

Making the Deal Happen

The purpose of this portion of our program is to present a simulation of a real-life negotiation over some of the most commonly debated lease provisions, with side comments and audience participation in order to give you the full picture of how “deals get done.” We will discuss the nature of certain lease provisions, the reason for such provisions and alternative provisions, including an extreme tenant-favorable provision, an extreme landlord-favorable position and a balanced provision. Note that the following provisions are being used to set forth concepts, rather than to give complete examples of language to be pasted into your own documents. Many (but not all) of these provisions are extremely important to both parties to the negotiation, and the issues may rise to the level of “deal killers” if not negotiated carefully both at the letter of intent stage and later at the lease stage. To the extent that any of these issues are of fundamental importance to your client, be sure that the necessary discussions take place during the negotiation of the letter of intent. Many parties to lease transactions will refuse to consider some of these issues to the extent that the request for same is first raised during lease negotiations.

A. USE CLAUSES. Use clauses help to define the parameters of tenant's operations at the Premises and in some settings should be specific, avoiding general, broad uses such as “office use” or “variety store.” Specificity is far more important in a retail setting, where tenant mixes and exclusives granted to other tenants restrict the freedom of the tenant to change its use. In an office lease, the use provision can be combined with (and secondary to) provisions requiring the tenant to stay in compliance with law and prohibiting activities that constitute a nuisance.

Extreme Tenant Position:

Tenant may use the Premises during the Term of this Lease for any lawful [retail or office] purpose.

Extreme Landlord Position:

During the Term of this Lease, Tenant shall use the Premises solely for _____, and for no other purpose without the express prior written consent of Landlord, which may be withheld in Landlord's sole and absolute discretion. Any violation of this provision shall be a material breach of this Lease.

Balanced Position:

The Premises shall initially be used for _____; thereafter, the Premises may be used for any lawful retail purpose, except for: (a) uses prohibited by the CC&Rs; (b) uses prohibited by Exhibit ____ [restrictions and exclusives granted to other tenants]; (c) any use which would require Landlord to maintain a greater parking ratio for the Shopping Center, (d) any use that would increase the cost of insurance premiums; or (e) any use which would require Landlord to make structural alterations to the Premises. The Premises may be used at all times for office and storage uses incidental to any permitted use.

B. CO-TENANCY REQUIREMENTS. This is an issue almost exclusive to retail leases. Typically, the value of the premises is based on the “draw” of (a) major tenant (issue:

how is this defined) and (b) numerous smaller retail tenants. Consequently, the Tenant wants the other tenants open and operating as a condition to the Tenant being required to open or to continue to operate its business from the premises. For example, if a shopping center relies on two major department stores to generate traffic, the loss of one would adversely impact the business of all other tenants in the center. In that case, a continuing co-tenancy provision could allow a tenant to reduce rent payable until the major department store (or a comparable replacement) was reopened. In addition, a tenant will often propose that it may elect to open for business before the “co-tenancy” requirement is satisfied but it will insist upon paying reduced rent (e.g. 50% of base rent) or percentage rent (rent paid in arrears as a percentage of gross sales from the premises) only until the co-tenancy is satisfied. In another case, a tenant moving in to a new shopping center may negotiate a delay in the commencement of rent or other concessions until other stores (particularly big box tenants) are open. Note that small retail tenants will rarely have the bargaining power to negotiate such clauses.

Extreme Tenant Position:

Tenant's obligation to pay Rent and other sums due under this Lease shall not commence until the first day of the month following the date when both _____ and _____ (the “Initial Co-Tenants”) have opened to the public at the Shopping Center, fully stocked and staffed for the conduct of their respective primary businesses. If either of the Initial Co-Tenants vacate or cease operations at the Shopping Center for any reason other than fire, other casualty or condemnation (which shall not exceed 180 days), Tenant's obligation to pay Rent and other sums due under this Lease shall cease as of the date of such vacation or cessation, and such obligations shall not recommence until the first day of the month following the date when a replacement tenant acceptable to Tenant (the “Replacement Co-Tenant”) has opened to the public at the Shopping Center, fully stocked and staffed for the conduct of its primary business.

