the lease;

(c) retaining a certain minimum occupancy; (d) actually operating in the space; and (e) satisfying a net worth test (fixed dollars or rent multiple) for at least ____ years before exercising the option.

16.9 Option Rent. Set a “floor” for option rent equal to the previous rent under the lease.

16.10 Covenant to Notify. Require the tenant to notify the landlord if the tenant needs more space, to give the landlord a chance to provide it in this or some other building. (The landlord might, however, better achieve the same result by saying nothing in the lease and just maintaining a good relationship with the tenant.)

16.11 Option Maintenance Fee. Require the tenant to pay a nominal annual fee to preserve future options, to give the tenant an incentive to terminate any option rights that it does not truly need.

16.12 Miscellaneous. State that the tenant may not separately assign any option. The tenant’s options should terminate if the tenant subleases more than a certain percentage of the premises or assigns the lease, or if specified other events occur.

17. Failure to Give Possession

17.1 No Liability. The landlord should incur no liability for failing to deliver possession on the commencement date for any reason, including holdover or construction delays. The tenant’s obligation to pay rent should commence on possession. Perhaps extend the term by the duration of any landlord delay in delivering the premises.

17.2 Delivery Procedure. Try to tie the “Commencement Date” to an objective event—preferably within the landlord’s control—or a date, rather than to any notice from the landlord. Notices are often not as easy to give (and give quickly) as they would seem to attorneys drafting leases. Any delay in giving a commencement date notice will mean lost revenue.

17.3 Condition of Premises. Substantial completion should suffice (e.g., temporary certificate of occupancy) for the landlord’s delivery of the premises.

17.4 Termination Right. The landlord may want a termination right if the landlord ultimately cannot deliver possession by a certain date.

- 17.5 Delivery Dispute.** Provide for a short deadline for the tenant to report any issue or problem about the premises or the landlord's work. Better, state that taking of possession constitutes acceptance for all purposes.
- 17.6 Rent Abatement.** To the extent the landlord agrees to give the tenant a rent abatement for late delivery, limit the duration of the abatement (e.g., if the rent abatement exceeds a set number of days, thereafter the tenant's only rights are to terminate or wait). Try to defer any such abatement (e.g., spread it out in equal annual installments over the remaining term of the lease). This will reduce immediate damage to the landlord's cash flow at a time when the landlord may be under financial stress.

18. Fee and Expenses

- 18.1 Fee and Expenses.** The tenant should pay a fee (and expenses) for the landlord's review of any plans, specifications, or request for consent/waiver. Avoid a flat fee. Set the fee according to a formula based on the size of the job or hours necessary, with a minimum floor.
- 18.2 Attorneys' Fees and Expenses.** The tenant should reimburse the landlord's attorneys' fees and expenses both broadly and with specificity (e.g., for actions and proceedings, including appeals, and in-house counsel fees and expenses). The reimbursement obligation should cover attorneys' fees and expenses incurred in connection with: (1) any litigation the tenant commences against the landlord, unless the tenant obtains a final favorable judgment; (2) negotiating a lender protection agreement for the tenant's asset-based lender; (3) the landlord's (or its employee's) acting as a witness in any proceeding involving the lease or the tenant; (4) reviewing anything that the tenant asks the landlord to review or sign; and (5) bankruptcy proceedings.
- 18.3 Witnesses.** The tenant should indemnify the landlord if the landlord or its personnel are called as a witness in any proceeding related to the lease or the tenant.

19. Future Documents and Deliveries

- 19.1 Tenant's Financial Condition.** Require the tenant to deliver annual financial statements for itself and any guarantor. Negotiate the right to require a security deposit,

rent adjustment, or other consequences to protect the landlord in case the financial condition of either deteriorates.

- 19.2 Reporting.** Require the tenant to immediately report if the tenant or any guarantor experiences: (1) any adverse change in financial position; or (2) any litigation that could adversely affect the ability to perform.
- 19.3 Further Assurances.** Require the tenant to enter into any amendments that the landlord reasonably requests to correct errors or otherwise achieve the intentions of the parties, subject to reasonable limitations.
- 19.4 Future Events.** The parties should agree to memorialize any commencement date, rent adjustment, or option exercise in a lease amendment.
- 19.5 Termination of Lease Memo.** If the tenant obtains a memorandum of lease, then: (a) the tenant should covenant to execute and deliver a termination of memorandum of lease in recordable form if the lease terminates early; and (b) consider requiring the tenant to sign such a termination at lease execution, to go in escrow.
- 19.6 Governmental Benefits, Generally.** The tenant must cooperate, as necessary, to help the landlord qualify for any tax or governmental benefits (e.g., tax abatements) that would otherwise be available.
- 19.7 Permitted Disclosure.** If the landlord agrees to any confidentiality restrictions, or if governing law automatically infers such restrictions, then the landlord should ask for the right to disclose to actual or prospective mortgages or purchasers any information about the tenant or any guarantor.

20. Guaranty

- 20.1 Social Security Number/Address.** State the social security (or driver's license) number and home address of any individual guarantor beneath his or her signature line. This underscores the fact that the guaranty is intended to constitute a personal obligation of the guarantor and may facilitate enforcement.
- 20.2 Guarantor Consents.** Tailor the guarantor's consent/waiver boilerplate to reflect circumstances of the lease, such as pre-consent to any future assignment of lease, and

any state-specific language necessary or helpful for a guaranty (e.g., a reference to New York Civil Practice Law and Rules section 3213).

