

# The Dance of Negotiation: What You Really Care About; What You Trade; Balance of Power Issues

Alan Aronson of Aronson Light LLP

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I. THE OFFICE LEASE

A. Possession

1. Business Manager

Tenant: Business Manager

Premises: 2,000 square feet

Building: 75,000 square feet, mid-rise, edge of Beverly Hills, 90% leased

Tenant leaves a large business management firm in order to start his own firm. He intended to find office space before resigning, but the firm fired him when they learned of his plans. His clients are prominent celebrities and expect him to have upscale office space in Beverly Hills. He locates the building and tells the Landlord that he must have 2,000 square feet, and arranges for temporary space in the building while his permanent space is built. His most important issue is getting into the permanent space as soon as possible. Here is what the lease provides:

Delivery of Possession. Landlord shall deliver to Tenant possession of the Premises, in its “as is, where is” condition with the Tenant Improvements Substantially Completed, in accordance with the terms of Exhibit “C”. The anticipated date of delivery is February 1, 2008. Landlord shall not be liable for any delay in delivery of possession of the Premises.

Business Manager, looking for a remedy that will give Landlord incentive to deliver the permanent space on time, proposes this revision:

Delivery of Possession. Landlord shall deliver to Tenant possession of the Premises, in its “as is, where is” condition with the Tenant Improvements Substantially Completed, in accordance with the terms of Exhibit “C”, -on or before December 1, 2007. If delivery does not occur by December 1, 2007, then effective on such date Monthly Rent for the Temporary Space (as defined in the Addendum) shall be reduced by 50% of the amount otherwise payable. If delivery does not occur by February 1, 2008, then effective on such date Monthly Rent for the Temporary Space shall be fully abated until delivery occurs. If delivery does not occur by June 1, 2008, then Tenant may terminate this Lease upon written notice to Landlord given at any time thereafter but prior to delivery. Except for such abatement and termination rights, Landlord shall not be liable for any delay in delivery of possession of the Premises.

Landlord responds with the following revised section:

Delivery of Possession. Landlord shall deliver to Tenant possession of the Premises, in its “as is, where is” condition with the Tenant Improvements Substantially Completed, in accordance with the terms of Exhibit “C”. The anticipated date of delivery is February 1, 2008. Landlord shall not be liable for any delay in delivery of possession of the Premises. Notwithstanding the

foregoing, if Landlord is unable to deliver the Premises to Tenant within one (1) year of the anticipated date of delivery, either party shall have the right to terminate this Lease upon prior written notice to the other.

Tenant, having no leverage, accepts the language. Was Tenant better off with the original language?

B. Relocation

1. Business Manager

Business Manager is told that the lease allows for relocation of the premises. Business Manager says his only concern is keeping his view of an adjacent golf course. The underlined revision satisfies everyone.

Relocation of Premises. Landlord shall have the right at any time, upon at least sixty (60) days' prior written notice to Tenant, to relocate Tenant at Landlord's cost to other comparable premises in the Project, provided that such space has comparable views and improvements to the Premises ("Relocated Premises").

Everyone except Tenant's attorney, who knows this language may prove inadequate if relocation actually occurs. See what a different Tenant negotiates:

2. Law Firm

Tenant: Law Firm

Premises: 15,000 square feet

Building: 775,000 square feet, new 40-story tower, Downtown Los Angeles,  
80% leased

The Story:

One of the city's high-profile law firms has decided to relocate. They have 2 years remaining on their lease, and are looking at several buildings. They like this building, but they are very much opposed to a relocation clause due to the disruption it will cause. They cannot commit to lease a full floor, so Landlord insists on the relocation clause. Here is what the Landlord offers in a proposed lease:

22. SUBSTITUTION OF OTHER PREMISES

Landlord shall have the right, on thirty (30) days' prior notice, to relocate Tenant to another space in the Building comparable to the Premises, and all terms hereof shall apply to the new space with equal force. In such event, Landlord shall give Tenant prior notice of Landlord's election to so relocate Tenant, and shall move Tenant's effects to the new space at Landlord's sole cost and expense at such time and in such manner as to inconvenience Tenant as little as reasonably practicable. Should Tenant refuse to permit Landlord

to move Tenant to such new space, Landlord shall have the right to cancel and terminate this Lease effective sixty (60) days from the date of Landlord's election to relocate Tenant.