Extreme Landlord Position:

NO CO-TENANCY REQUIREMENTS ALLOWED (USUALLY ACCOMPANIED BY NO OBLIGATION TO DELIVER BY A CERTAIN DATE).

Balanced Position:

Tenant's obligation to pay Rent and other sums due under this Lease shall not commence until the date when both _____ and _____ [or so many square feet of occupied/open business] (the “Co-Tenants”) have opened to the public at the Shopping Center, fully stocked and staffed for the conduct of their respective primary businesses; provided, however, if Tenant opens for business and the Co-Tenants are not open for business as of such date, then Tenant shall pay Base Rent at a reduced rate of _____ percent (____%) of the Base Rent scheduled herein until the above condition is satisfied; and provided further that Tenant shall pay all other sums due under this Lease during such period of rent reduction. If the Co-Tenants fail to open on or prior to one (1) year after the date Tenant was to have opened but for the failure of the Co-Tenants to open then Tenant shall have the right (a) to terminate this Lease upon thirty (30) days notice, after such 1 year period, or (b) to recommence paying full Base Rent.

If either of the Co-Tenants vacate or cease operations at the Shopping Center for any reason other than fire, other casualty or condemnation (provided that such closure due to fire, other casualty or condemnation does not exceed 270 consecutive days), Tenant's obligation to pay Base Rent shall be replaced during the period of such vacation or cessation by an obligation to pay to Landlord ___ percent of Tenant's monthly "Gross Sales" (as defined in Section ___), payable monthly in arrears. Tenant's obligation to pay Base Rent shall recommence on the date when a replacement tenant [Note that the parties will also need to consider what constitutes a "replacement tenant" in this context] has opened to the public at the Shopping Center, fully stocked and staffed for the conduct of its primary business. Tenant shall continue pay all other sums due under this Lease during such period of vacation or cessation of business.

C. OBLIGATION TO OPERATE COVENANTS. These covenants again are more important in a retail lease, though they may be required by a landlord in an office lease for high visibility space, such as ground floor offices in an office tower, or to keep lighting on in office space visible from the exterior. Known by other terms such as "continuous operation" clauses, "stay lit" provisions or "go dark" prohibitions, they require the tenant to remain open for business during specified hours, typically the operating hours for a shopping center. These clauses are important to landlords to preserve a uniform, attractive and vibrant appearance among tenants in a center and are vital if the rent is based in whole or in part on a percentage of sales. In the latter case, the provision may even require a set level of staffing and efforts to maximize sales. Normally, a tenant will propose a "go dark" provisions, *i.e.*, language under which the tenant is not required to operate business although it remains liable for minimum rent. The tenant will further propose that the landlord's remedy for the tenant's cessation of business operations will be termination of the lease and/or the right to seek an injunction requiring the tenant to open or remain open.. The landlord may want a penalty, such as double minimum rent during the period of closure.

Extreme Tenant Position:

NO OBLIGATION TO OPEN OR TO OPERATE

Extreme Landlord Position:

Tenant shall continuously: (a) operate at the entire Premises in a reputable manner and in conformity with prevailing industry standards, (b) staff and stock the Premises with sufficient sales personnel and merchandise so as to maximize Gross Sales for the benefit of Landlord. At a minimum, Tenant shall keep the Premises continuously open for business Monday through Friday from ___ a.m. to ___ p.m., Saturday from ___ a.m. to ___ p.m. and Sunday from ___ a.m. to ___ p.m. Tenant's failure to comply with this Section shall entitle Landlord, in addition to any and all other remedies available, to collect from Tenant an amount equal to two days of Base Rent for each day or portion thereof that Tenant fails to so comply. Such sum shall be in addition to the Base Rent and other sums due under this Lease.