- 20.3 Lease Assignment.** If the landlord sells the property, then the guaranty should, by its terms, automatically travel to the purchaser, whether or not the transfer documents say so.
- 20.4 Net Worth.** Any net worth test or other financial covenant should apply to both the tenant and the guarantor. Tailor the covenant as appropriate.
- 20.5 Estoppel Certificate.** The guarantor should agree to issue estoppel certificates upon request.
- 20.6 Springing Guaranty.** Consider a springing guaranty if certain adverse events occur (such as a reduction in the tenant's or a guarantor's net worth). Remember: the guarantor must sign the guaranty when the tenant signs the lease.
- 20.7 Tenant Bankruptcy.** The guarantor (and any unreleased assignor) should acknowledge its liability is not limited as a result of any limitation of the landlord's claim against the tenant for "rent" in bankruptcy.⁴
- 20.8 "Good Guy" Guaranty.** Consider a "good guy" guaranty (i.e., a guaranty of rent and perhaps all other obligations under the lease, continuing only until the tenant surrenders the premises vacant, in satisfactory physical condition, and free of any occupancy rights).
- 20.9 Security.** Consider securing a lease guaranty obligation with a letter of credit or other security. By tying such a letter of credit to a guaranty rather than to the lease, the landlord may reduce the likelihood—perhaps already low—that the tenant's bankruptcy estate could "claw back" any letter of credit proceeds beyond the landlord's permitted claim for rent in the tenant's bankruptcy.

4 11 U.S.C. § 502(b)(6).

21. Inability to Perform

- 21.1 Triggering Event.** If the tenant negotiates a force majeure clause, require the tenant to notify the landlord promptly of any force majeure event. The extension of time should continue only so long as such triggering event actually causes the tenant delay.
- 21.2 Exception to Force Majeure.** Force majeure should never apply to any monetary obligation.
- 21.3 Governmental Consents.** For the landlord, force majeure should include a failure to obtain governmental consents or permits.

22. Insurance

- 22.1 Additional Insureds.** Include the landlord and its managing agent and mortgagee as “additional insureds,” not “named insureds.” The latter may owe premiums.
- 22.2 Changed Requirements.** Conform the insurance requirements in the lease to those in the landlord’s mortgage (and any future changes in the mortgage). Allow the landlord to change the requirements in the lease as needed to comply with the landlord’s and any mortgagee’s future reasonable requirements.
- 22.3 Business Interruption Insurance.** Any rental/business interruption insurance should cover additional rent (e.g., escalations and tax pass-throughs) and percentage rent as well as base rent.
- 22.4 Evidence of Insurance.** Require “evidence” of insurance (the ACORD 27 form)⁵ or a copy of the tenant’s insurance policy at lease signing, not a “certificate” of insurance (the ACORD 25 form), which is often regarded as worthless unless modified. Try to get an ACORD 27 form (or its equivalent) not only for property insurance, for which it was designed, but also for liability insurance.
- 22.5 Landlord Insures.** Consider having the landlord insure the tenant’s improvements (with the tenant reimbursing the allocable premium either directly as additional rent or

⁵ ACORD is the universally used acronym for Association for Cooperative Operations Research and Development, a nonprofit standard-setting body for the world-wide insurance industry. For more information, see www.acord.org.

as an operating expense), and having the landlord restore (or give the landlord the right to require the tenant to restore) with any insurance proceeds.

22.6 Plate Glass Insurance. Require any retail tenant to carry plate glass insurance.

22.7 Insurance Broker. Allow the landlord (at its option) to deal directly with the tenant's insurance broker to obtain any insurance documents the lease requires. But the lease should state that doing so imposes no liability or obligation upon the landlord.

22.8 Approval Rights. Allow the landlord to approve the identity and financial condition of the tenant's insurance carriers.

22.9 Waiver of Subrogation. Understand "waiver of subrogation." This is a tricky topic, often wrongly handled. These clauses should be mutual, covering all losses caused by any insured risk (even negligence of the landlord or the tenant), provided the insurance carrier has consented to the waiver. Such consents often appear in standard insurance policies, although this should be confirmed.

22.10 Tenant's Rights to Proceeds. Make any right of the tenant to receive insurance proceeds subject to the rights of the landlord's mortgagee.

22.11 Tenant Failure to Insure. If the tenant fails to insure and a fire occurs, then make the tenant liable for the entire loss and not merely the unpaid insurance premiums—even if the landlord knew about the failure to insure. (Such a provision responds to cases that limit the tenant's liability to the amount of the unpaid premiums.)

22.12 Insurance Advice. Work with the landlord's insurance broker/consultant to check, update, and improve the insurance requirements of the lease as appropriate. Take into account whatever changes in insurance requirements and practices ultimately arise from the resolution of "terrorism insurance" in the wake of September 11.

23. Landlord's Access to Premises

23.1 Emergency Contact. Require the tenant to provide the name and telephone number of an emergency contact.

23.2 Reconfiguration. Reserve for the landlord the right to reconfigure or change the means of access to the premises.

- 23.3 Notice Requirements.** The lease should state that the landlord may enter without notice in an emergency. Even absent an emergency, oral notice to someone on site should suffice. This is yet another example of an area where a requirement for “written notice” may sound perfectly reasonable, but in the real world such a requirement is completely impractical.
- 23.4 Keys.** The tenant should deliver copies of all keys and access codes to the landlord. The landlord should consider, though, whether it truly wants whatever liability travels with the keys and access codes, especially if the tenant has unusually valuable personal property. The landlord may want to be selective about requiring keys and access codes.
- 23.5 No Eviction.** Make clear in the lease that the landlord’s entry to or inspection of the premises is not an actual or constructive eviction and does not entitle the tenant to any rights or remedies or any claim, offset, deduction, or abatement of rent.
- 23.6 Purpose of Access.** The landlord should insist on the right to: (1) show the premises to prospective purchasers, mortgagees or appraisers and post “for sale” signs and (2) during the last [12] months of the term, show the premises to prospective tenants and post “for rent” signs.