After some back and forth, the following is agreed upon:

22. SUBSTITUTION OF OTHER PREMISES.

22.1 Relocation. In the event Landlord enters into a lease with a third party tenant that will occupy the entire floor of the Building on which the Premises is then located, Landlord shall have the right, on ninety (90) days' prior notice, to relocate Tenant (the "Relocation") to another space in the Building on the terms set forth in this Section 22. Landlord must exercise such relocation right on or before \_\_\_\_\_. If Landlord fails to exercise such Relocation right on or before \_\_\_\_\_, such right shall lapse and be without further force or effect. The space to which Tenant may be relocated shall hereafter be referred to as the "Relocation Premises." Except as set forth herein to the contrary, all terms hereof shall apply to the Relocation Premises with equal force, provided that Tenant shall not be required to pay Base Rent for six (6) months commencing with the first (1<sup>st</sup>) day of the month following the Relocation.

22.2 Relocation Premises. The Relocation Premises, if any, shall (i) be located on a floor of the Building above the Premises, (ii) contain at least as much rentable area and comparable window lineal footage, window frontage and comparable directional views as the then Premises, (iii) contain substantially comparable (in terms of quality and configuration) tenant improvements and entry, (iv) be based on a floor plan comparable to Tenant's Final Space Plan, and (v) be leased to Tenant on the same terms and conditions of this Lease (including the then-current amount of Base Rent (except for the six (6) months free of Base Rent described above), which terms shall remain unchanged even if the Relocation Premises contains more rentable square feet than the Premises it replaces).

22.3 Costs and Expenses of Relocation. If Landlord elects to relocate Tenant, Landlord shall (a) prior to delivery of the Relocation Premises to Tenant, renovate the Relocation Premises including Tenant's entry and all tenant improvements (including but not limited to offices, workstations, walls, reception area and fixtures) in a substantially comparable manner to Tenant's Final Space Plan for the Premises, and (b) move Tenant's furniture, equipment, files, artwork, and effects to the Relocation Premises, at Landlord's sole cost and expense, and at such time and in such manner as to inconvenience Tenant as little as reasonably practicable. If Landlord relocates Tenant to the Relocation Premises, Landlord shall also pay directly all costs and expenses (or, at the election of Tenant, reimburse Tenant) for Tenant's actual costs and expenses incurred in connection with such Relocation including, but not limited to (i) moving, third party moving coordinator, telephone, computer and cabling relocation expenses (and the parties hereto agree that Tenant's move from the Premises to the Relocation Premises shall occur over a single weekend of Tenant's choice of three (3) specified Landlord-approved weekends), (ii) new stationary, business cards,

moving announcements and website update costs, (iii) \$\_\_\_\_\_ per hour for each hour (or portion thereof) spent by the individual partners of Tenant in preparing for and executing the Relocation, up to a maximum of \$\_\_\_\_\_, and (iv) other reasonable costs incurred in connection with such relocation.

22.4 Termination Right. In the event Landlord desires to provide Relocation Premises which do not satisfy the provisions hereof, Tenant may either (i) reject the proposed Relocation, in which event this Lease shall remain in full force and effect as to the Premises, or (ii) Tenant shall have the right to cancel and terminate this Lease effective two hundred seventy (270) days from the date of Landlord's election to relocate Tenant. In the event of such termination by Tenant, all Base Rent and other charges under this Lease shall be abated from the date of Tenant's election until the earlier of Tenant's vacation of the Premises or two hundred seventy (270) days from such election.

## C. Parking

### 1. Business Manager

Business Manager is starting out with only one employee, but expects to grow over time. He does not want to have to lease all 5 spaces to which he is entitled, but he wants to be certain that the spaces remain available throughout the term. Tenant proposes the following revision to the lease:

Parking. Tenant shall have the right, but not the obligation, to rent up to five (5) unreserved parking stalls in the Building's parking facility (the "Parking Facility") at the then prevailing Project rates applicable to the Parking Facility upon Tenant's compliance with all parking rules and regulations and upon payment of prevailing parking rates as in effect from time to time. Tenant's parking rights and privileges ~~are personal, and~~ may not be assigned or transferred separate from the Lease without Landlord's prior written consent, which consent Landlord may withhold in its reasonable discretion. Presently, the prevailing rates are \$\_\_\_\_\_ per unreserved stall per month in the Parking Facility. There shall be no free visitor parking.