Balanced Position:

From and after the Commencement Date of this Lease, Tenant shall continuously operate at the Premises during the term of this Lease on Monday through Friday from ___ a.m.

to ____ p.m., Saturday from ____ a.m. to ____ p.m. and Sunday from ____ a.m. to ____ p.m. [so long as the anchor tenants and ____% of other retail tenants] are open. This provision shall not apply to Tenant's closure: (a) on recognized legal holidays; (b) due to fire, casualty, failure of services or other cause beyond Tenant's control; (c) in connection with the taking of inventory; (d) for remodeling in accordance with the provisions of this Lease; or (e) in connection with the assignment of the Lease or a subletting of the Premises in accordance with the provisions of this Lease.

If Tenant failure to operate in accordance with the foregoing more than two times in any consecutive twelve month period, Landlord, in addition to any and all other remedies available, shall be entitled to collect from Tenant Base Rent of 150% of the rate otherwise payable, for the duration of such noncompliance by Tenant. Such sum shall be in addition to the other sums due under this Lease. [Note, this type of clause is difficult to administer because it is almost impossible to keep track of which tenants are actually open, and during what hours.]

The obligation to continuously operate shall terminate _____ years after the rent commencement date. [Note, this might work in a new center in order to facilitate the initial lease up.]

D. EARLY TERMINATION AND RELOCATION RIGHTS. Although a tenant may anticipate successful operations its actual experiences especially during the first few years of a new center may be unexpectedly poor. As a result the tenant may want to terminate the lease early. These provisions can impact both office and retail leases. In either setting, a tenant may negotiate provisions providing for an early termination either after a certain amount of time (e.g., after the first 3 years) or if tenants sales do not achieve a stated minimum (e.g., \$300 per square foot), often in exchange for payment of the landlord's unamortized tenant improvement costs plus an additional amount to compensate landlord for the time and expense of remarketing the premises. Landlords are increasingly beginning to reserve the right to terminate a lease early (such as if a tenant does not achieve a stated level of sales or tenant does not start paying a percentage rent by a particular date), but this is a tough concept to sell to a tenant, and landlords would typically opt for a relocation provision instead.

In order to maintain flexibility in its leasing program and to remodel the office building or center, the landlord will most often retain the right to relocate a tenant. Relocation may also arise in an office lease if a landlord rents space subject to the rights of another tenant to expand into that space. For example, an accounting firm may rent a partial floor, but reserve the right to expand into the full floor in the future. The landlord, looking to maximize revenues, may rent the expansion space to another tenant, subject to the right to relocate that tenant if the accounting firm exercises its expansion option. Another important consideration for landlords in office buildings is retaining a right to relocate tenants leasing relatively small square footages in order to accommodate future full floor tenants. Likewise, a retail tenant may take less desirable space in a center, subject to an option to relocate into a better space if it becomes available. The tenant will attempt to include several necessary conditions that must be satisfied if the landlord has the right to move a tenant to "comparable space". For example, the tenant will insist that rent will be at the same level per square foot and satisfy all moving costs, the tenant might limit the places in the shopping center to which it might relocate, the tenant might require a specific

length of storefront, the tenant might insist on a particular configuration and are, and the tenant might limit the times during the year during which it would relocate.

Extreme Tenant Position (Early Termination):

Tenant may terminate this Lease at any time upon thirty (30) days' notice to Landlord of its intent to terminate. In that event, Tenant shall pay a termination fee equal to the lesser of: (a) Landlord's unamortized costs of tenant improvement of the Premises; or (b) the market value of such tenant improvements. Landlord and Tenant agree that payment of the termination fee shall be the sole remedy of Landlord following such Lease termination.

Extreme Tenant Position (Relocation):

NO RELOCATION PERMITTED

Extreme Landlord Position (Early Termination):

NO EARLY TERMINATION PERMITTED

Extreme Tenant Position (Relocation):

Landlord, in its sole discretion, may relocate Tenant from the Premises into replacement premises at any time during the term of this Lease. Base Rent and other sums due under this Lease shall be increased or decreased proportionally if the replacement premises are of a different size than the Premises. Landlord shall use reasonable efforts to provide Tenant with advance notice of any relocation, but shall have no liability to Tenant for failing to give advance notice. Tenant shall pay all costs incurred in moving to the replacement premises. Upon relocation, the replacement premises shall be deemed to be the "Premises".