24. Landlord’s Liability

- 24.1 Exculpation.** Limit the landlord’s liability to its interest in the property. Negate personal liability of the landlord or its partners, members, managers, officers, directors, and the like. Recent cases have applied the “implied covenant of good faith and fair dealing”—a tort theory of liability—to sidestep exculpation clauses in leases. To avoid the possible effect of such cases, state that the landlord’s exculpation applies not only to claims under the express terms of the lease, but also claims of any kind whatsoever arising from the relationship between the parties or any rights and obligations they may have relating to the property, the lease, or anything related to either.
- 24.2 Landlord Default.** Give the landlord the same open-ended cure periods for nonmonetary defaults that tenants typically obtain—the landlord should not be deemed in default so long as the landlord has commenced and is diligently prosecuting the cure of its default.

24.3 Liability. Liability of the landlord should cease if the landlord transfers its interests in the premises.

24.4 Liability for Prior Owner's Acts. As a rather aggressive position, say that after any conveyance of the property (even outside foreclosure), the new owner is not liable for (and the tenant may not assert any credit or counterclaim because of) any claims the tenant might have had against the former owner, such as for overcharges and refunds of escalations.

25. Landlord's Representations

25.1 Express Not Implied. State that the landlord makes no implied covenants, representations, or warranties. Limit the landlord's responsibilities to those expressly set forth in the lease.

25.2 Merger. State that any agreements, written or otherwise, predating the lease merge into the lease. Indicate that any statements or representations on the landlord's Web site or in the landlord's advertising are not part of the lease.

25.3 Other Leases. State that the landlord makes no representations, warranties, or covenants regarding other tenants (past, present, or future) or the terms of their leases.

26. Maintenance and Repairs

26.1 No Overtime. The landlord has no obligation to do any work at overtime or premium rates.

26.2 Tenant's Obligation. The tenant must maintain and repair parts of the building—including storefronts and sidewalks—that exclusively serve the premises.

26.3 Right to Perform. If the tenant's acts or omissions cause damage to another tenant's premises, the landlord can repair them at this tenant's expense.

26.4 Broad Repair Obligations. Where the tenant has broad repair obligations, expressly include "ordinary or extraordinary, structural or nonstructural, foreseen or unforeseen" repairs.

26.5 Specify Repair Obligations. Avoid distinguishing repairs as “structural” (the landlord’s responsibility) and “nonstructural” (the tenant’s responsibility). Draw these lines specifically and in detail. Otherwise, a court may decide what the parties intended.

26.6 Periodic Upgrades. Beyond maintaining the premises “as is,” the lease could require the tenant to upgrade and renovate every ___ years, to keep the premises exciting and new, particularly for retail space.

27. Occupancy

27.1 “As Is” Condition. The tenant should represent and acknowledge that it takes possession of the premises in its “as is, where is” condition as of the commencement date.

27.2 No Obligation Except Specific Work. Confirm that the landlord has no obligation to perform any work or make any installations to prepare for the tenant’s occupancy, except as the lease expressly states.

27.3 Tenant Covenants. The tenant should covenant to file its plans, install its fixtures, and open for business, in each case by a certain date. The tenant should then agree to operate for at least a certain minimum period.

28. Percentage Rent and Radius Clause

28.1 Increases. Provide for an increase in percentage rent upon any change of use or change of the tenant.

28.2 Inclusions/Exclusions. For percentage rent purposes, include any catalog or Internet sales that the tenant makes through the store. Prohibit the tenant from claiming any credit for goods that a customer bought through a catalog or over the Internet (unless previously included in store sales). Exclude sales to the tenant’s employees only if the tenant makes those sales at a discount.

28.3 Limit Percentage Rent Penalty Period. If the lease allows the tenant to pay “percentage rent only” if any cotenancy or other problem arises, restore the fixed rent after the landlord solves the problem, or limit the percentage-rent-only period. After a certain time, allow the landlord to require the tenant to either terminate or resume paying full fixed rent.

- 28.4 Effect of Casualty.** The lease should provide that if the premises are closed part of the year because of a casualty or condemnation, the “breakpoint” for percentage rent will drop. (This assumes the lease expresses the “breakpoint” as a fixed dollar amount, and not a formula referring to actual fixed rent payable from time to time. The latter would be more common, so this problem usually does not arise.)
- 28.5 Gross Sales.** Define gross sales to include sales by subtenants and concessionaires.
- 28.6 Fixed Rent Increases.** Increase fixed minimum rent (and percentage rent breakpoint) periodically over time based on increasing gross sales.
- 28.7 Audit Right.** Let the landlord audit the tenant’s gross sales. If the tenant underpaid percentage rent by more than three percent, the tenant should pay interest and the costs of the audit.
- 28.8 Kick-out Right.** Give the landlord the right to terminate the lease if percentage rent does not reach a certain level by a certain date.
- 28.9 Recordkeeping.** Require the tenant to maintain records sufficient to make any audit meaningful.
- 28.10 Radius Clause.** Include a “radius clause” in any lease requiring percentage rent, i.e., the tenant may not compete with itself within a restricted area without the landlord’s consent.
- 28.11 Violation.** Consider requiring the tenant to include as “gross sales” (for percentage rent purposes) the greater of (a) a specified percentage of gross sales at the premises; or (b) the gross sales of the tenant’s store in the restricted area if it violates the radius clause.

29. Quiet Enjoyment

- 29.1 Conditions.** New York law (and probably the law of other states) implies a covenant of quiet enjoyment if the lease is silent. Consider providing that quiet enjoyment is subject to the rights of mortgagees, ground lessors, and all other terms of the lease. Condition the covenant of quiet enjoyment upon the tenant’s not being in default.
- 29.2 Limit Obligation to Provide Services.** Expressly limit the landlord’s obligation to provide services and other obligations regarding the building to bare occupancy and

express obligations under the lease. Try to prevent the courts from using the “covenant of quiet enjoyment” as the basis to infer possible landlord obligations to provide services beyond those the lease requires.