Landlord is agreeable, but with a twelve-month limit. The Building's location is off the beaten path, so there is no demand for public parking and Landlord counts on selling parking to the tenants to meet expenses.

Parking. Tenant shall have the right to rent up to five (5) unreserved parking stalls in the Building's parking facility (the "Parking Facility") at the then prevailing Project rates applicable to the Parking Facility upon Tenant's compliance with all parking rules and regulations and upon payment of prevailing parking rates as in effect from time to time. Tenant's parking rights and privileges are personal, and may not be assigned or transferred without Landlord's prior written consent, which consent Landlord may

withhold in its reasonable discretion. Presently, the prevailing rates are \$ \_\_\_\_\_ per unreserved stall per month in the Parking Facility. There shall be no free visitor parking. If Tenant has not rented the total number of allotted parking stalls on or before the twelfth (12<sup>th</sup>) month of the Term, or if at any time Tenant elects to give up the right to use any of the allotted parking stalls, Tenant shall have no ongoing right to rent such stalls and Landlord shall not be obligated to provide any additional parking stalls except and to the extent then available on a month-to-month basis.

2. Law Firm

Law Firm won't agree to must-take parking either, but it is not an issue for Landlord. Landlord knows that all of the firm's attorneys and staff will need parking, and also knows that the demand for public parking in downtown L.A. will keep the Building garage full.

Tenant Parking Passes. Tenant shall have the right, but not the obligation, to rent from Landlord, commencing on the Lease Commencement Date, up to the amount of parking passes set forth in Section 9 of the Summary, on a monthly basis throughout the Lease Term, which parking passes shall pertain to the Project parking facility. Tenant shall pay to Landlord for automobile parking passes on a monthly basis the prevailing rate charged from time to time at the location of such parking passes. In addition, Tenant shall be responsible for the full amount of any taxes imposed by any governmental authority in connection with the renting of such parking passes by Tenant or the use of the parking facility by Tenant. Tenant's continued right to use the parking passes is conditioned upon Tenant abiding by all rules and regulations which are prescribed from time to time for the orderly operation and use of the parking facility where the parking passes are located, including any sticker or other identification system established by Landlord, Tenant's cooperation in seeing that Tenant's employees and visitors also comply with such rules and regulations.

D. Operating Costs

1. Business Manager

Business Manager's lease arrives with no exclusions to Operating Expenses, and an "including but not limited to" definition of the same. Landlord offers the following:

Operating Costs. Notwithstanding anything to the contrary contained in the Lease, Operating Costs shall not include the following, except to the extent specifically permitted by a specific exception to the following:

- (i) Any ground lease rental;
- (ii) Costs of items considered capital repairs, replacements, improvements and equipment under generally accepted accounting principles consistently

applied ("Capital Items"), except for the Permitted Capital Items (as defined in Section 23(i);

(iii) Costs incurred by Landlord, to the extent that Landlord is reimbursed by insurance or condemnation proceeds;

(iv) Costs, including permit, license and inspection costs, incurred with respect to the installation of tenant or other occupants' improvements in the Building or incurred in renovating or otherwise improving, decorating, painting or redecorating vacant space for tenants or other occupants of the Building;

(v) Marketing costs including, without limitation, leasing commissions, attorneys' fees in connection with the negotiation and preparation of letters, deal memos, letters of intent, leases, subleases and/or assignments, space planning costs, and other costs and expenses incurred in connection with lease, sublease and/or assignment negotiations and transactions with present or prospective tenants or other occupants of the Project; or

(vi) Expenses in connection with services or other benefits which are not offered to Tenant or for which Tenant is charged for directly, but which are provided to another tenant or occupant of the Project.