Balanced Position:

Tenant shall have a one-time right to terminate this Lease at the end of the fifth (5th) lease year (the "Early Termination Date"), by providing Landlord notice thereof not less than one hundred eighty (180) days prior to the Early Termination Date. Tenant's election shall be irrevocable once notice is given. Not later than the Early Termination Date, Tenant shall pay to Landlord the sum of: (a) Landlord's unamortized costs of the Tenant Improvements [Note, the landlord may also want to obligate the tenant to pay the landlord's unamortized commissions and lease concessions (such as free rent provided at the beginning of the term)]; plus (b) six (6) months of Base Rent at the rate then in effect for the privilege of such early termination. Upon such termination, all of Landlord's and Tenant's obligations to each other shall cease, except as may have arisen prior to the Early Termination Date.

Landlord shall have the right to relocate Tenant to alternate premises within the Building upon giving Tenant at least one hundred twenty (120) days' prior notice of such relocation; provided that the replacement premises are of substantially equal size and that the replacement premises are reasonably suitable for the conduct of Tenant's business. Landlord, at its sole expense, shall cause the replacement premises to be improved prior to delivery in a manner similar to the original Premises and such replacement premises shall be substituted for

the Premises under this Lease. Landlord shall pay all relocation expenses reasonably incurred by Tenant, up to a maximum of _____ dollars, including without limitation, moving expenses, printing expenses for stationery, business cards and business publications, signage changes, reinstallation of telephone equipment, costs to change directory listings and the cost of a mailing to Tenant's customers, notifying such customers of the move. Base Rent shall be adjusted downward if the square footage of the replacement premises is smaller than the Premises, but Tenant's Base Rent shall not increase if the replacement premises are larger than the Premises. Tenant's obligation to pay CAMs shall not increase by virtue of the relocation.

E. SUBLETTING AND ASSIGNMENT. This is an area that practitioners need to be careful not to gloss over as mere boilerplate. Tenants will want the maximum flexibility to assign or sublet space, particularly in an age of mergers and acquisitions and in an unsettled economy. For example, provisions regarding changes of ownership or control, definitions of affiliate transfers, and sales of “substantially all” assets are often endlessly negotiated. It is similarly critical to retail landlords to preserve an appropriate tenant mix, to avoid violations of other tenants’ exclusives or restricted uses, and to maintain high profile trade names for Shopping Center branding purposes. Landlords may also want to capture excess rent being paid by a subtenant or compensation paid by a transferee to acquire the tenant's interest, i.e. the infamous shared profits clause. A landlord wants the assignment clause not to undercut the landlord’s ability to control leasing space in the center or building or to limit its ability reject a tenant that, for a variety of reasons, is unacceptable.

Although both parties have important interests in this provision, the landlord can protect itself against the risk of an undesirable assignee or subtenant by qualifying the tenant’s right by certain objective criteria and the tenant’s input with respect to such criteria should be actively considered. For example, the following items might be required to be met before the landlord is obligated to reasonably respond to a request to sublet or assign: The tenant is not then in default; the transferee meets the landlord financial criteria [Note the related issue: should the landlord be looking to its then-existing financial criteria or the financial criteria that was in place when the lease was executed?]; the transferee’s use does not violate any exclusive use clauses in other leases or any CC&Rs; the use is consistent with the character of the center/building [Note, the subjective nature of this item may need further clarification]; the transferee has a proven track record in the proposed use; the proposed use will not have the potential create a hazardous condition or insurance risk.

Extreme Tenant Position:

Tenant may sublet the Premises, or any part thereof, or assign the Lease to any person or entity at any time, so long as the subtenant or assignee agrees to be bound by or assume all obligations of the Lease. Tenant shall give Landlord notice of any assignment within thirty (30) days of such assignment, whereupon Tenant shall be relieved of all of its obligations to Landlord under the Lease.