30. Real Estate Taxes

- 30.1 Tax Contests.** Prohibit the tenant from contesting taxes without the landlord’s consent. If the landlord does consent, the landlord may want the right to require the tenant to post a bond or letter of credit in the amount of any contested taxes (if the tenant did not need to pay the taxes as a condition to the contest).
- 30.2 Business Improvement District (BID) Charges and Special Assessments.** Include any “BID” charges and special assessments in the definition of “Real Estate Taxes.”
- 30.3 Base Year Real Estate Taxes.** Define “Base Year Real Estate Taxes” as “net of any special assessments” and “as finally determined.”
- 30.4 Further Assurances.** The tenant should agree to assist the landlord, as reasonably necessary, to qualify for tax abatements and benefits (e.g., Industrial Commercial Incentive Program [ICIP] in New York City). If the landlord obtains such benefits, the lease should indicate whether the landlord or the tenant will ultimately gain the economic benefits of the program and how those benefits interact with real estate tax escalations.
- 30.5 Estimated Tax Payments.** Require the tenant to make monthly estimated tax payments, especially when the landlord’s mortgage requires tax escrow payments.
- 30.6 Management Fee.** If the landlord protests real estate taxes, impose an extra management fee to compensate for the landlord’s time, trouble, and effort.
- 30.7 Imperiled Abatement.** If the property benefits from any tax abatement, deferral, subsidy, or the like, think about the risk that someone might challenge the validity of such benefit. If any such challenge arises, allow the landlord to require the tenant to pay monthly (just like a regular payment of real estate taxes) an appropriate contribution toward whatever incremental taxes the landlord might owe if the challenge succeeded. The landlord would refund these payments if the challenge failed. Without a structure

like this, the landlord will bear much of the risk of any challenge and, in practice, may not shift much of that risk to tenants.

30.8 Transfer Taxes. Consider possible transfer taxes on the lease. New York, for example, imposes a transfer tax on certain leases with terms beyond 49 years (including extension periods).

30.9 Contest Expenses. Have the tenant pay its proportionate share of the cost of the landlord's real estate tax counsel in seeking to lower assessment, instead of merely subtracting the landlord's legal fees in the event of a successful tax contest. (This issue matters only to the extent that counsel's compensation is not contingent.)

31. Remedies of Landlord

31.1 Yellowstone Injunction. Consider whether the landlord can proactively add language to the lease to limit the availability and effect of so-called "Yellowstone" injunctions under New York law. For example, consider some or all of the following, each of which responds to one or more of the issues that arise in "Yellowstone" proceedings:

(A) *Waiver.* Require the tenant to waive its right to bring a "Yellowstone" injunction (probably not enforceable).

(B) *Financial Defaults.* Have the tenant acknowledge that it cannot obtain a "Yellowstone" injunction for any financial default, even if uncertainty or disagreement exists (which it always will, in these cases) about the tenant's obligations. The tenant must pay first, and fight later.

(C) *Cure Period Extension Rights.* The tenant may obtain an open-ended cure period—and a period in which to litigate an alleged default—by depositing with the landlord as security an amount equal to the landlord's estimate of the cost to cure the alleged default. State that such a deposit constitutes the only way the tenant can evidence its ability and desire to cure the default. Only if the tenant actually makes the deposit, will it be entitled to prevent the landlord from terminating the lease.

(D) *Other Rights and Remedies.* State that a "Yellowstone" injunction, if granted, limits only the landlord's right to terminate the lease and does not

limit any other rights or remedies (e.g., late charges, default interest, and reimbursement of the landlord's expenses).

(E) *Final Cure Period Before Eviction.* State that if the landlord obtains a warrant of eviction, the tenant will automatically have—or the landlord can agree at any time to grant the tenant—a short final cure period before the landlord proceeds with actual eviction. A “last clear opportunity to cure” at the end of the eviction proceedings substantially undercuts the basis for a “Yellowstone” injunction.

- 31.2 Default Rate.** Require the tenant to pay interest at the default rate on amounts past due even after judgment (when the statutory judgment rate would otherwise apply).
- 31.3 Interest and Late Charge.** Require the tenant to pay for interest on late payments (in addition to a late charge). Multiple defaults or bounced checks within a specified period should have special consequences. For example, the landlord can require a higher late fee; a larger security deposit; that the next default be incurable; or that future payments—or at least all payments for the next [12] months—be made by certified or cashier's checks or wire transfer.
- 31.4 Waiver of Counterclaims.** Require the tenant to waive counterclaims other than compulsory counterclaims.
- 31.5 Rights of Redemption.** Require the tenant to waive any and all rights of redemption under existing or future laws.
- 31.6 Nonpayment.** Allow the landlord to exercise a “conditional limitation” right and terminate the lease, not merely commence nonpayment proceedings, if the tenant fails to pay rent. (Many Standard Leases establish a “conditional limitation” only for all defaults except failure to pay rent.) Expressly give the landlord the right to exercise a “conditional limitation” right to terminate the lease and also prosecute a proceeding for nonpayment of rent. Try to negate the usual rule that requires the landlord to elect between the two—unless and until the landlord actually obtains one or the other.
- 31.7 No Mitigation.** Provide that the landlord has no obligation to mitigate damages.

- 31.8 Inducement Repayments.** Require that in the event of default, the tenant must repay the unamortized balance of the landlord's rent concessions, brokerage commissions and contribution to the tenant's work. (The tenant will argue that this gives the landlord double compensation. That may be true—but only if the tenant actually pays the damages provided for in the lease. The landlord can agree to offset any liquidated damages provided for in the lease by the damages suggested in this paragraph if the tenant actually pays the latter damages. But in that case, why bother?)
- 31.9 Right to Cure.** Allow the landlord to cure the tenant's defaults and bill the tenant for the landlord's expenses, with interest at the default rate as additional rent.
- 31.10 Specific Performance.** Try to provide that the landlord can obtain specific performance regarding all nonmonetary covenants, both negative and affirmative (supervised and monitored by a special master if necessary).
- 31.11 Intermediate Remedies.** Consider how to respond to a court's likely reluctance to terminate a lease—based on minor defaults—such as failure to deliver financial information or an estoppel certificate. For these defaults, establish intermediate remedies. Make them meaningful, but not Draconian, such as a nuisance fee (\$100/day), a temporary rent adjustment, or a suspension or deferral of some privilege or benefit. If the tenant's "minor" default continues for a specified period, at some point it should constitute an event of default.
- 31.12 Abandonment.** The landlord's seizure of the premises based on "abandonment" can be dangerous, because of uncertainty about what "abandonment" means. Try to define abandonment in the lease, e.g., nonpayment of rent and physical absence from the premises for a specified period.
- 31.13 All Payments Are "Rent."** Describe/define all payments to be made by the tenant under the lease as "rent" to obtain "summary dispossess" rights for nonpayment. This characterization will have mixed consequences in bankruptcy, though, so the landlord may wish to be strategic about this issue.