## 2. Law Firm

Law Firm advises Landlord that it expects to receive the complete list of exclusions from operating expenses offered to other large tenants in downtown Los Angeles. Landlord offers the following:

### Operating Expense Exclusions

- (a) Any ground lease rental;
- (b) Capital expenditures required by Landlord's failure to comply with laws enacted on or before the Commencement Date;
- (c) Costs for capital improvements made to reduce Operating Expenses where the present value of the projected costs of the improvements (including original purchase cost, installation and subsequent repairs and replacements) exceed the present value of the amount reasonably anticipated to be saved as the result of such capital improvements;
- (d) Costs incurred by Landlord for the repair of damage to the Building, to the extent that Landlord is reimbursed by insurance proceeds;
- (e) Costs, including permit, license and inspection costs, incurred with respect to the installation of tenant improvements made for new tenants in the Building or incurred in renovating or otherwise improving, decorating, painting or redecorating vacant space for tenants or other occupants of the Building;
- (f) Depreciation, amortization and interest payments, except as provided herein and except on materials, tools, supplies and vendor-type equipment purchased by Landlord to enable Landlord to supply services Landlord might otherwise contract for with a third party where such depreciation,

- amortization, and interest payments would otherwise have been included in the charge for such third party's services, all as determined in accordance with generally accepted accounting principles, consistently applied;
- (g) Leasing commission, attorneys' fees, space planning costs, and other costs and expenses incurred in connection with negotiations or disputes with present or prospective tenants or other occupants of the Building;
  - (h) Costs incurred by Landlord for alterations which are considered capital improvements and replacements under generally accepted accounting principles, consistently applied, except as permitted in (b) and (c) above;
  - (i) Costs of a capital nature, including, without limitation, capital improvements, capital repairs, capital equipment and capital tools, all as determined in accordance with generally accepted accounting principles, consistently applied, except as permitted in (b) and (c) above;
  - (j) Expenses in connection with services or other benefits which are not received, either directly or indirectly, by Tenant or for which Tenant is charged for directly but which are provided to another tenant or occupant of the Building;
  - (k) Costs incurred by Landlord due to the violation by Landlord or any tenants of the terms and conditions of any lease of space in the Building;
  - (l) Overhead and profit increment paid to Landlord or to subsidiaries or affiliates of Landlord for goods and/or services in the Building to the extent the same exceeds the costs of such goods and/or services rendered by unaffiliated third parties on a competitive basis;
  - (m) Interest, principal, points and fees on debts or amortization on any mortgage or mortgages or any other debt instrument encumbering the Building;
  - (n) Landlord's general corporate overhead and general and administrative expenses not directly attributable to operation of the Building;
  - (o) Any compensation paid to clerks, attendants or other persons in commercial concessions operated by Landlord or in the parking garage of the Building;
  - (p) Except for making repairs or keeping permanent systems in operation while repairs are being made, rentals and other related expenses incurred in leasing air-conditioning systems, elevators or other equipment ordinarily considered to be of a capital nature, except equipment not affixed to the Building which is used in providing janitorial or similar services;
  - (q) All items and services for which Tenant or any other tenants in the Building reimburses Landlord or which Landlord provides selectively to one or more tenants without reimbursement.
  - (r) Advertising and promotional expenditures, and costs of signs in or on the Building identifying the owner of the Building;
  - (s) Electric power costs for which any tenant directly contracts with the local public service company;
  - (t) Services provided and costs incurred in connection with the operation of the retail, restaurant, and garage operations in the Building;
  - (u) Costs incurred in connection with upgrading the Building to comply with handicap, life, fire and safety codes in effect prior to the Commencement Date;
  - (v) Any other expenses which, in accordance with generally accepted accounting principles, consistently applied, would not normally be treated as

Operating Expenses by landlords of comparable office buildings in the metropolitan area in which the Building is located;

- (w) Costs for which Lessor has been compensated by a management fee;
- (x) Costs arising from Lessor's negligence including, without limitation, the selection of building materials;
- (y) Costs arising from the presence of asbestos, asbestos containing materials and other hazardous materials and substances on or about the Building before the Commencement Date including, without limitation, hazardous materials or substances in the ground water or soil;
- (z) Costs arising from Lessor's charitable or political contributions;
- (aa) Costs arising from earthquake insurance; and
- (bb) Costs arising from repairs to latent defects in the base, shell or core of the Building.

