

ASSIGNMENT AND SUBLEASING

ISSUES MATRIX

<u>ISSUE</u>	<u>LANDLORD</u>	<u>TENANT</u>	<u>OCCUPANT</u>
REMEDIES FOR DEFAULT OF OCCUPANT	<ul style="list-style-type: none"> • Eviction of Tenant • Tenant Security Deposit • Confirmation of Guarantees • Direct Rights Against Occupant 	<ul style="list-style-type: none"> • Eviction of Occupant • Occupant Indemnification, Security Deposit or Other Security • Notice and Right to Cure • Agreement with Landlord to Preserve Lease 	
REMEDIES FOR DEFAULT OF TENANT	<ul style="list-style-type: none"> • Eviction of Tenant • Tenant Security Deposit • Confirmation of Guarantees • Direct rights against Occupant • Direct Access to Occupant Rent Payments • Attornment 		<ul style="list-style-type: none"> • Direct Recognition Agreement with Notice and Right to Cure • Indemnification from Tenant with Security (Cash, L/C, Guaranty)
OCCUPANT'S DESIRE TO EXPAND AND/OR EXTEND	<ul style="list-style-type: none"> • Governed by Terms of Primary Lease 	<ul style="list-style-type: none"> • Usurps Future Flexibility • Extends/Expands Liability • Possible Limitation by Agreement with Landlord • Require Consent and establish parameters 	<ul style="list-style-type: none"> • Landlord Recapture Rights • Obligations of Tenant to Exercise Upon Request

CONCERNS WHICH BRIDGE CHANGES IN OCCUPANCY <ul style="list-style-type: none"> • PRIOR DEFAULT • NATURE OF USE • CONDITION OF PREMISES 		<ul style="list-style-type: none"> • Due diligence investigation and document review • Landlord Estoppel • Baseline Study or Inspection (Landlord Agreement to Recognize Results) • Release from Liability for Landlord Prior Default 	<ul style="list-style-type: none"> • Due Diligence Investigation and Review • Landlord Estoppel • Tenant Estoppel • Baseline Study or Inspection (Landlord Agreement to Recognize Results)
COMMON EXPENSES	<ul style="list-style-type: none"> • Tenant Security 	<ul style="list-style-type: none"> • Occupant Security Deposit • Adjustment on True-Up • Control of Audit Rights <ul style="list-style-type: none"> - Present - Future 	<ul style="list-style-type: none"> • Adjustment on True-Up • Control of Audit <ul style="list-style-type: none"> - Present - Future
LIMITATION OF SURETY DEFENSES	<ul style="list-style-type: none"> • Clearly Delineate Tenant's Continuing Obligations 	<ul style="list-style-type: none"> • Control Occupant's Rights with Required Consents and Criteria • Limit Liability for Costs Associated with Occupant Requests or Changes 	

DUE DILIGENCE ON LEASE STATUS			<ul style="list-style-type: none"> • Reps re: Document Listings and Status • Confirm Reps with Landlord Estoppel • Direct Recognition Agreement • Consent by Lender and/or SAND
ALLOCATION OF SHARED SERVICES		<ul style="list-style-type: none"> • Analyze Adequacy of Shared Space and Nature of Operations • Allocation of Services such as Parking and Costs of Disproportionate Use of Utilities 	<ul style="list-style-type: none"> • Analyze Adequacy of Shared Space and Nature of Operations • Limitation Occupant Obligations such as Limits of Required Insurance Coverage, Repair of Areas Shared with Tenant, etc.
DAMAGE AND DESTRUCTION	<ul style="list-style-type: none"> • Governed by Primary Lease 	<ul style="list-style-type: none"> • Responsibility for Additional Occupant Fit-Out/Alterations • Termination Rights 	<ul style="list-style-type: none"> • Responsibility for Additional Occupant Fit-Out/Alterations • Limit Termination Rights • Direct Recognition if Primary Lease is Terminated
INSURANCE	<ul style="list-style-type: none"> • Waiver of Subrogation from Occupant 	<ul style="list-style-type: none"> • Insurance of Occupant Installed Fit-Out/Alterations and Personal Property 	<ul style="list-style-type: none"> • Insurance of Occupant Installed Fit-Out/Alterations and Personal Property • Waiver of Subrogation from Landlord • Limits on Extent of Coverage

OBLIGATIONS OF LANDLORD UNDER PRIMARY LEASE	<ul style="list-style-type: none"> • Governed by 	<ul style="list-style-type: none"> • Obligation to Provide/Enforce Basic Landlord Services • Additional Services • Release from Liability for Landlord Default 	<ul style="list-style-type: none"> • Right to Enforce Landlord's Lease Obligations and Pass-Through of Remedies • Additional Services Requiring Landlord Consent/Cooperation
AMENDMENT OF PRIMARY LEASE		<ul style="list-style-type: none"> • Control Occupant Amendment with Required Consents • Landlord Agreement to Limit Amendments 	<ul style="list-style-type: none"> • Occupant Consent to Tenant Amendments • Limit Tenant Amendments by Nature of Effect on Occupant • Provide for Direct Recognition on Surrender or Termination for Default

NOTES:

What Do They All Want?

Whom does the Subtenant call if its lights do not go on or if it wants additional services as an elevator on a weekend?

This is a simple distillation of many of the Tenant's concerns in a Sublease after it has assured itself of the sufficiency of the Premises and the term. If the Landlord has an obligation to supply services to the Tenant, and the Subtenant has (at best) a right to those services from the Tenant who may not be in a position to provide them, and if the Tenant has a cure (and deduct) right for Landlord's default, the Subtenant may have a similar right against the Tenant; otherwise, the Subtenant's best hope is an assignment of the Tenant's rights against the Landlord on account of the Landlord's breach and a right to pursue those rights at the Subtenant's expense.

If the Subleased Premises are a part of the larger Premises that are affected by the Landlord's default, then the Tenant and the Subtenant will probably be pursuing the Landlord together and the Tenant may even agree to include the Subtenant's claim as its own by an assignment of its rights. The Tenant and Subtenant will share the cost of the action in proportion of the Subleased Premises to the total Premises. However, if only the Subtenant's Premises are affected, the Tenant may have no interest in pursuing the Landlord or sharing the cost to do so. On the other hand, if the entire Premises are covered by the Sublease, the Subtenant may have negotiated an agreement from the Landlord to provide services to the Subtenant as part of the agreement between them. Since it is unlikely that the Tenant can provide services, there is nothing that it can do other than act as a conduit for what is provided to it from the Landlord and as a claimant on behalf of the Subtenant for what is not provided.

Acknowledging that Landlords', Tenants' and Subtenants' goals will differ with the size of the Subleased Premises and the duration of the Sublease, there are some nearly universal goals:

The Landlord wants:

1. an agreement with the Subtenant that they will be bound to each other if the Tenant defaults (and if the Landlord believes the Sublease is worth saving);
2. the right to collect rent from the Subtenant if the Tenant fails to pay it;
3. the confirmation of the continued liability of any guarantors of the lease;
4. the right to enforce (and on demand get an assignment of) the Tenant's rights against the Subtenant in the event of a default under the prime lease caused by Subtenant;
5. no further Subleases or assignments of the Sublease to which it has consented.

The Tenant wants:

1. the Subtenant's compliance with the prime lease;
2. indemnification against loss arising from default under the prime lease that is caused by the Subtenant;
3. exoneration from performance of duties under the prime lease that Tenant is not in a position to perform, such as the Landlord's violation of an exclusive right;
4. the Subtenant's agreement to join amendments to the prime lease;
5. copies of notices that the Subtenant receives from the Landlord so that the Tenant can cure or prevent defaults under the prime lease;
6. a right of re-entry or eviction so it can get a non-paying Subtenant out of the Premises quickly without paying rent while it litigates with the Subtenant on a contract claim.

The Subtenant wants:

1. an agreement from the Landlord (in the nature of an SNDA), providing notice and an opportunity for the Subtenant to cure the Tenant's default under the prime lease;
2. an agreement not to amend the prime lease without the Subtenant's consent;
3. a SNDA from the Landlord's lender (which may be very difficult to obtain);
4. a promise by Tenant to comply with the prime lease;
5. an indemnification by the Tenant for its breach of the prime lease causing loss to the Subtenant;
6. the same rights against the Tenant that the Tenant has against the Landlord, such as setoff;
7. the Tenant's promise to exercise its option or extension rights if necessary to assure the Subtenant's rights under the Sublease;
8. the Tenant's promise not to amend the prime lease;
9. a provision in which the Subtenant agrees not to cause any breach of the prime lease in lieu of a provision in which the Subtenant assumes the obligations of the Tenant under the prime lease and, thus, becomes bound to the Landlord by privity of contract.