32. Rent

- 32.1 Payment.** The lease should include an express covenant to pay rent, not merely a schedule of rental amounts. Allow the landlord to require the tenant to pay all rent by wire transfer.
- 32.2 Rent Concessions.** Give the landlord the right to undo a rent concession if the tenant defaults before fully applying the concession. Consider extending a rent concession for a longer period (e.g., six months of 50 percent rent rather than three months of free rent) or in stages over the lease term (e.g., one month free every 24 months rather than several months free at the beginning). Condition any rent concession on the tenant's finishing its initial alterations by a certain date.
- 32.3 Rent Not Per Square Foot.** State rent as a flat amount rather than based on the square footage of the premises. This can prevent controversy about square footage and remeasuring. Avoid any statement about the square footage or rentable square footage of the premises.
- 32.4 Re-measurement.** Negate any possible remeasurement of the space or the common areas. If the tenant insists on the right to remeasure, define the formula for measurement (e.g., that of the Building Owners and Managers Association [BOMA]) and have the landlord's architect/space planner certify such measurement to the landlord. If the tenant later brings an action against the landlord for bad measurement, the landlord may have a claim over against the design professional.
- 32.5 Stock Options.** For tenants with initial public offering (IPO) potential, consider whether to require (or accept) stock, options, or warrants. (This paragraph was added early in the development of this checklist, sometime before April 2001. Recognizing that business cycles have not yet been repealed, the subcommittee decided to leave this paragraph in place.)
- 32.6 Waiver.** Require the tenant to waive New York Real Property Law § 232(a) and (c), which automatically converts a terminated lease into a month-to-month tenancy (with notice requirements for termination) if the tenant keeps paying rent. (Some

subcommittee members reject such a waiver. They say the cited statute is reasonable and equitable.)

- 32.7 Free Rent.** Define the free rent period to end on a particular date (defined in the term sheet), not a certain number of months after the occurrence of an event (e.g., lease signing or delivery of premises). This approach shifts to the tenant the financial risk of protracted lease negotiations.
- 32.8 Commercial Rent Control.** Leases already require the tenant to make a corrective payment when rent control terminates. Consider requiring the tenant to escrow the shortfall amount with the landlord each month during any the rent control, and pay interest on the shortfall.
- 32.9 Lockbox.** If the tenant pays rent into a lockbox, consider how to handle the risk that the lockbox administrator will deposit a check that the landlord would have wanted to reject. For example, the lease might state that any such deposit does not waive the landlord's rights, as long as the landlord refunds the amount of the incorrectly deposited check within ___ days after the lockbox administrator deposited it. This way, the landlord can correct the lockbox administrator's mistakes and preserve the landlord's rights.

33. Rules and Regulations

- 33.1 Compliance.** Require the tenant to comply strictly with the rules and regulations attached as an exhibit to the lease, and any later changes (reasonable changes?) that the landlord makes. Consider whether the landlord's rules and regulations correctly reflect present circumstances and building operations.
- 33.2 No Liability.** No liability if the landlord does not enforce the rules or regulations against other tenants—or if other tenants violate them with impunity—this should impose no liability or obligation upon the landlord. A landlord often wants to have the freedom to enforce rules and regulations against some tenants but not others.
- 33.3 Lease Incorporation.** If the rules and regulations contain anything unusually important, move it to the body of the lease. Courts may ignore rules and regulations. State that if any conflict exists between the rules and regulations and the lease, the lease governs.

33.4 Recycling. Consider requiring the tenant to separate its waste. The landlord's requirements may exceed those of applicable law.

34. Security

34.1 Segregated Account. Comply with any state-specific requirements regarding how to hold security deposits (e.g., New York General Obligations Law § 7-103 and related provisions). When these provisions require notices to the tenant relating to the security deposit, try to build those notices into the lease if possible.

34.2 Letter of Credit. Consider requiring the tenant to deliver a letter of credit in place of a cash security deposit to try to reduce the impact of any possible tenant bankruptcy.

34.3 Letter of Credit Requirements. If the tenant delivers a letter of credit, require that: (1) the issuing bank be a New York Clearinghouse bank; (2) the landlord can draw the letter of credit at a bank branch in the same city as the landlord upon presentation of merely a sight draft (no drawing certificate); (3) the letter of credit be an "evergreen" or the bank must notify the landlord (at least __ days before expiry) of any failure to renew and the landlord may draw (or better, shall be deemed automatically to have drawn) the letter of credit; (4) even if the letter of credit is an "evergreen," the issuer must confirm the current expiry date upon request; (5) the letter of credit will not expire until at least a specified number of days after lease expiration; and (6) the landlord can transfer the letter of credit without charge to any lender or purchaser.

34.4 Waiver. Require the tenant to waive any damages claim against the landlord for wrongful drawing on the letter of credit, and any right to enjoin or otherwise interfere with a drawing.

34.5 Security Deposit Is Additional Rent. State that any security deposit (or increase in any security deposit) constitutes Additional Rent.