## II. THE RETAIL/RESTAURANT LEASE

### A. Assignment and Subletting

Three tenants are negotiating for space in a new lifestyle center. They are a 30,000 square foot electronics store, a 6,000 square foot sit-down restaurant, and a 3,000 square foot Mexican food restaurant with drive-thru service. All are national chain stores.

Restaurants and retailers are very concerned about exit strategies, and want the right to get out of their leases if business is bad, a better space becomes available in a newer center nearby, or they want to exit the market altogether. Accordingly, assignment and subleasing clauses are heavily negotiated. Regional and national developers strive to keep chain stores happy so they will agree to lease space in developers' other projects. Balances of power shift at various times during lease negotiation. Here are the clauses each tenant respectively approved:

#### 1. Electronics Retailer

Tenant may, without Landlord's consent, assign this Lease, or sublet (or enter into concession or license agreements with respect to) the whole or any part of the demised premises, to (i) any assignee, sublessee, concessionaire or licensee (collectively a "transferee") that has an audited net worth equal to or greater than One Hundred Million Dollars (\$100,000,000) and operates at least twenty-five (25) other retail stores, or (ii) any transferee that is (A) a parent or subsidiary entity of Tenant, (B) a successor to Tenant by merger, consolidation or other business combination, or (C) a purchaser of all or substantially all of the capital stock or assets of Tenant. Tenant may assign this Lease, or sublet (or enter into concession or license agreements with respect to) the whole or any part of the demised premises to a transferee that is not described in clauses (i) or (ii) of the immediately foregoing sentence only upon Landlord's consent, which consent shall not be unreasonably withheld, conditioned or delayed, and which consent shall be deemed to have been given if Landlord fails to respond in writing to Tenant's request for consent to such transaction within thirty (30) days following delivery of

Tenant's request for consent accompanied by (x) current financial statements of the proposed transferee (which statements need not be audited unless the proposed transferee regularly prepares audited financial statements), (y) a description of the business to be operated in the demised premises by the proposed transferee, and (z) a description of the prior business operating experience of the proposed transferee. If Tenant assigns its interest in this Lease, then Tenant shall remain liable and responsible for Tenant's obligations under this Lease.

2. The Drive-Thru and Sit-Down Restaurant

The Assignment and subletting provisions in the Drive-Thru lease and the Sit-Down Lease are relatively similar. The differences are noted below in bold with brackets.

§16.01. Lessee shall not Transfer this Lease or Lessee's interest in and to the Pad, or any part thereof (or advertise that the Pad or this Lease are available for Transfer), without first procuring the written consent of Lessor, which consent shall not be unreasonably withheld or delayed. Lessor shall grant or deny its consent within twenty (20) days after request, failing which Lessee may submit a second request. If Lessor fails to grant or deny its consent within five (5) days after receipt of the second request, such Transfer shall be deemed disapproved. In determining whether to consent to a proposed Transfer, it shall be reasonable for Lessor to withhold its consent if, among other reasons, (a) the proposed Transferee shall not be of sound financial net worth or shall not have sufficient liquid capital to properly operate its business; or (b) if the financial capacity of the proposed Transferee is less than that of the Lessee as of the time of the proposed Transfer; or (c) [the business to be conducted at the Demised Premises by the proposed Transferee will not result in the same level of customer traffic as generated by Lessee - DELETED FROM SIT-DOWN LEASE;] or (d) the business skills, experience or reputation of the proposed Transferee are insufficient to insure Lessor of a successful business operation at the Demised Premises; or (e) the proposed Transferee is a lessee of the Shopping Center or a prospective lessee with whom Lessor has had discussions pertaining to the Shopping Center during the period of six (6) months prior to the date of the proposed Transfer; or (f) if the intended use of the Demised Premises by the proposed Transferee (i) shall violate the provisions of Article 12 (use clause) or any laws or rights granted to other lessees, occupants or parcel owners of the Shopping Center or shall violate rights retained by Lessor; or (ii) shall not conform with Lessor's desired "tenant mix" for the Shopping Center; or (iii) shall not be in keeping with the quality and character of the Shopping Center or shall constitute a nuisance; or (iv) shall result in an increase in the Common Area Expenses; or (v) shall unduly burden the parking areas of the Shopping Center; or (g) at the time of the proposed Transfer or upon the effective date of the proposed Transfer, there shall be in existence an Event of Default or an event shall have occurred or state of facts exist which, with the giving of notice or the passage of time, or both, would constitute an Event of Default; or (h) [Lessor has available vacant space within the Shopping Center - DELETED FROM SIT-DOWN LEASE;] or (i) in the exercise of Lessor's reasonable business