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ANATOMY OF A LEASE

ASSIGNMENT AND SUBLETTING

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ANATOMY OF A LEASE **ASSIGNMENT AND SUBLETTING**

I. INTRODUCTION

- A. Lease - If a lease is silent as to a Tenant's right to assign the lease or sublet Rhynhart, Notes on the Law of Landlord and Tenant, 20 Md. L. Rev. 1 (1960).
- B. Landlord's Perspective
 - 1. Landlord wants to prohibit assignments or subletting by the Tenant entirely. In addition, if the Tenant is a business entity, the Landlord wants to be able to control transfers of controlling interests in the entity. Howard E. Kane, Shopping Center Leases: Negotiability -- Different Problems Presented and Confronted by Landlords and Tenants, in Commercial Real Estate Leases 1995, at 479, 493 (PLI Real Estate Law and Practice Course Handbook Series No. 410, 1995).
 - 2. Landlord's reasons for restricting assignments or subleases:
 - a. To retain a desirable Tenant in possession, Hendrickson v. Freericks, 620 P.2d 205, 210 (Alaska 1980);
 - b. To have a certain amount of control over the type of business which may follow the original Tenant, Hendrickson v. Freericks, 620 P.2d 205, 210 (Alaska 1980), so that quality and marketability of the Landlord's premises is not adversely affected, Martin D. Polevoy, Assignment, Subletting and Lease Transfers, in Current Issues in Negotiating Commercial Leases, at 99, 107 (PLI Real Estate Law and Practice Course Handbook Series No. 405, 1994);
 - c. To protect Landlord's investment and the welfare of other Tenants, Warmack v. Merchants Nat'l Bank of Fort Smith, 612 S.W.2d 733, 735-36 (Ark. 1981);
 - d. To take advantage of a rising market, Martin D. Polevoy, Assignment, Subletting and Lease Transfers, Current Issues in Negotiating Commercial Leases, at 99, 107 (PLI Real Estate Law and Practice Course Handbook Series No. 405, 1994);
 - e. To protect and preserve percentage rental income stream;
 - f. To provide for appropriate and profitable Tenant mix;
 - g. To prevent having an undesirable Tenant or use;

- h. To avoid increasing exposure to environmental or other liability;
and
- i. To avoid the need for substantial alterations to the premises.

C. Tenant's Perspective

1. At the very least, the Tenant wants the lease to provide that the Landlord's consent to assignment or subletting shall not be unreasonably withheld, delayed or conditioned. See Gary L. Hall, Construction and Effect of Provision in Lease that Consent to Subletting or Assignment Will Not Be Arbitrarily or Unreasonably Withheld, 54 A.L.R.3d 679 (1973). Preferably, the Tenant wants the right to freely assign or transfer all or part of its interest in the lease or sublet the premises, all without the Landlord's consent. Howard E. Kane, Shopping Center Leases: Negotiability -- Different Problems Presented and Confronted by Landlords and Tenants, in Commercial Real Estate Leases 1995, at 479, 493 (PLI Real Estate Law and Practice Course Handbook Series No. 410, 1995).
2. Tenant's reasons for wanting no restrictions on right to assign or sublet:
 - a. To have the flexibility to dispose of space which it no longer needs;
 - b. To avoid restrictions which will interfere with the Tenant's achievement of its business goals; and
 - c. To maximize the value of its interest in the lease in a rising market. Martin D. Polevoy, Assignment, Subletting and Lease Transfers, in Current Issues in Negotiating Commercial Leases, at 99, 123 (PLI Real Estate Law and Practice Course Handbook Series No. 405, 1994).

D. Bargaining Power - Generally, whether the final clause regarding the Tenant's right to assign or sublet favors the Landlord or the Tenant depends upon the market and which party has greater bargaining power.

E. Basic Distinctions between Assignment and Subletting

1. When a lease is transferred by assignment, the assignee steps into the Tenant's shoes and acquires all the Tenant's rights in the lease. Upon assignment of a lease, privity of estate no longer exists between the Landlord and the original Tenant, and the assignee thereafter becomes bound by all of the covenants running with the property, including the provisions of the lease. However, privity of contract between the Landlord and the original Tenant is not extinguished, and therefore the

Tenant is still secondarily liable under the lease provisions, while the assignee becomes primarily liable. Italian Fisherman, Inc. v. Middlemas, 313 Md. 156, 163, 545 A.2d 1, 5 (1988). The assignor has no right to re-enter the premises if the assignee defaults unless it has a security interest such as a collateral assignment of the lease in a leasehold mortgage; these, however, may also require the landlord's consent in the case of an all-inclusive definition of "assignment".

2. Alternatively, under a sublease, the Tenant relets the premises to a sublessee, thus creating a new Landlord-Tenant relationship between the Tenant and the sublessee. The original tenancy is not terminated, but rather, continues in full force and effect. Therefore, the original Tenant retains both privity of estate as well as privity of contract. No legal relationship emerges between the Landlord and sublessee, so that Landlord's recourse is against the Tenant only. Id.
3. The test to determine whether a transfer is an assignment or a sublease may be determined as follows: If the instrument purports to transfer all of the Tenant's estate for the entire remainder of the lease term, it will be considered an assignment; but if the instrument purports to transfer less than all of the Tenant's estate for all or less than all of the term, it will be considered a sublease, regardless of the parties intentions. Id.; Estate of Phil Basile v. Famest, Inc., 718 So. 2d 892 (Fla. Dist. Ct. App. filed Sept. 16, 1998).

II. TENANT'S RIGHT TO ASSIGN OR SUBLET (See Example 1)

- A. Absent a statute or express restriction in a lease, a Tenant has an absolute right to assign or sublet. See, e.g., Mann Theatres v. Mid-Island Shopping Plaza, 464 N.Y.S.2d 793, 797 (N.Y. App. Div. 1983), aff'd, 468 N.E.2d 51 (N.Y. 1984); Fernandez v. Vazquez, 397 So.2d 1171, 1172 (Fla. App. 1981).
- B. Limitation - A Tenant may not sublet premises "to be used in a manner which is injurious to the property or inconsistent with the terms of the original lease." Funk v. Funk, 633 P.2d 586, 588 (Idaho 1981).

III. LANDLORD'S RESTRICTIONS ON ASSIGNMENTS OR SUBLEASES

- A. Landlord's Right to Restrict Tenant's Right to Assign or Sublet in Lease(See Example 2)
 1. Courts will generally enforce an express lease provision that affords the Landlord the absolute right to withhold consent for a Tenant to assign the lease or sublet the premises. See James C. McLoughlin, When Lessor

May Withhold Consent Under Unqualified Provision in Lease Prohibiting Assignment or Subletting of Leased Premises Without Lessor's Consent, 21 A.L.R.4th 188 (1983).

2. Rationale

- a. Landlord has a substantial interest in controlling the assignability of a lease. Mann Theatres v. Mid-Island Shopping Plaza, 464 N.Y.S.2d 793, 798 (N.Y. App. Div. 1983).
- b. Restriction provides the Landlord with the “opportunity to assess the financial responsibility and ‘business character’ of any proposed assignee or Subtenant, as well as the legality of the proposed use and the nature of the occupancy. Mann Theatres v. Mid-Island Shopping Plaza, 464 N.Y.S.2d 793, 798 (N.Y. App. Div. 1983).

3. If the terms of an assignment are clear and unambiguous, the provision will be enforced without a court inquiring as to the parties’ intent. Darnestown Valley-WHM Ltd. v. McDonald's Corp., 102 Md. App. 577, 650 A.2d 1365 (1994).

4. Such a restriction constitutes a restraint on the free alienation of land and will be strictly construed. Julian v. Christopher, 320 Md. 1, 9, 575 A.2d 735, 739 (1990).

- a. A restriction against assignment will not preclude subletting, pledging or mortgaging the lease, or granting a license.
- b. In the same manner, a restriction against subletting does not prohibit an assignment. See also Milton R. Friedman, Friedman on Leases § 7.303 (3d ed. 1990).

5. If a Landlord has the right to consent, the Tenant should seek to have excluded, at the very least, assignments to affiliates; assignments in connection with mergers and consolidations; and assignments in connection with a sale of all or substantially all of the Tenant’s assets. See Jay M. Zitter, Merger or Consolidation of Corporate Lessee as Breach of Clause in Lease Prohibiting, Conditioning, or Restricting Assignment or Sublease, 39 A.L.R.4th 879 (1985 & Supp. 1995).