34.6 Replenishment. Require the tenant to replenish promptly the amount of any security that the landlord draws, or restore the letter of credit accordingly.

34.7 Increased Security. A rent increase should trigger a requirement to post increased security. Are there any other circumstances that should trigger such a requirement?

- 34.8 Mortgagee Requirements.** Accommodate future mortgagee requirements (e.g., a right to pledge the landlord's interest in the security deposit or to transfer any letter of credit to the mortgagee). If the tenant ultimately needs to cooperate with these measures, establish a tight time frame for that cooperation. Allocate any resulting costs, including attorneys' fees.
- 34.9 Lien on Personalty.** Consider taking a lien on the tenant's personal property, perfected with a UCC-1 financing statement.

35. Services Provided by Landlord

- 35.1 Additional Services.** If the landlord agrees to provide at the tenant's expense additional electricity or HVAC condenser water if available at the premises, the landlord should still have the sole right to determine how much it needs for other tenants and should have the right to set aside sufficient capacity for future needs.
- 35.2 HVAC.** Express HVAC standards as design criteria, not as performance specifications. The landlord's only obligation is to operate HVAC in conformance with design criteria. The tenant should be responsible for distribution within the premises.
- 35.3 Tenant Complaints.** Limit who can complain about any building services. Require a written notice of any such complaint, signed only by specified officers of the tenant.
- 35.4 Tenant-Provided Services.** Prohibit the tenant from providing its own building-related services, especially where this could create labor problems.
- 35.5 Changes in Building Operation.** Allow the landlord to change how the building operates and the services the landlord provides, subject to reasonable standards.
- 35.6 Early Air Conditioning.** If the landlord provides air conditioning before the regular air conditioning season (because of hot weather or tenant requests), the landlord may charge tenants for that extra service, even if the lease does not yet require air conditioning.
- 35.7 Specifications.** To the extent that the landlord agrees to comply with specifications for any landlord services, consider the assumptions that underlie those specifications. For example, elevator specifications assume a certain level and distribution of occupancy

and usage. If the tenant installs a cafeteria, this may alter traffic patterns so much that the landlord should have the right to change the elevator specifications.

- 35.8 Telecommunications/Fiber Optics Cable Provider.** Consider requiring the tenant to use the landlord's telecommunications/fiber optics cable provider. Give the landlord the right to change providers. Negate any landlord obligation to continue to use any particular provider. (The Federal Communications Commission constantly reviews and revises the rules in this area.)

36. Subordination and the Landlord's Estate

- 36.1 "Financeability" Provisions.** To avoid negotiating a separate subordination, nondisturbance, and attornment agreement (SNDA), include directly in the lease all mortgagee protections and benefits that an SNDA would typically give a mortgagee. Require the tenant to confirm these protections if a mortgagee so requests, with the form of confirmation attached as an exhibit (perhaps as part of the form of estoppel certificate). Build in flexibility to add any other SNDA protections that some future mortgagee might (reasonably?) require.
- 36.2 SNDA Form.** Require the tenant to execute any SNDA form that the landlord's lender requires. State that if the landlord delivers that form of SNDA and the tenant does not sign and return it within a specified period, then the landlord has fully performed its obligations regarding obtaining an SNDA from that mortgagee.
- 36.3 Expenses.** Require the tenant to reimburse the landlord's expenses for delivering any SNDA from the landlord's mortgagee, including the landlord's reasonable attorneys' fees.
- 36.4 Condominium or Ground Lease.** The landlord should retain the right to create a condominium regime or to enter into a ground lease. Require the tenant to cooperate, as reasonably necessary, provided the new structure produces no material adverse impact on the tenant. Allow the landlord to equitably adjust escalation formulas if the building becomes a condominium or the landlord makes some similar structural change.

- 36.5 Mortgage Modifications.** Require the tenant to agree to any reasonable modification that a mortgagee requests, if it does not materially reduce the tenant's rights or increase its obligations.
- 36.6 Mortgage Right to Subordinate.** State that any mortgagee can unilaterally subordinate its mortgage to the lease, in whole or in part. Any such subordination should bind the tenant automatically, whether or not the tenant has been notified of it.
- 36.7 Lease Subordinate.** Make the lease automatically subject and subordinate to the landlord's existing or any future fee mortgage. Try not to condition subordination on delivery of a nondisturbance agreement.

37. Tenant's Equipment and Installations

- 37.1 Electromagnetic Fields (EMF).** The tenant should agree not to cause any EMF interference. If the tenant generates EMF interference, the tenant should agree to solve the problem and the landlord will have no liability. Allow the landlord to control placement of machines that may cause EMF, even within the premises.
- 37.2 Rooftop Equipment.** The landlord should control roof rights, including penetration, relocation, and size and weight of any rooftop dish or other equipment. Require the tenant to remove its equipment (and any connecting cables) and restore the roof at the end of the term. The tenant should agree to indemnify the landlord against all liability arising from the tenant's rooftop equipment. Charge for the tenant's use of rooftop space. State that the landlord may require the tenant to relocate equipment elsewhere on the roof, at the tenant's expense.
- 37.3 Conduits and Risers.** The landlord should control/coordinate use of conduits and risers that run through or adjacent to the premises. The landlord should have no liability for claims arising out of the tenant's use of conduits and risers. Allow the landlord to recapture unused conduit or riser space and require the tenant to remove cables no longer in use.
- 37.4 Signage and Identity.** The landlord controls all rights to exterior signage (including the name of the building, any flagpole, and rights to install plaques or other identification), even if exterior signage affects light and air. If the landlord installs any signs for the

tenant, the tenant should pay for them. As an alternative, state that the tenant's signs must comply with signage criteria to be attached as a lease exhibit, which the landlord may modify or update from time to time. For future changes in signage criteria, give the landlord an express right to upgrade the tenant's signs, perhaps at the landlord's expense. Require the tenant to cooperate.