judgment, the proposed Transferee is otherwise unacceptable; or (j) Lessor's lender does not consent to such Transfer, to the extent such consent may be required by the terms of Lessor's financings; or (k) the Transferee does not intend to itself occupy and conduct business in the Shopping Center from the Demised Premises. Lessee shall submit such reasonable information as Lessor may request in connection with Lessee's request for consent to a Transfer, including financial statements in order to evaluate the solvency, financial responsibility and the business acumen and experience of the proposed Transferee. [THE FOLLOWING DOES NOT APPEAR IN THE SIT-DOWN LEASE: In addition, Lessor and Lessee acknowledge and agree that in executing this Lease, Lessor is relying upon the agreement by Lessee to open for business at the Demised Premises for the Permitted Use of the Demised Premises under the Trade Name in accordance with the provisions of §12.01 above. Accordingly, prior to the Rent Commencement Date, except for a Permitted Transfer (as defined in §16.04), Lessee shall not (and shall not have the right to) Transfer the Demised Premises, this Lease or any interest therein.] In no event may Lessee assign this Lease or sublet the Demised Premises, directly or indirectly by operation of law or otherwise, to a Prohibited User (as defined in the Development Agreement). Attached to this Lease as Exhibit "K" is a Schedule of Prohibited Users. Any attempted or purported Transfer, without the written consent of Lessor shall constitute an Event of Default and shall be void and shall confer no rights upon any third Person.

§16.02 Each Transfer to which there has been consent shall be by an instrument in a form satisfactory to Lessor, and shall be executed by Lessee and the Transferee in each instance, as the case may be. Each such Transferee shall agree in writing for the benefit of Lessor to assume, to be bound by, and to perform the terms, covenants and conditions of this Lease to be done, kept and performed by Lessee, including the payment of all amounts due or to become due under this Lease. An executed copy of such instrument shall be delivered to Lessor. No Transfer shall relieve Lessee from its covenants and obligations under this Lease. A failure to first obtain in writing Lessor's consent where required pursuant to the provisions of this Article 16, or a failure to comply with the provisions of this Article 16; shall render any such Transfer voidable at the sole option of Lessor and shall constitute an Event of Default.

§16.03. In the event Lessee shall Transfer its interest in this Lease or the Pad, or any part thereof, then the Minimum Rent specified in Article 1 shall be increased, effective as of the date of such Transfer to one-half (1/2) of the excess of the rentals and other consideration payable by any such Transferee pursuant to such Transfer over the Minimum Rent otherwise payable under this Lease following recovery by Lessee of any brokerage commissions paid by Lessee in connection with such Transfer. In no event shall the Minimum Rent, after such assignment or subletting, be less than the Minimum Rent specified in Article 1. The provisions of this §16.03 shall not apply to a Permitted Transfer. THIS SECTION 16.03 DOES NOT APPEAR IN THE SIT-DOWN LEASE.