B. Silent Lease Clause (See Example 3)

1. Common Law

a. Rule - Where consent of the Landlord is required, and the lease does not expressly provide that the Landlord's consent may not be unreasonably withheld, the Landlord may arbitrarily withhold his or her consent.

b. Cases

- **Georgia** - Vaswani v. Wohletz, 396 S.E.2d 593 (Ga. App. 1990).
- **Indiana** - First Fed. Sav. Bank of Indiana v. Key Mkts., Inc., 559 N.E.2d 600 (Ind. 1990).
- **Massachusetts** - 21 Merchants Row Corp. v. Merchants Row, Inc., 587 N.E.2d 788 (Mass. 1992).
- **Michigan** - White v. Huber Drug Co., 157 N.W. 60 (Mich. 1916).
- **Minnesota** - Gruman v. Investors Diversified Servs., Inc., 78 N.W.2d 377 (Minn. 1956).
- **New Hampshire** - Segre v. Ring, 170 A.2d 265 (N.H. 1961).
- **New York** - Mann Theatres Corp. of California v. Mid-Island Shopping Plaza Co., 464 N.Y.S.2d 793 (N.Y. App. Div. 1983), aff'd, 468 N.E.2d 51 (N.Y. 1984).
- **North Carolina** - Isbey v. Crews, 284 S.E.2d 534 (N.C. App. 1981).
- **Ohio** - F & L Center Co. v. Cunningham Drug Stores, Inc., 482 N.E.2d 1296 (Ohio App. 1984).
- **South Carolina** - Dobyns v. South Carolina Dep't of Parks, Recreation and Tourism, 480 S.E.2d 81 (S.C. 1997).
- **Texas** - Trinity Prof'l Plaza Assoc. v. Metrocrest Hosp. Auth., 987 S.W.2d 621 (Tex. App. 1999).
- **Vermont** - B & R Oil Co. v. Ray's Mobile Homes, Inc., 422 A.2d 1267 (Vt. 1980).
- **Washington** - Coulos v. Desimone, 208 P.2d 105 (Wash. 1949); Johnson v. Yousoofian, 930 P.2d 921 (Wash. Ct. App. 1996).

c. Rationale

- i. Where parties had required that Landlord's consent cannot be unreasonably withheld in other provisions of the lease, they were aware of the restriction and could have restricted assignments and subleases. F & L Ctr. Co. v. Cunningham Drug Stores, Inc., 482 N.E.2d 1296, 1300 (Ohio App. 1984).

- ii. Court will not rewrite unambiguous language in the lease agreement to require Landlord to give reason for withholding consent. B & R Oil Co. v. Ray's Mobile Homes, Inc., 422 A.2d 1267, 1268 (Vt. 1980); Segre v. Ring, 170 A.2d 265, 266 (N.H. 1961).
- iii. Tenant could have bargained for a reasonableness clause to be included in the lease. Gruman v. Investors Diversified Services, Inc., 78 N.W.2d 377, 382 (Minn. 1956).
- iv. Since the Landlord personally chose the Tenant for a definite term and "has expressly provided that no substitute shall be acceptable without his written consent, no obligation rests upon him to look to anyone but the [Tenant] for his rent." Gruman v. Investors Diversified Services, Inc., 78 N.W.2d 377, 380 (Minn. 1956).
- v. Stare Decisis - The need for stability and certainty in the law. Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 847 (Cal. 1985) (noting reasons for majority rule).
- vi. Many leases in effect have been crafted by counsel with the majority rule in mind. Gruman v. Investors Diversified Services, Inc., 78 N.W.2d 377, 381 (Minn. 1956).
- vii. The implied duty of good faith is derivative. Since there is no covenant for reasonableness when withholding consent, there is no contractual duty and therefore nothing to be performed in good faith. Johnson v. Yousoofian, 930 P.2d 921, 925 (Wash. Ct. App. 1996).
- viii. There is no duty to act in good faith in an ordinary commercial contract where there is no special relationship between the parties. Trinity Prof'l Plaza Assoc. v. Metrocrest Hosp. Auth. 987 S.W.2d 621, 625-626 (Tex. App. 1999).

2. Modern Trend

- a. Rule - Where the Landlord's consent is required, the Landlord must act reasonably when withholding consent to an assignment or a sublease, even if the lease does not expressly require that the Landlord's consent cannot be unreasonably withheld.

b. Cases

- **Alabama** - Homa-Goff Interiors, Inc. v. Cowden, 350 So.2d 1035 (Ala. 1977).
- **Alaska** - Hendrickson v. Freericks, 620 P.2d 205 (Alaska 1980).
- **Arizona** - Tucson Medical Ctr. v. Zoslow, 712 P.2d 459 (Ariz. App. 1985).
- **Arkansas** - Warmack v. Merchants Nat'l Bank of Fort Smith, 612 S.W.2d 733 (Ark. 1981).
- **California** - Kendall v. Ernest Pestana, Inc., 709 P.2d 837 (Cal. 1985).
- **Connecticut** - Warner v. Konover, 553 A.2d 1138 (Conn. 1989).
- **Florida** - Fernandez v. Vazquez, 397 So.2d 1171 (Fla. Dist. Ct. App. 1981).
- **Idaho** - Funk v. Funk, 633 P.2d 586 (Idaho 1981).
- **Illinois** - Jack Frost Sales v. Harris Trust & Sav. Bank, 433 N.E.2d 941 (Ill. App. 1982).
- **Louisiana** - Truschinger v. Pak, 513 So.2d 1151 (La. 1987).
- **Maryland** - Julian v. Christopher, 320 Md. 1, 575 A.2d 735 (1990).
- **Nebraska** - Newman v. Hinky Dinky, 427 N.W.2d 50 (Neb. 1988).
- **New Mexico** - Boss Barbara, Inc. v. Newbill, 638 P.2d 1084 (N.M. 1982).
- **Oregon** - Pacific First Bank v. New Morgan Park Corp., 876 P.2d 761 (Or. 1994).

c. Statutes

- **Delaware** - Del. Code Ann. tit. 25, § 5512(b) (1989).
- **Hawaii** - Haw. Rev. Stat. § 516-63 (1992 Supp.).

d. Application - Rule only applies if the Tenant has requested the Landlord's consent to assign the lease. Hendrickson v. Freericks, 620 P.2d 205, 211 (Alaska 1980).

e. Rationale

i. Good Faith and Fair Dealing

- (a) Leases generally - As a contract, the lease should be governed by contract principles of good faith and fair dealing. See, e.g., Pacific First Bank v. New Morgan Park Corp., 876 P.2d 761, 767 (Or. 1994); Warner v. Konover, 553 A.2d 1138, 1140 (Conn. 1989); Tucson Medical Ctr. v. Zoslow, 712 P.2d

459, 461 (Ariz. App. 1985); Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 844 (Cal. 1985); Boss Barbara, Inc. v. Newbill, 638 P.2d 1084, 1086 (N.M. 1982); Fernandez v. Vazquez, 397 So.2d 1171, 1173-74 (Fla. Dist. Ct. App. 1981).

- (b) Assignment and subletting clauses - In granting or withholding consent to an assignment or sublease, Landlord must exercise his or her discretion in good faith and in accordance with commercially reasonable standards. Pacific First Bank v. New Morgan Park Corp., 876 P.2d 761, 767 (Or. 1994); Warner v. Konover, 553 A.2d 1138, 1140-41 (Conn. 1989); Tucson Medical Ctr. v. Zoslow, 712 P.2d 459, 461 (Ariz. App. 1985); Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 845 (Cal. 1985); Boss Barbara, Inc. v. Newbill, 638 P.2d 1084, 1086 (N.M. 1982); Fernandez v. Vazquez, 397 So.2d 1171, 1174 (Fla. Dist. Ct. App. 1981).

- ii. “The necessity of reasonable alienation of commercial building space has become paramount in our ever-increasing urban society.” Homa-Goff Interiors, Inc. v. Cowden, 350 So.2d 1035, 1037 (Ala. 1977).

- iii. Silent lease clauses are ambiguous, and Tenants may not understand that such a clause means that the Tenant has no right to assign or sublet under the common law rule. Where a clause is subject to different interpretations, public policy favors the interpretation which least restricts the freedom to alienate. Julian v. Christopher, 320 Md. 1, 8, 575 A.2d 735, 738 (1990).

- iv. Allowing a Landlord to arbitrarily refuse consent would essentially nullify a Tenant’s right to sublet. Funk v. Funk, 633 P.2d 586, 589 (Idaho 1981).

f. Reasonableness

i. Standard

- (a) Landlord must act in an objectively reasonable commercial manner. See, e.g., Maxima Corp. v. Cystic Fibrosis Found., 81 Md. App. 602, 613, 568 A.2d 1170, 1176 (1990); Homa-Goff Interiors, Inc. v. Cowden, 350 So.2d 1035, 1038 (Ala. 1977).

See also Tucson Medical Center v. Zoslow, 712 P.2d 459, 462 (Ariz. App. 1985) (reason for withholding consent must be “objectively sensible and of some significance”).