37.5 Uniform Elevator Lobbies, Signage, Entrance Doors and Window Shades. Require all tenants to maintain uniform elevator lobbies, signage, entrance doors and window shades. As an alternative, consider giving the landlord the right to require future uniformity.

37.6 Supplemental HVAC, Backup Generator, and Fuel Tank. The tenant must maintain its equipment in compliance with law and good practices (e.g., monthly inspections), and keep written maintenance records. These installations become the property of the landlord at the end of the term, delivered in good working order with all permits, warranties, and maintenance history documents. Restrict testing of backup generators (very noisy).

38. Use

38.1 Narrow Use. Draft the use clause narrowly (e.g., not general office use, but general office use for a computer consulting company operating under a specific business name). Then say: "and for no other use."

38.2 Recapture Right. In a retail lease with an operating covenant, give the landlord a continuous or periodic recapture right if the tenant ceases to operate for a stated period. Structure it so that a lender can exercise it after foreclosure. For example, do not just give the landlord a one-time right to recapture within a certain period after the tenant closes its doors.

38.3 Odors. If the tenant's operations emit odors (e.g., a restaurant or a donut store), define in the lease specific odor-mitigation measures, rather than a general obligation of the tenant to control or prevent odors. Allow the landlord to impose additional odor-control measures if the initial measures do not work.

- 38.4 Internet.** In a retail lease, consider prohibiting in-store advertising promoting the purchase of merchandise over the Internet. (Some members of the Silent Lease Issues Subcommittee note that landlords who have tried to establish such prohibitions were generally laughed at, and such prohibitions do not seem likely in the future.) Consider requiring the tenant to include the name and address of the premises, as appropriate, in all Internet advertising. The tenant's Internet sales from the store should be subject to the same use limits as the sales the lease otherwise allows.
- 38.5 Single-Store Operation.** Require the tenant to use and operate the premises only as a single retail operation (no separate stores or stalls, except bona fide licensed departments or concessionaires not operated under a separate name). Prohibit the tenant from segregating any part of its space from the rest of the space for use as a separate store, with or without a separate entrance.
- 38.6 Exclusive Uses.** Track exclusive uses to avoid conflict. The landlord would ideally have no liability for conflicting exclusive use clauses or enforcement of exclusive use clauses. Alternatively, consider limiting the tenant's remedies if the landlord violates any exclusivity clause. For example, allow the tenant to pay "percentage rent only"—but have no other remedy—if the landlord violates the clause. If some other tenant operates a prohibited use, allow the landlord to assign to this tenant any right to enforce the prohibitions in the other tenant's lease. Carve out from any "exclusive use" any store that operates the same use as one of multiple uses, but not its primary use.
- 38.7 Loss of Exclusive.** Provide that if the tenant does not use its exclusive use right, then the right permanently terminates. (A temporary termination does not help the landlord much.)
- 38.8 Covenant of Continuous Operation.** Require the tenant to open and stay open during certain prescribed hours with sufficient personnel and inventory. What measure of damages for breach? Provide for remedies other than an injunction (e.g., higher rent), because an injunction probably won't be granted.
- 38.9 Certificate of Occupancy.** State that delivery of a certificate of occupancy does not constitute the landlord's representation or warranty that the tenant may use the premises for the permitted use.

38.10 Cotenancy. Provide for flexibility in cotenancy requirements to accommodate possible future changes in the retail marketplace. Avoid requirements that over time may become impossible to satisfy. Terminate the cotenancy requirements at some point.

39. Vault Space

39.1 Use and Occupancy. Since vault space may lie outside the boundaries of the landlord's property, state that the landlord makes no representation about any right to use or occupy such space. If the tenant uses any vault space, require the tenant to maintain, repair, and pay any municipal fees imposed from time to time.

39.2 Diminution. State that any reduction of vault space (e.g., use by any government or utility) does not entitle the tenant to any rights.

39.3 Recapture Right. Give the landlord the right to recapture any vault area if a utility or governmental authority needs the space.

40. Miscellaneous

40.1 Continued Status. The tenant should agree to update its representations and warranties from time to time and to maintain good standing throughout the lease term.

40.2 Survival. The tenant's obligations and liabilities under the lease should survive expiration or sooner termination of the lease.

40.3 Independence of Covenants; No Termination Right. Require the tenant to acknowledge that all covenants are independent and that the tenant waives any right to terminate based on the landlord's default.

40.4 Diplomatic Immunity. If applicable, obtain the tenant's waiver of diplomatic immunity.

40.5 Tenant's SEC Filing. A publicly held tenant whose lease is a "material obligation" must file a copy of the lease with the tenant's publicly available SEC filing. Consider having the tenant: (a) represent that the lease is not a "material obligation"; (b) agree to notify the landlord if the tenant is later required to publicly file the lease; and (c) agree to try to have rental information redacted or given "confidential" treatment.

- 40.6 Undesirable Elements.** Make the tenant responsible for any undesirables that the tenant attracts (e.g., vandals and protesters).
- 40.7 Confidentiality.** Require the tenant to keep the terms of the lease confidential.
- 40.8 Arbitration.** If the tenant has the right to arbitrate disputes, condition this right on no rent default. Expressly exclude any rent dispute from the arbitration right. If the landlord cares about quick resolution of any arbitrated dispute, agree on possible arbitrators directly in the arbitration clause, and do not leave their selection until a dispute arises.
- 40.9 Interpretation.** Say once that “include” means “without limitation.”
- 40.10 Concessions.** To the extent that the landlord gives the tenant any special “right” or “privilege,” condition it on certain minimum occupancy? No default? Other criteria or conditions? When the landlord agreed to the concession, what assumptions did the landlord make? What happens if those assumptions stop being true? For example, if the tenant’s good credit eliminates any requirement for bonds or other landlord protections, undo this concession if the tenant’s credit turns bad. Can the tenant exercise any privilege or right only once or only within a certain period? Or does it apply throughout the lease term? Can the tenant assign any particular special privilege if the tenant assigns the lease? If the tenant exercises any privilege or right, should the landlord be able to require an estoppel certificate or other documents? These issues potentially arise for every tenant “right” or “privilege,” including permitted assignments, releases from liability, options, exclusive uses, etc.
- 40.11 Marked Leases.** When preparing final lease documents for signature, mark them against landlord’s standard form to facilitate future lease review projects and administration.
- 40.12 Resale.** Prohibit the tenant from reselling to other tenants any telecommunications services, satellite capacity, electricity or other utility or service.