[Note, if the lease is silent on the issue of whether the tenant may sublet or assign, then because the general rule is that courts favor assignability, a tenant shall have the right to sublet or assign without the landlord’s consent. It is very rare that a commercial lease will be silent on this issue.]

Extreme Landlord Position:

Tenant shall not sublet the Premises, in whole or in part, during the term of this Lease. Tenant shall have neither the right nor the power to assign its interest under this Lease at any time and any such assignment, whether directly or through the operation of law, shall be void.

Balanced Position:

Tenant may sublease all or part of the Premises without Landlord's prior written consent; provided, however, that no such subletting shall in any way relieve Tenant of its obligations under this Lease. [Note, many commercial leases will require reasonable consent by the landlord for subleases]

Notwithstanding the foregoing, Tenant may freely assign its interest under this Lease to a Tenant Affiliate without Landlord's prior written consent, but with prior notice to Landlord. As used herein, "Tenant Affiliate" means an entity that is under common ownership, management or control with Tenant or its parent or any subsidiary or division of either; the term includes any entity that merges, consolidates with, is acquired by Tenant or acquires substantially all of Tenant's assets. [Note, some leases may condition a free right to assign in connection with a merger or consolidation to the resulting tenant entity having a minimum net worth].

Tenant shall not assign its interest under this Lease to any non-Tenant Affiliate without Landlord's prior written consent, which shall not be unreasonably withheld, delayed or conditioned. Any request by Tenant for Landlord's consent to such an assignment shall include: (a) the name, type of organization and the nature of business the proposed assignee or subtenant ("Transferee"); (b) the intended use of the Premises by the Transferee; (c) information related to the experience, reputation and financial ability of the Transferee; and (d) reimbursement for all costs reasonably incurred by Landlord, not to exceed _____ dollars, in evaluating Tenant's request.

Any such assignment shall be deemed approved by Landlord twenty-one days after delivery of the above information to Landlord, unless Landlord notifies Tenant in writing prior to that time that it is withholding consent and giving specific reasons for its decision.

Landlord's consent shall be deemed to be reasonably withheld if Landlord reasonably believes that the Transferee does not have the experience, reputation or financial ability to comply with the requirements of the Lease or if the assignment would violate any exclusive rights of other tenants or any prohibited uses arising under other tenants' leases or the CC&Rs.

Any Tenant Affiliate assignee and any approved non-Tenant Affiliate assignee shall execute and deliver to Landlord an instrument fully assuming all of the obligations and liabilities of Tenant. Consent to one assignment shall not be deemed to be consent to any subsequent assignment. No such assignment shall relieve Tenant of its obligations under this Lease.

F. FIRE AND CASUALTY. Both landlord and tenant have a common interest in having a property promptly rebuilt/repared following a fire or casualty loss. This section should tie in with the insurance requirements of the lease. Traps for a tenant to watch for include giving the landlord's lender the ability to retain insurance proceeds to pay down the loan with no obligation to rebuild (the landlord may not have any ability to prevent its lender from having such a right), ensuring that the landlord maintain adequate coverage on common areas (which the tenant is paying for anyway, in the form of CAM reimbursement), watching the distinction between damage to the leased premises versus damage to the shopping center and checking whether rent and CAMs are abated during the time it cannot operate its business. Landlords should conversely ensure that rents are not abated or that they or their tenants maintain rent abatement insurance to protect their cash flows. They need to be aware of issues (liability, coordination of claims against multiple sources of coverage, impact of subrogation provisions) if, for example, a fire in one tenant's space damages common areas and other tenants' spaces.

Both parties need to be aware of provisions relating to a parties' obligation to rebuild if insurance proceeds are insufficient, tying the obligation to rebuild to the actual receipt of such proceeds, giving the parties the right to terminate the lease following a loss, or excusing the obligation to rebuild (usually coupled with the right to terminate) near the end of the lease term or an option period. Timing of a rebuild needs to be taken into account: the time it takes to hire an architect and general contractor, prepare new plans and specifications, obtain demolition and building permits, and reconstruct the building or damaged portion thereof when weather will not permit such activities. Although each party wants the premises to be re-opened as quickly as possible, landlord's usually want it quicker.