- (b) Test - Whether a reasonable person in the Landlord’s position would have withheld his or her consent - Funk v. Funk, 633 P.2d 586, 590 (Idaho 1981); Ernst Home Ctr., Inc., 910 P.2d 486, 492-493 (Wash. Ct. App. filed Feb. 5, 1996).
- (c) What is reasonable will differ depending upon the type of property, e.g., commercial office building vs. multi-use complex vs. shopping center. Martin D. Polevoy, Assignment, Subletting and Lease Transfers, in Current Issues in Negotiating Commercial Leases, at 99, 112 (PLI Real Estate Law and Practice Course Handbook Series No. 405, 1994).

ii. Factors

- (a) Financial responsibility of the proposed assignee or Subtenant - Newman v. Hinky Dinky, 427 N.W.2d 50, 54 (Neb. 1988); Fernandez v. Vazquez, 397 So.2d 1171, 1174 (Fla. App. 1981).
 - (i) Past earnings of the proposed assignee or sublessee - Newman v. Hinky Dinky, 427 N.W.2d 50, 54 (Neb. 1988).
 - (ii) Estimated future receipts “in relation to rent based on gross receipts from business conducted or to be conducted on the leased premises” - Newman v. Hinky Dinky, 427 N.W.2d 50, 54 (Neb. 1988).
 - (ii) Insolvency, poor payment record of proposed assignee or Subtenant - Landlord’s refusal to consent is not unreasonable - Jack Frost Sales v. Harris Trust & Sav. Bank, 433 N.E.2d 941, 950 (Ill. App. 1982).
- (b) Identity or business character of the assignee or Subtenant (suitability for the particular property) - Newman v. Hinky Dinky, 427 N.W.2d 50, 54 (Neb.

1988); Fernandez v. Vazquez, 397 So.2d 1171, 1174 (Fla. App. 1981).

(c) Proposed use

- (i) Legality - Newman v. Hinky Dinky, 427 N.W.2d 50, 54 (Neb. 1988); Fernandez v. Vazquez, 397 So.2d 1171, 1174 (Fla. App. 1981).
- (ii) Desirability - Where maintaining a proper balance, or “mix,” of Tenants is critical to the success of a shopping center, it was reasonable for a Landlord to withhold its consent to the proposed sublease since the proposed Tenant already leased mall space. Warmack v. Merchants Nat’l Bank of Fort Smith, 612 S.W.2d 733, 735 (Ark. 1981).
- (d) Need for alteration of the premises - Newman v. Hinky Dinky, 427 N.W.2d 50, 54 (Neb. 1988).
- (e) Nature of the occupancy, e.g., office, factory - Newman v. Hinky Dinky, 427 N.W.2d 50, 54 (Neb. 1988); Fernandez v. Vazquez, 397 So.2d 1171, 1174 (Fla. App. 1981).
- (f) Assignee’s or Subtenant’s inability to fulfill the terms of the lease - Tucson Medical Ctr. v. Zoslow, 712 P.2d 459, 462 (Ariz. App. 1985).
- (g) Tenant must show that a proposed sublessee was “ready, willing and able” to take over the lease and meets reasonable commercial standards. Jack Frost Sales v. Harris Trust & Sav. Bank, 433 N.E.2d 941, 949 (Ill. App. 1982).
- (h) Legality of assignee’s intended use of the property - Ernst Home Ctr., Inc., 910 P.2d 486, 492-493 (Wash. Ct. App. filed Feb. 5, 1996).
- (i) Consent should not be withheld unless the prospective Tenant is unacceptable under the same standards applied in accepting the original Tenant. Boss Barbara, Inc. v. Newbill, 638 P.2d 1084, 1086 (N.M. 1982).

- (j) “Tone” and “image” may be considered by a Landlord withholding consent if there is evidence showing that the Landlord’s subjective concerns are also objectively reasonable. Ernst Home Ctr., Inc., 910 P.2d 486, 494 (Wash. Ct. App. filed Feb. 5, 1996).

iii. Examples of Bad Faith or Unreasonableness

- (a) Landlord’s leasing premises to same person previously rejected - Homa-Goff Interiors, Inc. v. Cowden, 350 So.2d 1035, 1038 (Ala. 1977).
- (b) Landlord’s wrongful interpretation of deed restrictions imposed on leased property regarding use of property - Tucson Medical Ctr. v. Zoslow, 712 P.2d 459, 462 (Ariz. App. 1985).
- (c) Withholding consent primarily on the basis of “personal taste, convenience or sensibility” - Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 845 (Cal. 1985); Fernandez v. Vazquez, 397 So.2d 1171, 1174 (Fla. App. 1981).
- (d) Withholding consent so that the Landlord may charge a higher rent than that contracted for with the original Tenant - Julian v. Christopher, 320 Md. 1, 10, 575 A.2d 735, 739 (1990); Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 845 (Cal. 1985).
- (e) Refusing to grant consent unless Landlord receives one-half of the sublease proceeds - Funk v. Funk, 633 P.2d 586, 589 (Idaho 1981). Cf. Truschinger v. Pak, 513 So.2d 1151, 1155 (La. 1987) (holding that a Landlord’s refusal to consent to subletting of premises unless he received one-half of the purchase price was not a motive against “moral rules, good faith, or elementary fairness”).
- (f) Withholding consent “[w]ithout fair, solid and substantial cause or reason” - Warmack v. Merchants Nat’l Bank of Fort Smith, 612 S.W.2d 733, 735 (Ark. 1981) (citation omitted).

3. Where a lease prohibits assignment or subletting without the Landlord's consent, assignment from an assignee back to the original Tenant requires the Landlord's consent. Italian Fisherman, Inc. v. Middlemas, 313 Md. 156, 166-67, 545 A.2d 1, 5-6 (1988). Contra Coulos v. Desimone, 208 P.2d 105, 110 (Wash. 1949) (noting that where lease prohibiting assignment without the Landlord's consent is assigned from assignee back to original Tenant, the Landlord's consent is not required).
- C. Lease Clause Providing Conditions to Tenant's Right to Assign or Sublet or to Landlord's Withholding of Consent Unreasonably (See Example 4)
1. Lease clause conditioning Tenant's right to assign or sublet on Tenant not being in default
 - a. At least one court has upheld such a clause. First Nat'l Bank of Chicago v. Plitt Theaters, Inc., 730 F. Supp. 167 (N.D. Ill. 1990) (holding that the assignment was invalid where Tenant was in default, and lease clause permitted an assignment only when Tenant was not in default).
 - b. No jurisdiction has addressed whether a Landlord may withhold consent to an assignment or sublease based solely on the fact that the Tenant is in default.
 2. Lease clause providing that Landlord shall not withhold consent unreasonably upon certain conditions
 - a. Typical conditions imposed by Landlord:
 - i. Tenant cannot sublease or assign to a particular type of occupant;
 - ii. Tenant cannot increase "traffic" within the building;
 - iii. Tenant cannot negotiate with an entity which is negotiating with the Landlord or has negotiated with the Landlord previously within a certain period of time;
 - iv. Tenant cannot assign or sublease to a current occupant of the building;
 - v. Proposed Tenant's use of premises is limited to the use specified in Tenant's lease for Tenant's business; Martin D. Polevoy, Assignment, Subletting and Lease Transfers, in Current Issues in Negotiating Commercial Leases, at 99,

110-12 (PLI Real Estate Law and Practice Course Handbook Series No. 405, 1994).

- vi. Satisfactory financial condition of assignee;
- vii. Satisfactory business and operating experience of assignee;
- viii. Original Tenant remaining liable;
- ix. Obtaining consent of Landlord's lender;
- x. Any increase in rent being paid to the Landlord;
- xi. Acceptable use, with no impact on Tenant mix, percentage rent or previously granted exclusive;
- xii. Increase in minimum rent;
- xiii. Tenant to pay all of Landlord's expenses in connection with the assignment;
- xiv. Landlord not having any space available in the project suitable for the proposed assignee; and
- xv. Tenant not being in default under the lease.

b. Reasonableness

- i. General rule - same standard as in II.B.2.f.
- ii. Where the lease further qualifies the clause that authorizes the Landlord's withholding of consent, the standard is varied according to the conditions provided in the lease. For example, the lease may provide that the Landlord's consent is conditioned upon the proposed Tenant not being a business which competes with the Landlord's business. In such a case, the Landlord may withhold consent even if the proposed Tenant meets reasonable commercial standards. Milton R. Friedman, Friedman on Leases § 7.304c (3d ed. 1990).
- iii. Where lease contained use restriction and provided that Landlord shall not withhold consent unreasonably as long as such assignment or sublease shall not relieve the Tenant of its obligations under the lease, the Landlord's duty to act

reasonably does not arise until the condition has been met. Leonard, Street & Deinard v. Marquette Assocs., 353 N.W.2d 198, 201 (Minn. App. 1984).