41. Due Diligence

- 41.1 Credit.** Perform a credit check and UCC search for the entity that will be the tenant under the lease (not just its parent or affiliate).

- 41.2 Financial Statements.** Examine the tenant's and the guarantor's financial statements.
- 41.3 References.** Obtain references for the tenant and its principals.
- 41.4 Tenant Representations.** Obtain representations and warranties regarding the ownership structure of the tenant, perhaps backed by a secretary's certificate and copies of documents.
- 41.5 Identities of Tenant and Guarantor.** Determine the entity on the lease, and the identity of any guarantor and stock ownership.

42. Other Documents

- 42.1 Good Standing and Organizational Documents.** Obtain and review the tenant's good standing certificate and organizational documents. Ask for an organizational chart if the tenant's structure is complex.
- 42.2 Entity Documents.** Obtain certified copies of filed charters, and the like, to confirm exact names.
- 42.3 Opinion of Counsel.** For a major lease, consider obtaining an opinion of counsel about the tenant's due authorization, execution, and delivery of the lease, though not necessarily enforceability of the lease.
- 42.4 SEC Filings.** If the tenant is publicly held and any previous lease of the tenant was a "material obligation," the tenant should have incorporated that prior lease in a previous SEC filing. As a strategic matter, the landlord may wish to review this filing and see what the tenant accepted in the previous transaction.
- 42.5 Brokerage.** Consider the effect of a possible tenant default on the landlord's liability for unpaid brokerage commissions. What about an early negotiated termination of the lease based on a change in the tenant's financial condition? Try to negate any further payment obligations to the broker in any such event.
- 42.6 UCC-1 Financing Statement.** The landlord should file a UCC financing statement if the landlord obtains a security interest in the tenant's personal property.

- 42.7 Memorandum of Lease and Release.** If the lease requires the landlord to sign a memorandum of lease, also obtain a release of memorandum of lease, and deposit it in escrow with the landlord's counsel.
- 42.8 Guaranty.** Obtain a guaranty executed by the correct guarantor.
- 42.9 Letter of Credit.** Review the letter of credit form in advance. Obtain lender sign-off as needed.
- 42.10 Certificate of Insurance.** Have an insurance consultant review the tenant's insurance certificate as well as the underlying insurance coverage.
- 42.11 Taxpayer Identification Number; W-9 Form.** Require the tenant's taxpayer identification number under the tenant's signature. Sooner or later the landlord will need it. If the tenant delivers an interest-bearing security deposit, the landlord will need the taxpayer identification number immediately. Consider incorporating the tenant's W-9 Form certifications into the body of the lease to avoid the need for a separate form.

43. Post-Closing; Monitoring

Note: The following handful of suggestions on lease administration and enforcement is not intended as a complete guide to administering and enforcing leases.

- 43.1 Insurance.** Monitor expiration dates of insurance. Update coverage limits and requirements as markets change.
- 43.2 Delivery of Premises.** Issue formal notice and confirmation of delivery of the premises.
- 43.3 Future Deliveries.** To the extent that the lease requires the tenant to make future or periodic deliveries of documents (e.g., financial statements, certificate of ownership structure, estoppel certificates), remember to ask for them.
- 43.4 Future Events.** Memorialize any exercise of an option, delivery of additional space, and the like, and the resulting rent adjustments.
- 43.5 Alteration Consents.** A lease sometimes says the tenant need not remove its alterations and restore the premises at the end of the term unless the landlord requires such restoration as a condition to the landlord's approval of the particular work. In those

cases, the landlord must remember to exercise its right to require restoration when appropriate.

- 43.6 Pre-Emptive Rights.** Remember to give the tenant notices of available space, and other notices, under the tenant's rights of first refusal and other pre-emptive rights.
- 43.7 Letters of Credit.** Monitor expiration dates; draw at the earliest possible opportunity, if necessary.
- 43.8 Tickler Reminders.** If the tenant persuaded the landlord to remind the tenant of certain matters (e.g., restoration obligations, option exercise deadlines), establish appropriate reminders in the landlord's calendar. Counsel may also wish to make appropriate "tickler" entries, but should avoid assuming responsibility to remember.
- 43.9 Future Amendments.** If the landlord and the tenant amend the lease, the landlord may want to obtain guarantor consent; amend any recorded memorandum of lease; and take other steps to protect the landlord's interests.
- 43.10 Abandonment.** If the tenant appears to have moved out, then before entering and taking control of the premises, consider sending an "estoppel" notice to the tenant reiterating the lease provisions on "abandonment" and inviting the tenant to confirm that it has not abandoned the premises (with payment of any unpaid rent). If any doubt exists about whether the tenant has abandoned the premises, consider using a summary possession action rather than self-help to avoid claims of wrongful eviction.
- 43.11 Change of Address.** If the landlord relocates, it should send a formal notice of change of address to the tenant, with a copy to any other tenant representatives designated in the lease to receive notices.
- 43.12 Estoppels.** The landlord may wish to request periodic estoppel certificates simply to try to prevent future issues from arising. Request an estoppel certificate (or include equivalent language in the documentation) for any amendment, consent, waiver, favor, or other concession of any kind. Include "reliance" language to support enforceability.
- 43.13 Advice and Administration Memo.** The landlord may desire a memorandum summarizing important provisions of the lease and advising the landlord on actions it should remember to take to avoid problems, issues, or disputes.



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