§16.04. If Lessee is a corporation, unincorporated association, limited liability company or a partnership, the Transfer of forty nine percent (49%) or more of any stock or other ownership interest in such corporation, association, limited liability company or partnership shall be deemed a Transfer within the meaning of and subject to the provisions of this Article 16. Notwithstanding the provisions of **§16.01**, if Lessee is a corporation whose stock is regularly traded on a national stock exchange, or is regularly traded in the over-the-counter market and quoted on Nasdaq, the Transfer of stock, regardless of quantity, shall not constitute an assignment for the purposes of this Lease. Notwithstanding the provisions of **§16.01**, Lessor hereby acknowledges and consents to Lessee's right, without further approval from Lessor but only after written notice to Lessor, to sublease the Demised Premises or assign its interest in this Lease (i) to a Person that directly, or indirectly through one or more intermediaries, Controls, is Controlled by or is under Common control with Lessee; (ii) in the event of the merger or consolidation of Lessee with another Person; (iii) in the event of a sale or transfer of all or substantially all of the stock of Lessee or all or substantially all of Lessee's assets; (iv) to any operator, franchisor, franchisee or licensee of Lessee; (v) to a Person that acquires all or substantially all of Lessee's freestanding stores in Arizona, provided that immediately following the events enumerated in clauses (i) to (v) above, the tangible net worth of Lessee, calculated in accordance with generally accepted accounting principles, consistently applied, and the credit standing of Lessee is not less than the tangible net worth, calculated in accordance with generally accepted accounting principles, consistently applied, and credit standing of Lessee immediately prior to the events described in clauses (i) through (v) above (collectively, the "Permitted Transfers"). In addition, Lessor acknowledges that the Transfer of stock among the current stockholders of Lessee, a Transfer of stock among the current stockholders of Lessee and their immediate families (i.e., spouses, parents, brothers, sisters, children, grandchildren or any spouse of any such parent, brother, sister, child or grandchild), a Transfer of stock by will or devise, or a Transfer of stock to any employee, officer or director of Lessee shall not constitute a Transfer requiring Lessor's approval and shall be considered a Permitted Transfer. No Permitted Transfer shall relieve Lessee of liability under this Lease and Lessee shall remain liable to Lessor for the payment of all Minimum Rent, Impositions, Common Area Expenses and additional rent and the performance of all covenants and conditions of this Lease applicable to Lessee. With the exception of **§16.02**, the provisions of this Article 16 shall not be applicable to a Permitted Transfer.

§16.05. If Lessee proposes to assign Lessee's interest in this Lease, Lessor may, at Lessor's option, upon notice to Lessee within thirty (30) days after Lessor's receipt of Lessee's request for consent, elect to recapture the Pad, and within sixty (60) days after notice of such election has been given to Lessee, this Lease shall terminate, unless Lessee shall, within fifteen (15) days after delivery of the Assignment Recapture Notice to Lessee, deliver to Lessor written notice withdrawing its request for consent to assign this Lease. If Lessee proposes to sublet all or any part of the Pad, Lessor may, at Lessor's option, upon notice to Lessee (the "Sublease Recapture Notice") within thirty (30) days after Lessor's receipt of Lessee's request for consent,

elect to recapture such portion of the Pad as Lessee proposes to sublet, and within sixty (60) days after notice of such election has been given to Lessee, this Lease shall terminate as to the portion of the Pad recaptured, unless within fifteen (15) days after delivery to Lessee of the Sublease Recapture Notice, Lessee delivers to Lessor written notice withdrawing its request for consent to the proposed sublease of all or any portion of the Pad. If only a portion of the Pad is recaptured, the Minimum Rent payable under this Lease shall be proportionately reduced. If all or a portion of the Pad is recaptured by Lessor pursuant to this §16.05, Lessee shall promptly execute a termination agreement for the purpose of setting forth the termination date with respect to the Pad or the recaptured portion thereof, and prorating the Minimum Rent and other charges to such date. If Lessor does not elect to recapture as set forth above, Lessee may thereafter enter into a valid assignment or sublease with respect to the Pad, provided that Lessor consents pursuant to this §16.05, and provided, further, that (i) such assignment or sublease is executed within ninety (90) days after Lessor has given Lessor's consent, (ii) Lessee pays all amounts then due to Lessor under this Lease, and (iii) there is not in existence an Event of Default as of the effective date of the assignment or sublease. The provisions of this §16.05 shall not apply to a Permitted Transfer.

#### ISSUES TO CONSIDER:

Can the Landlord recapture Premises in lieu of consenting to assignment?

Who gets reimbursed for what on recapture?

Does anyone ever get released from liability on transfer?

Can major tenants avoid deemed recapture in multiple-location transfers?