Landlord's lender will want the landlord never to have an obligation to repair or restore without the consent of the lender and will want the landlord never to have an obligation to repair or restore if there are inadequate insurance proceeds. However, if the insurance proceeds are inadequate because the landlord did not maintain adequate types and amounts (through negligence or in breach of the lease requirements) and tenant was paying for insurance coverage through CAM payments, tenant should have the right to require the landlord to rebuild or restore.

Extreme Tenant Position:

If all or any part of the Premises or Shopping Center is damaged or destroyed by fire or other casualty (even if due to the negligence or intentional acts or omissions of Tenant), Landlord shall within thirty (30) days, commence and diligently complete restoration of the improvements to the condition existing prior to the event and satisfactory for use by Tenant. In the event Landlord fails to comply with the foregoing, Tenant may either give notice of immediate termination of this Lease or Tenant may restore said improvements and shall have a lien against the Shopping Center and the proceeds of any insurance available to Landlord for all sums expended, including an administrative charge of fifteen percent (15%) and interest on the unpaid balance at the lower of twelve percent (12%) per annum or the highest rate permitted by law. Notwithstanding any contrary provision of this Lease, if Tenant continues in possession of the Premises, Tenant may offset restoration costs against future rent payments until fully reimbursed. All Rent and other sums due under the Lease shall abate during such time as the Premises or access thereto or other common area facilities are unfit for use by Tenant.

Extreme Landlord Position:

Landlord shall repair any damage or destruction of the Premises caused by fire or other casualty upon receipt of insurance proceeds, unless Landlord elects to terminate the Lease as provided below. Landlord may terminate this Lease following a casualty if: (a) Landlord determines in its sole and absolute discretion that insurance proceeds will not be sufficient to fully repair the damage; (b) Landlord determines that the Premises cannot, with reasonable diligence, be fully or safely repaired within 6 months from the date of loss; (c) the Premises are damaged or destroyed within the last 36 months of the Lease term; (d) Tenant is in default of this Lease at the time of the loss; or (e) the cost to repair could exceed ten percent (10%) of the replacement cost of the Shopping Center/office building. If Landlord elects to terminate this Lease, Landlord will give Tenant written notice of this election, and the Lease will terminate 30 days later. No such termination by Landlord shall be deemed a waiver of any of Landlord's rights against Tenant under the Lease. Tenant waives any statutory or other rights of termination by reason of fire or other casualty, it being the intention of the parties to provide specifically and exclusively in this Article for the rights of the parties with respect to termination of this Lease as a result of a casualty.

If Landlord does not terminate the Lease, Landlord will commence removal of any part of the Premises damaged by such casualty, obtain all necessary permits and approvals, and upon receipt thereof, diligently pursue the repair through completion. Landlord's repair obligation shall be limited to repair of the Premises and not personal property or trade fixtures of Tenant. Rent and other sums due under this Lease shall not abate during the period of repair. Tenant shall not be entitled to any compensation or damages from Landlord for the loss of or interference with Tenant's personal property or improvements resulting from such loss or the repair thereof, including without limitation consequential damages, opportunity costs or lost profits.

Balanced Position:

Landlord shall promptly and diligently repair or reconstruct the Premises (but excluding Tenant's personal property) in the event of damage or destruction by fire or other casualty, and the proceeds from insurance attributable to the Premises by Landlord or Tenant shall be applied by Landlord for said repair or reconstruction; provided, however, that if such damage occurs during the last two years of the Term, either Landlord or Tenant may, within thirty days following the date such damage occurs, terminate this Lease by written notice to the other party. Notwithstanding the foregoing, if Tenant has an unexercised option to extend the term of this Lease, and exercises such option within thirty days following receipt of notice of termination from Landlord, the Lease shall not terminate. Landlord, promptly after settlement of insurance claims (as to insured losses) and issuance of any necessary permits, shall commence the repair and of the Premises as herein provided. Provided that Landlord complies with its obligations hereunder, Tenant waives any right to terminate the Lease granted by law.