- c. Lease clause providing a condition to the Landlord's consent that proposed Tenant be of the same "type, class, nature and quality of business" as the Tenant has been upheld. Whitman v. Pet Inc., 335 So.2d 577, 580 (Fla. Dist. Ct. App. 1976) (holding that Landlord did not unreasonably withhold its consent where proposed Tenant, although financially secure, was not of the same quality as the business of Tenant required by condition in lease); Trinity Prof'l Plaza Assoc. v. Metrocrest Hosp. Auth. 987 S.W.2d 621 (Tex. App. 1999) (holding that Landlord did not unreasonably withhold consent where Landlord had specified certain "Qualified Persons" eligible for sublease or assignment).
- d. Lease may provide reasonable use restrictions upon which the Landlord may condition its consent. Such "restrictions are valid and enforceable." Pay 'n Pak Stores v. Superior Court, 258 Cal. Rptr. 816, 819 (Cal. Ct. App. 1989). The Landlord must put the use restrictions in the pertinent covenants of the lease and can not rely on the "purpose clause" to withhold consent. Astoria Bedding, Mr. Sleeper Bedding Ctr., Inc. v. Northside Partnership, 657 N.Y.S.2d 796, 797 (N.Y. App. Div. 1997).
- e. Profit
 - i. Landlord's perspective - As a condition to an assignment or sublease, a Landlord may want to provide in the lease that if the Tenant requests an assignment or sublease of all or part of premises, Landlord will receive all or a share of the profit received by the Tenant.
 - ii. Tenant's perspective - Tenant will want a clause providing that the Tenant will, at the very least, recover its costs in obtaining the assignment or sublease prior to sharing any profit with the Landlord. A Practical Guide to Reviewing a Commercial Lease, 19 A.B.A. Real Prop., Prob. & Tr. J. 891, reprinted in Commercial Real Estate Leases 1995, at 869, 900 (PLI Real Estate Law and Practice Handbook Series No. 410, 1995).

D. Clause Providing that Landlord May Arbitrarily Withhold Consent
(See Example 6)

1. There exists authority for the proposition that a lease which requires the Landlord's consent for an assignment or sublease may also provide that the Landlord may arbitrarily withhold such consent.
 - a. Restatement (Second) of Property § 15.2(2) (1977 & Supp. 1996) provides: A restraint on alienation without the consent of the Landlord of the Tenant's interest in the leased property is valid, but the Landlord's consent to an alienation by the Tenant cannot be withheld unreasonably, *unless a freely negotiated provision* in the lease gives the Landlord an absolute right to withhold consent. (Emphasis supplied).
 - b. Cases noting or adopting the Restatement approach
 - **Alaska** - Hendrickson v. Freericks, 620 P.2d 205 (Alaska 1980).
 - **Arizona** - Tucson Medical Ctr. v. Zoslow, 712 P.2d 459 (Ariz. App. 1985).
 - **Arkansas** - Warmack v. Merchants Nat'l Bank of Fort Smith, 612 S.W.2d 733 (Ark. 1981).
 - **California** - Kendall v. Ernest Pestana, Inc., 709 P.2d 837 n.14 (Cal. 1985) (noting that a provision absolutely prohibiting assignment or granting absolute discretion over assignment to lessor would be valid under Restatement (Second) of Property § 15.2 if freely negotiated).
 - **Colorado** - Basnett v. Vista Village Mobile Home Park, 699 P.2d 1343 (Colo. App. 1984).
 - **Maryland** - Julian v. Christopher, 320 Md. 1, 575 A.2d 735 (1990).
 - **New Mexico** - Boss Barbara, Inc. v. Newbill, 638 P.2d 1084, 1086 (N.M. 1982).
 - **Oregon** - Pacific First Bank v. New Morgan Park Corp., 876 P.2d 761 (Or. 1994).
2. Problems
 - a. Good faith and fair dealing - One commentator has suggested that courts may not enforce a provision similar to Restatement (Second) of Property § 15.2. Alex M. Johnson, Jr., Correctly Interpreting Long Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases, 74 Va. L. Rev. 751, 770 (1988).
 - b. "Freely negotiated" - Comment i to § 15.2 of the Restatement (Second) of Property states that a lease clause which gives the Landlord "an absolute right to withhold consent to an alienation is

not freely negotiated where the [Tenant] . . . has no significant bargaining power.”

E. Lease Clause Providing that Prohibition Against Assignments or Subleases Includes Assignments or Subleases by Operation of Law (See Example 2)

1. Generally

- a. A non-assignment clause bars an affirmative voluntary act.
 - i. It does not bar an involuntary transfer, such as a transfer by operation of law.
 - ii. Example - The transfer of a lease upon the Tenant’s death to his or her personal representative constitutes a transfer by operation of law and does not violate a general non-assignment clause. 49 Am. Jur. 2d Landlord & Tenant § 1102 (1995).
- b. To prohibit transfers by operation of law, the restriction in the lease must be clearly drafted as the restriction will be strictly construed. Milton R. Friedman, Friedman On Leases § 7.303d (3d Ed. 1990).

2. The Partnership Tenant

- a. Changes in the membership of a partnership Tenant, such as the addition or withdrawal of a partner, do not violate a general non-assignment clause.
- b. In order for changes in the partnership to be included in the non-assignment clause, the lease must explicitly provide. See also Milton R. Friedman, Friedman On Leases § 7.303b (3d Ed. 1990).

3. The Corporate Tenant (See Example 5)

- a. Merger
 - i. Very little authority exists regarding the effect of a non-assignment clause on a merger of the Tenant corporation.
 - ii. General non-assignment clause - Such a clause is not breached by merger of corporate Tenant. Segal v. Greater Valley Terminal Corp., 199 A.2d 48, 50 (N.J. 1964) (merger of parent and wholly-owned subsidiary into one

corporation). See also Dodier Realty & Inv. Co. v. St. Louis Nat'l Baseball Club, 238 S.W.2d 321 (Mo. 1951).

iii. Operation of law - Where lease contains a non-assignment clause which expressly prohibits assignments by operation of law without the Landlord's consent

(a) The merger of the Tenant corporation into another corporation constitutes a transfer by operation of law and therefore violates the non-assignment clause. Citizens Bank & Trust Co., v. Barlow Corp., 456 A.2d 1283, 1289 (Md. 1983). Contra Standard Operations, Inc. v. Montague, 758 S.W.2d 442 (Mo. 1988) (en banc) (holding the Tenant corporation's merger into another corporation does not constitute an assignment by operation of law).

(b) The merger of the Tenant corporation into its wholly owned subsidiary constitutes a transfer by operation of law and therefore requires the Landlord's consent. Pacific First Bank v. New Morgan Park Corp., 876 P.2d 761, 766 (Or. 1994).

(c) A merger of the Tenant corporation constitutes a breach of a non-assignment clause "if the effect is to transfer the lease to an entity other than that of the original Tenant' even though no interest in property is impaired by the merger." Pacific First Bank v. New Morgan Park Corp., 876 P.2d 761, 765 (Or. 1994) (citation omitted).

b. Transfer or Sale of Tenant Corporation's Stock

i. Sale of shares of Tenant corporation's stock to another corporation does not constitute an assignment or subletting of the premises under general non-assignment clause. Segal v. Greater Valley Terminal Corp., 199 A.2d 48, 50 (N.J. 1964) (citations omitted).

ii. Lease clause which provides that a transfer of stock control constitutes an assignment has been upheld. Associated Cotton Shops, Inc. v. Evergreen Park Shopping Plaza of Delaware, Inc., 170 N.E.2d 35 (Ill. App. 1960).

iii. General non-assignment clause providing that the Landlord's consent shall not be unreasonably withheld

- (a) Sale of stock by shareholders of Tenant corporation to party that Tenant had previously attempted to assign the lease did not constitute an assignment. Branmar Theatre Co. v. Branmar Inc., 264 A.2d 526 (Del. Ch. 1970).
- (b) Merger of Tenant subsidiary corporation into parent corporation did not violate non-assignment clause which expressly provided that the transfer or sale of fifty percent or more of the corporation's stock constituted an assignment. Brentsun Realty Corp. v. D'Urso Supermarkets, Inc., 582 N.Y.S.2d 216 (N.Y. App. Div. 1992).

c. Effect of Dissolution

- i. Does not terminate lease.
- ii. Vests lease and other assets of the corporate Tenant in its shareholders. Milton R. Friedman, *Friedman on Leases* § 7.303c2 (3d ed. 1990).