If this Lease is terminated as provided above, Tenant shall surrender possession of the Premises within 60 days after notice of termination is duly given, and all obligations of either party hereunder shall terminate as of the date of such termination.

Rent (but not other sums due hereunder) shall abate during the repair and reconstruction period; provided, however, that, if Tenant continues the operation of its business following such damage or destruction or reopens prior to Landlord's completion of work, Rent shall be equitably abated for such period, based on the nature and degree of the interference with Tenant's business resulting therefrom.

G. OBLIGATION TO REPAIR – WHO IS RESPONSIBLE? Most retail and office leases provide that the tenant will be responsible for repairs and maintenance of the interior of the premises. In retail leases, the tenant is also typically responsible for the storefront and storefront glass. In industrial leases and with “big box” tenants, the maintenance and repair obligations may extend to the repair and replacement of utilities, HVAC and exterior surfaces. To the extent the landlord controls the building where the premises are situated, the landlord typically takes the responsibility for maintaining the exterior portions of the building and the common areas. Keep in mind that landlords also typically pass along some or all of these costs to the tenants in the form of CAMs and further that in most net and triple net leases the landlord is reimbursed for its replacements/repairs of non-capital items. Both landlord and tenant will want to have the right (but not the obligation) to take over the work that the other party is obligated to do, with a right of set-off in the event such party is not properly reimburse for such efforts.

The parties need also to negotiate rights of entry to perform any necessary work by landlord.

Extreme Tenant Position:

Landlord shall maintain and repair at its sole expense and in as good condition as of the commencement date of this Lease: (a) all interior and exterior structural and non-structural portions of the Premises (including plate glass); (b) sidewalks, driveways, landscaping and other common areas related thereto; (c) all utility lines inside or outside of the Premises; and (d) all mechanical, electrical and plumbing systems serving the Premises. Landlord shall paint the interior and exterior walls of the Premises as requested by Tenant.

Extreme Landlord Position:

Tenant shall maintain and repair at its sole expense and in as good condition as of the commencement date of this Lease: (a) all interior and exterior structural and non-structural portions of the Premises (including plate glass); (b) sidewalks, driveways, landscaping and other common areas within one hundred feet of the Premises; (c) all utility lines inside or outside of and serving the Premises; and (d) all mechanical, electrical and plumbing systems serving the Premises. Tenant shall paint the interior and exterior walls of the Premises on an annual basis. Tenant shall obtain and keep in effect a regularly scheduled preventative maintenance service contract for all HVAC and water heating equipment with a qualified contractor selected by Landlord. Tenant shall also make such repairs and alterations necessary to comply with the requirements of any governmental authority having jurisdiction, even if such repairs or alterations are of a capital nature.

Balanced Position:

Tenant shall maintain the Premises and the improvements thereon (including all doors, plate glass, and HVAC [Note, if tenant is required to replace it then arguably tenant should be reimbursed for the remaining unamortized cost therefor at the end of the lease term], electrical and plumbing systems serving and located within the Premises), in good condition and repair. If Tenant does not comply with its obligations under this Article after appropriate notice and cure period, Landlord may, but need not, make such repairs and replacements, and Tenant shall pay Landlord the cost thereof on or prior to ten (10) days after written demand therefor, together with reasonable evidence of the costs incurred.

Landlord shall maintain the Shopping Center and all Common Areas in good condition and repair in accordance with standards then prevailing for shopping centers [office buildings] of similar age, construction and character. Landlord shall maintain and repair all structural portions of the Premises [building], including the roof, foundation, and walls and any common utility facilities in the Common Areas. Landlord shall not be liable or responsible for breakdowns or temporary interruptions in access or utilities nor for interference with Tenant's business or Tenant's access to the Premises during the course of repairs or maintenance; provided Landlord used reasonable efforts not to unreasonably interfere with the operation of Tenant's operation in the premises.

H. SET-OFF RIGHTS. A set-off clause, frequently referred to as the “hell and high water” clause, is included in most commercial leases as a protection for landlords' cash flow. This type of clause will provide that a tenant is not entitled to reduce rental payable under the lease by deductions, offsets or other claims against the landlord. In situations when the landlord becomes obligated to pay the tenant (e.g. unpaid tenant improvement allowance, tenant performing landlord's restoration obligations), the logical answer from the tenant's perspective is to offset the debt against rent coming due. If the landlord has financing on the premises, it may need the entire rent check to service the debt. Unfortunately, the tenant may then be left with the possibility of filing suit to collect from the landlord while still writing a full rent check each month. The parties may be able to negotiate certain circumstances when set-off is allowed.

Extreme Tenant Position:

Eliminate all references which prohibit set-off or deduction.

Extreme Landlord Position:

Specifically include references – for example:

- ...Rent shall be paid without demand, set-off or deduction...
- Tenant's sole remedy in the event Landlord does not timely remit all sums due to Tenant shall be to file an action for damages. Tenant shall not be permitted to deduct or offset the sums due against the payment of Rent or other sums due by Tenant under this Lease.

Balanced Position:

Notwithstanding any provision of this Lease to the contrary, if Landlord does not remit all sums due to Tenant within thirty (30) days of receipt of a statement therefor with backup invoices attached, Tenant may offset up to ___ percent of the Base Rent due each month thereafter until Tenant is reimbursed in full.

OR

Notwithstanding any provision of this Lease to the contrary, all rent shall be due and payable on the first day of each month without setoff, deduction or other claims, except as expressly provided herein. [Note, obviously, the tenant will need to negotiated specific provisions (e.g., offsets related to tenant self-help right of offsets for Landlord's failure to pay tenant allowances in a timely fashion)].

I. IMPROVEMENTS – REMOVAL VS. LANDLORD'S PROPERTY. An issue can arise in lease transactions over the ownership of improvements placed in the premises by tenant during the lease term. While most personal property is generally not a concern – desks, shelves and file cabinets can be easily removed – trade fixtures and semi-permanent installations can pose a problem. The tenant will want the option to remove such improvements as it sees fit, and retain the right to abandon those that are not worth the expense. The landlord wants to avoid the cost of removing the tenant's “junk” at the end of the lease term and wants to retain improvements that may be valuable to future tenants.

Extreme Tenant Position:

All trade fixtures, equipment, and personal property (“Personalty”) installed by Tenant in the Premises shall remain the property of Tenant throughout the Term and any Renewal Terms. Tenant shall have the right to remove its Personalty at any time prior to or within 30 days after the expiration or earlier termination of this Lease. Any Personalty remaining more than 30 days after the expiration or earlier termination of the Lease shall be deemed abandoned to Landlord, without warranty of any kind from Tenant.

Extreme Landlord Position:

All permitted Tenant improvements and alterations are deemed part of the realty and belong to Landlord. As a condition of Landlord's consent to any Tenant improvements or Tenant alterations, Landlord reserves the right, at any time to: (a) require Tenant to pay an amount determined by Landlord to cover the costs of removing or demolishing part or all of such improvements or alterations and the cost of returning the Premises to the condition existing before such work commenced; or (b) elect to make Tenant the owner of all or any specified part and, upon termination of this Lease, require Lessee to remove same at its sole cost and expense. The provisions of this Paragraph shall survive the termination of this Lease.

Balanced Position:

Upon the expiration or earlier termination of this Lease, Tenant shall surrender the Premises in a clean, undamaged condition and shall remove all of Tenant's trade fixtures, equipment, and personal property and repair all damage caused by the removal. Tenant shall not remove permanent improvements that were provided by Landlord at the commencement of this

mutually beneficial relationship. Lease negotiations do not need to be adversarial. Even the most difficult negotiations, when conducted with professionalism and respect, can help facilitate, rather than impede, beneficial future landlord/tenant relationships. The parties will be interlocked for years to come and it is likely that a bad beginning will not improve with age.