F. Lease Clause Providing for Landlord's Recapture of Space or Profits (See Examples 7 & 8)

1. Space

- a. Generally - The Landlord may include in the lease an option to recapture the space offered for assignment or sublease by the Tenant.
- b. The lease should specify:
 - i. The circumstances under which the recapture clause becomes effective;
 - ii. The percentage of space, if any, the Tenant is permitted to sublet;
 - iii. Whether the entire lease, or a portion of the lease, will terminate upon Tenant's request for Landlord's consent to an assignment or subletting;
 - iv. Whether the Tenant's rent will be reduced in proportion to the premises recaptured; and

- v. What notice the Landlord will give to the Tenant if the Landlord intends to recapture. A Practical Guide to Reviewing a Commercial Lease, 19 A.B.A. Real Prop., Prob. & Tr. J. 891, reprinted in Commercial Real Estate Leases 1995, at 869, 900 (PLI Real Estate Law and Practice Handbook Series No. 410, 1995).

2. Validity of Recapture Clauses

- a. Lease provides that the Tenant has a right to assign or sublet as long as the Tenant obtains the Landlord's consent, which shall not be unreasonably withheld, and also provides that the Landlord may cancel the lease.
 - i. At least one court has rejected the Landlord's right to terminate. The court reasoned that the clauses were repugnant to each other and that the first clause will remain, and the second will fall. Petrou v. Wilder, 557 So.2d 617, 618 (Fla. Dist. Ct. App. 1990).
 - ii. Such a lease clause permits the Landlord to cancel the lease only if the Landlord first determines that there is a reasonable basis for withholding consent to the proposed assignment or subletting. Park Place Ctr. Enters., Inc. v. Park Place Mall Assocs., 836 S.W.2d 113, 117 (Tenn. App. 1992).
 - iii. However, the California Supreme Court has upheld a recapture clause similar to the one above holding that the clause was not an unreasonable restraint on alienation under California law, nor did it violate the implied covenant of good faith and fair dealing. Carma Developers, Inc. v. Marathon Development California, Inc., 826 P.2d 710 (Ca. 1992).
- b. Lease provides that the Tenant has a right to assign or sublet as long as the Tenant obtains the Landlord's consent and also provides that the Landlord may cancel the lease.
 - i. Construing the two clauses together, one court has rejected the Landlord's right to cancel on the basis that the parties did not intend for the Landlord to be able to cancel the lease simply because the Tenant requested to assign or sublet the lease in accordance with the terms of the lease.

First Fed. Sav. Bank of Indiana v. Key Markets, Inc.,
532 N.E.2d 18, 25 (Ind. App. 1988).

G. Lease Clause Providing for Percentage Rent

1. Generally - Tenant has a right to assign or sublet a percentage lease in the absence of an express provision prohibiting such. Brown v. Safeway Stores, Inc., 617 P.2d 704 (Wash. 1980); Crestwood Plaza, Inc. v. Kroger Co., 520 S.W.2d 93 (Mo. App. 1975); Kroger Co. v. Bonny Corp., 216 S.E.2d 341, 343 (Ga. App. 1975).
 - a. As a result, the Landlord usually wants to condition the assignment of a percentage rent lease upon the proposed Tenant's gross sales being similar to the original Tenant.
 - b. Depending on the Tenant's business, the Landlord may want to increase the percentage.
 - i. Supermarket with high volume of sales would pay a small percentage, for example 1%.
 - ii. On the other hand, a small merchant would pay a higher percentage. Milton R. Friedman, Friedman on Leases § 6.12 (3d ed. 1990).
2. It is not unreasonable for a Landlord to insist upon "preserving the existing Landlord-Tenant relationship . . . until the Landlord is convinced that the change in Tenants . . . will not harm his or her interest in maintaining the existing level of percentage rent." Newman v. Hinky Dinky, 512 N.W.2d 410, 417 (Neb. App. 1994).
3. Identity of the Tenant is important in percentage rent cases, especially where the percentage rent clause was a "crucial component of the lease." Newman v. Hinky Dinky, 512 N.W.2d 410, 419 (Neb. App. 1994).

IV. OTHER ISSUES TO CONSIDER

A. Tenant's Remedies in the Event of Landlord's Wrongful Act

1. Some courts hold that a Tenant has a right to terminate its lease if Landlord unreasonably withholds consent to an assignment or sublease, in breach of its covenant to act reasonably. Chrysler Capital Corp. v. Lavender, 934 F.2d 290 (11th Cir. 1990); Maurin-Ogden-1978-Pinhook Plaza v. Wiener Corp., 430 So.2d 747 (La. App. 1983); Adams, Harkness

& Hill, Inc. v. Northwest Realty Corp., 281 N.E.2d 262 (Mass. 1972); Ringwood Assocs., Ltd. v. Jack's of Route 23, Inc., 379 A.2d 508 (N.J. Super. Ct. 1977); Restatement (Second) of Property § 15.2, at 106, cmt. h (1977); see also Halper v. Demeter, 610 N.E.2d 332 (Mass. 1993) (no right to terminate, but obligation to pay rent ceases); Varnas & Assocs. v. Family Pride Finer Foods, Inc., 498 N.E.2d 333 (Ill. Ct. App. 1986) (obligation to pay rent ceases); Brigham Young Univ. v. Seman, 672 P.2d 15 (Mont. 1983) (Tenant has right to cancel where a Landlord's breach is an unjustified interference with Tenant's leasehold estate). Cf. 601 W. 26 Corp. v. John Wiley & Sons, Inc., 298 N.Y.S.2d 1018 (N.Y. 1st Dept. 1969) (no right to terminate); Rock County Sav. & Trust Co. v. Yosts, Inc., 153 N.W.2d 594 (Wis. 1967) (no right to terminate); Ernst Home Ctr., Inc., 910 P.2d 486, 495 (Wash. Ct. App. filed Feb. 5, 1996) (no right to terminate).

2. If a lease provides that a Landlord may not unreasonably withhold consent to an assignment or sublease, declaratory judgment in favor of a sublessee declaring that it is entitled to remain in possession may be an appropriate remedy. Maxima Corp. v. Cystic Fibrosis Found., 81 Md. App. 602, 610-11, 568 A.2d 1170, 1174 (1990); Mann v. Steinberg, 64 N.Y.S.2d 68 (N.Y. Civ. Ct. App. Div. 1946).
3. Tenant may also be entitled to specific performance, requiring Landlord to lease the premises to the assignee or Subtenant. Hedgecock v. Mendel, 263 P. 593 (Wash. 1928).
4. Damages may also be available in an action against a Landlord for wrongful refusal to consent to an assignment or sublease, particularly where damages are ascertainable. Cohen v. Ratinoff, 195 Cal. Rptr. 84 (1983); United Unions, Inc. v. Webster & Sheffield, 521 A.2d 273 (D.C. App. 1987); Campbell v. Westdahl, 715 P.2d 288 (Ariz. App. 1985) (substantial damages awarded for lost profits, or value of the lost bargain); Natural Kitchen, Inc. v. American Transworld Corp., 449 So.2d 855 (Fla. App. 1984); Texaco, Inc. v. Greenwich-Kinney, Inc., 328 N.Y.S.2d 180 (N.Y. Civ. Ct. App. Div. 1971); Haritas v. Goveia, 188 N.E.2d 73, cert. denied, 375 U.S. 845 (Mass. 1963) (Landlord liable for damages incurred in Tenant's liquidation of business caused by Landlord's wrongful refusal).
5. Some courts have taken the view that damages may be awarded only under the particular provision in the lease. Singer Sewing Machine Co. v. Eastway Plaza, Inc., 158 N.Y.S.2d 647 (N.Y. Civ. Ct. App. Div. 1957).
6. A Landlord may draft a provision in the lease which bars the Tenant from any right to damages against the Landlord for its discretionary decisions, and thereby limit Tenant's remedies to a declaratory judgment, injunction

or specific performance. (See Example 9) Milton Friedman, Friedman On Leases § 7.304b (3d Ed. 1990).

B. Forfeiture in the Event of Tenant Fails to Obtain Consent Prior to Assignment.

1. The general rule is that forfeitures are not favored in law. Sherwood v. Panhandle E. Pipeline Co., 1997 U.S. Dist. Lexis 448, at 18-19 (D. Kan. Jan. 8, 1997) (citing Fleming Companies v. Equitable Life Ins. Co. of Iowa, 818 P.2d 813, 818 (Kan. App. 1991)).
2. Courts may have equitable power to terminate a lease in some circumstances even where the lease has no forfeiture provision. Sherwood, 1997 U.S. Dist. Lexis at 21 (citing Fleming, 818 P.2d at 818). A court may terminate a lease where the breach goes to an “essential” part of the lease and where damages are impracticable. Sherwood, 1997 U.S. Dist. Lexis at 21 (quoting Turner v. Kaufman, 699 P.2d 435, 439 (Kan. 1984)).
3. Tenant’s failure to gain consent prior to assigning or subletting lease may not necessarily result in a material breach. Meyer v. Ocean View Investments Company, Inc., 935 P.2d 992 (Haw. 1997); Sherwood v. Panhandle E. Pipeline Co., 1997 U.S. Dist. Lexis 448, at 18-19 (D. Kan. Jan. 8, 1997); Hemisphere Tour & Travel, South, Inc., 978 S.W.2d 451 (Mo. Ct. App. filed Sept. 25, 1998) (Missouri statute requires written consent if the lease is for less than two years or the assignment will not be effective).
 - a. Lessor fails to give Lessee notice of default as specified in Lease Agreement. Meyer, 935 P.2d at 1003-1004.
 - b. Lessor is estopped from claiming forfeiture when the lessor had knowledge of the breach and failed to act within a reasonable amount of time. Id.
 - c. No forfeiture provision in the lease. Sherwood, 1997 U.S. Dist. Lexis at *19 (citing Winkler v. Gibson, 42 P. 937 (1895). The assignment provision within lease is not “in effect” a forfeiture clause. Sherwood, 1997 U.S. Dist. Lexis at *19, n.2.

C. Effect of Bankruptcy Proceedings on an Assignment or Sublease (See Example 10)

1. Generally - Regardless of provisions in the lease, a Tenant may have broad rights of assignment in bankruptcy proceedings, subject to the provisions of the Bankruptcy Code. See 11 U.S.C. § 365(b)(3). As a

result, a Landlord should consider ways to draft lease provisions that afford the most protection to preserve the Landlord's Tenant mix, while still complying with the Code.

2. Congressional Intent and Legislative History - Addressing the assignability of leases in bankruptcy, Congress recognized unique qualities of shopping centers. It acknowledged that a shopping center is often a carefully planned unit, and though it consists of many different Tenants, it is considered a single unit which may be leased under a master lease agreement. Under a master lease, the Tenant mix may be as important to the Landlord as actual rental payments, since certain Tenant combinations have proven to attract more consumers. The Tenant mix becomes even more important when rent is based upon a Tenant's gross sales and the Landlord receives percentage rent. In such cases, courts must consider factors such as the nature of the assignee's or trustee's business and proposed use, whether such use complies with the master lease, whether the assignee's sales volume will generate substantially the same amount of percentage rent as the debtor's, and whether the assignment would lead to a breach of other clauses in the master lease. House Report No. 95-595, 95th Cong., 1st Sess. 349-49 (1977).

3. Relevant Bankruptcy Code Provision - Section 365(b)(3):

* * *

(b)(3) For purposes of [providing adequate assurance, as required in] paragraph (b)(1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance -

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as radius, location, use or exclusivity provision, and will not breach any such provision, contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any Tenant mix or balance in such shopping center.

4. Cases

- a. The term “shopping center” is to be strictly construed, although it is not expressly defined in the Bankruptcy Code. In re Ames Dept. Stores, Inc., 121 B.R. 160, 164 (Bankr. S.D.N.Y. 1990). Landlord bears the burden of proof of showing that leased premises are in a shopping center to subject Tenant to higher standard required by § 365(b)(3). In re R&J, Inc., 140 B.R. 316, 317 (Bankr. D. Mass. 1992).
- b. Case law has established several objective criteria to determine whether a lease is considered a “shopping center lease” for purposes of § 365. Such criteria include: a combination of leases, all leases held by a single Landlord, all Tenants engaged in the commercial retail distribution of goods, common parking areas, the purposeful development of the premises as a shopping center, a master lease, fixed hours during which all stores are open, joint advertising, restrictive use provisions in leases, percentage rent provisions, right of Tenant to terminate upon anchor Tenant’s termination, common area maintenance, and contiguity of stores. In re Joshua Slocum Ltd., 922 F.2d 1081, 1087-88 (3rd Cir. 1990); In re Goldblatt Bros., Inc., 766 F.2d 1136, 1140-41 (7th Cir. 1985); In re 905 Int’l Stores, Inc., 57 B.R. 786, 788-89 (E.D. Mo. 1985); In re Sun TV and Appliances, Inc., 234 B.R. 56 (Bankr. Del. 1999).
- c. If a proposed assignee of a debtor’s lease would have a negative effect on a shopping center by disrupting Tenant balance and targeting a different consumer market, a bankruptcy court may disapprove such assignment in order to protect the Landlord’s once bargained-for security and control over the character of the shopping center. In re Federated Dept. Stores, Inc., 135 B.R. 941, 945 (Bankr. S.D. Ohio 1991).
- d. Where a shopping center lease provides for a Tenant’s unfettered right to assign or sublet, regardless of Tenant mix, § 365(b)(3)(D) would not afford additional protection to the Landlord to preserve Landlord’s Tenant mix. In re Ames Dept. Stores, Inc., 121 B.R. 160, 164 (Bankr. S.D.N.Y. 1990).
- e. A bankruptcy court does not have to prequalify bidders before conducting a sale. In re Food Barn Stores, Inc., 107 F.3d 558 (8th Cir. 1997).

SAMPLE LEASE CLAUSES

Example 1 - The Pro-Tenant Clause:

5. ASSIGNMENT AND SUBLETTING

5.1. Right to Assign or Sublet - Tenant shall have the right to: (a) assign this Lease, or any interest herein, (b) sublet all or any part of the Premises, or (c) transfer any interest in this Lease to any person, partnership, corporation, or other entity without the consent of Landlord.

Example 2 - Clause Expressly Providing That Landlord Shall Not Unreasonably Withhold Consent:

5. ASSIGNMENT AND SUBLETTING

5.1. Landlord's Consent Required - Except as otherwise provided in this Lease, Tenant shall not assign this Lease or sublet the Premises in whole or in part, or transfer possession, occupancy, or any interest in the Premises to any person, partnership, corporation, or other entity without the prior written consent of Landlord, which consent shall not be withheld unreasonably, delayed or conditioned.

Example 3 - The Pro-Landlord Silent Clause:

5. ASSIGNMENT AND SUBLETTING

5.1. Landlord's Consent Required - Except as otherwise provided in this Lease, Tenant agrees that it will not: (a) assign this Lease, or any interest herein, (b) sublet all or any part of the Premises, or (c) transfer any interest in this Lease, whether voluntary, involuntary or by operation of law, to any person, partnership, corporation, or other entity without first obtaining the written consent of Landlord. Any such assignment, subletting, or transfer without the written consent of Landlord shall be void, and shall constitute a default by Tenant. Any person, partnership, corporation or other entity to whom an assignment or subletting is attempted without Landlord's consent shall not have a claim, right or remedy against Landlord. In addition, the acceptance of rent by Landlord from any assignee, Subtenant or transferee shall not constitute a waiver of Tenant's obligation to obtain Landlord's consent under this section. If Landlord's consent is given under this section, such consent shall not: (a) constitute consent to any subsequent assignment, subletting, or transfer, nor (b) release Tenant of its obligations under the terms of this Lease.

Example 4 - Clause Providing That Landlord Shall Not Unreasonably Withhold Consent Subject to Certain Conditions:

5. ASSIGNMENT AND SUBLETTING

5.2. Permitted Assignments and Subleases - Landlord agrees that it will not unreasonably withhold its consent to an assignment or sublease under Section 5.1 provided that: [ADD ANY OF THE FOLLOWING]

- (a) any rent received by Tenant as a result of such assignment or sublease, which is in excess of the rent being paid by Tenant for the Premises assigned or sublet, shall be paid by Tenant to Landlord monthly as additional rent;
- (b) Landlord shall be entitled to _____ percent of profits received by Tenant as a result of the assignment or sublease of the premises.
- (c) the assignee or sublessee continues to operate the business conducted on the Premises in the same manner as Tenant;
- (d) the net assets of the assignee or sublessee shall not be less than that of the Tenant at the time that Tenant entered into the Lease and at the assignment or sublease;
- (e) the assignee or sublessee pays percentage rent to Landlord in the amount of ____ percent of its annual gross profits;
- (f) the assignee or sublessee expressly agrees in writing to be bound by all of the terms of this Lease;
- (g) Tenant shall pay all of Landlord's costs and expenses in connection with the proposed assignment;
- (h) Landlord's lender consents to the assignment;
- (i) Tenant remains liable under all terms and provisions of this Lease;
- (j) The assignee uses the Premises only for the purpose of _____;
- (k) The minimum rent payable hereunder shall increase to \$_____ per annum;
- (l) Landlord does not have space available in the project suitable for the assignee; and
- (m) Tenant is not in default under any terms or provisions of the Lease.

Example 5 - Clause Regarding Assignment in Connection with the Merger or Sale of Assets of a Corporation:

5. ASSIGNMENT AND SUBLETTING

5.2. Merger or Sale of Assets of Tenant - If Tenant is a corporation, Tenant may assign this Lease, upon prior written consent of Landlord, to parent, subsidiary, or another corporation which has obtained all or substantially all of Tenant's assets, or its corporate shares, through merger or sale by Tenant, subject to the following conditions: (a) the assignee corporation continues to operate the business conducted on the premises in the same manner as Tenant; (b) the net assets of the assignee corporation shall not be less than the net assets of the Tenant at the time of the assignment and at the time Tenant entered into the Lease; (c) the assignee corporation agrees in writing to be bound by all of the terms of this Lease and to operate

the business conducted on the Premises in the same manner as Tenant; and (d) such an assignment does not release Tenant of its obligations under this Lease.

Example 6 - Clause Expressly Providing That Landlord May Withhold Consent Arbitrarily:

5. ASSIGNMENT AND SUBLETTING

5.1. Consent - The Tenant hereby acknowledges that the Landlord has entered into this Lease because of the Tenant's financial strength, goodwill, ability and expertise and that, accordingly, this Lease is one which is personal to the Tenant, and agrees for itself and its successors and assigns in interest hereunder that it will not (a) assign this Lease or any of its rights under this Lease, as to all or any portion of the Premises or otherwise, or (b) make or permit any voluntary or involuntary total or partial sale, lease, sublease, assignment, conveyance, license, mortgage, pledge, encumbrance or other transfer of any or all of the Premises or the occupancy or use of any or all of the Premises (each of which is hereinafter referred to as a "Transfer") (including, by way of example rather than of limitation, (i) any sale at foreclosure or by the execution of any judgment of any or all of the Tenant's rights hereunder, or (ii) any Transfer by operation of law) without first obtaining the Landlord's express written consent thereto (which consent (a) may be given or withheld in the Landlord's sole discretion and, if given, shall not constitute a consent to any subsequent such Transfer, whether by the person hereinabove named as "the Tenant" or by any such transferee, but (b) shall not be deemed to have been given by the Landlord's acceptance of the payment of Rent after such Transfer occurs, with or without the Landlord's knowledge, or by any other act or failure to act by the Landlord, other than the giving of such express, written consent, as aforesaid). Without limiting the generality of the foregoing, the Landlord shall be entitled, at its sole discretion, to condition any such consent upon the entry by such person into an agreement with (and in form and substance satisfactory to) the Landlord, by which it assumes all of the Tenant's obligations hereunder. Any person to whom any Transfer is attempted without such consent shall have no claim, right or remedy whatsoever hereunder against the Landlord, and the Landlord shall have no duty to recognize any person claiming under or through the same. No Transfer made with or without the Landlord's consent shall alter or impair the obligations hereunder of any person constituting the Tenant, or liable as a guarantor for the obligations of the Tenant, before such Transfer, or of any other person holding any interest or obligation hereunder before such Transfer. [For purposes of the foregoing provisions of this subsection, a transfer, by any person or persons controlling the Tenant on the date hereof, of such control to a person or persons not controlling the Tenant on the date hereof shall be deemed a Transfer of this Lease.] [The Landlord shall be entitled to be paid by the Tenant any profit derived by the Tenant from any Transfer made without the Landlord's consent, as aforesaid.]

THIS CLAUSE DRAFTED BY GREGORY L. REED, ESQUIRE, BALLARD SPAHR ANDREWS & INGERSOLL, BALTIMORE, MARYLAND.

Example 7 - Recapture Clause – Space:

5. ASSIGNMENT AND SUBLETTING

5.2. Recapture of Space - In the event that Tenant wishes to assign or sublet all or part of the Premises, Tenant shall notify Landlord in writing of the proposed assignment or

sublease. Such notice shall contain the terms and conditions of the proposed assignment or sublease. Upon receipt of Tenant's notice, Landlord shall have thirty (30) days from such receipt to elect to: (a) consent to an assignment or sublease of the premises according to the terms specified in the notice; or (b) terminate this Lease. If Landlord terminates this Lease, such termination shall be effective on the date that is _____ (____) days after the date of Landlord's notice, on which date Tenant shall vacate the Premises in accordance with the provisions of this Lease.

Example 8 - Recapture Clause - Excess Rent:

5. ASSIGNMENT AND SUBLETTING

5.3. Excess Rent - In the event that Landlord does not exercise its option to terminate this Lease under Section 5.2, and Landlord consents to an assignment or sublease of this Lease by Tenant, Tenant shall pay to Landlord any rent Tenant receives as a result of the assignment or sublease, whether designated as rent or not under such assignment or sublease, which exceeds the amount Tenant is required to pay under the terms of this Lease. Tenant agrees to pay the excess rent to Landlord within ten (10) days of Tenant's receipt. In the event that Tenant defaults, Tenant also agrees to assign to Landlord Tenant's right to receive rent from the assignment or sublease.

Example 9 - Tenant's Remedies Upon Landlord's Unreasonable Refusal of Consent
(This clause may be used in conjunction with Examples 2 and 4.):

5 ASSIGNMENT AND SUBLETTING

5.4. Tenant's Remedies - In the event that Landlord unreasonably withholds its consent from Tenant to assign its rights under this Lease or to sublet the Premises throughout the term of this Lease, Landlord shall not be subject to any claims by the Tenant or any proposed assignee or sublessee for damages. Tenant's remedies will be limited to a claim for declaratory judgment, injunctive relief or for specific performance.

Example 10 - Tenant's Bankruptcy:

3.5. TENANT'S BANKRUPTCY - In addition to Landlord's remedies under Section 12, Landlord may, at its sole discretion and without notice, invoke the following provisions:

13.5.1. Upon a Tenant's bankruptcy, this Lease and all rights of Tenant hereunder shall automatically terminate with the same force and effect as if the date of any such event were the date stated herein for the expiration of the Term, and Tenant shall vacate and surrender the Premises, but shall remain liable as herein provided. Landlord reserves any and all remedies provided herein or at law or in equity.

13.5.2. If this Lease is not terminated in accordance with paragraph 13.5.1 above because such termination is not permitted under the Bankruptcy Code, upon the filing of a petition by or against Tenant under the Bankruptcy Code, as debtor and as debtor in possession, and any trustee who may be appointed, agree:

(a) to perform each and every obligation of Tenant under this Lease until such time as this Lease is either rejected or assumed by order of the United States Bankruptcy Court;

(b) to pay monthly in advance on the first day of each month as reasonable compensation for use and occupancy of the Premises an amount equal to all Base Rent and all Additional Rent;

(c) to reject or assume this Lease within sixty (60) days of the filing of such petition under Chapter 7 of the Bankruptcy Code or within thirty (30) days of the filing of a petition under any other Chapter;

(d) to give Landlord at least forty-five (45) days prior written notice of any proceeding relating to any assumption of this Lease;

(e) to give Landlord at least thirty (30) days prior written notice of any abandonment of the Premises, any such abandonment to be deemed conclusively a rejection of this Lease;

(f) to be deemed conclusively to have rejected this Lease in the event of the failure to comply with any of the above; and

(g) to have consented to the entry of an order by an appropriate United States Bankruptcy Court providing all of the above, waiving notice and hearing of the entry of same.

13.5.3. Notwithstanding anything in this Lease to the contrary, all amounts payable to Tenant to or on behalf of Landlord hereunder, whether or not expressly denominated as Rent, shall constitute “rent” for the purposes of Section 502(b)(7) of the Bankruptcy Code, including, without limitation, reasonable attorney’s fees incurred by Landlord by reason of Tenant’s bankruptcy.

13.5.4. Tenant acknowledges that this is a lease of space in a “shopping center” and thereby subject to all applicable provisions of the Bankruptcy Code. Included within and in addition to any other conditions or obligations imposed upon Tenant in the event of assumption and/or assignment are the following:

(a) in the event of assignment, the execution and delivery to Landlord of an instrument by which the assignee assumes all of the obligations arising under this Lease from and after the date of assignment pursuant to the provisions of the Bankruptcy Code;

(b) the cure of any monetary defaults and the reimbursement of pecuniary loss resulting from any such default within thirty (30) days of assumption and/or assignment;

(c) the prior written consent of any mortgagee to which this Lease has been assigned as collateral security; and

(d) the Premises, at all times, remains a single unit and no physical changes of any kind are made thereto unless in compliance with the applicable provisions of this Lease.

13.5.5. Nothing contained in this Section 13.5 shall be deemed in any manner to limit Landlord's rights and remedies under the Bankruptcy Code, as presently existing or as may hereafter be amended. In the event that the Bankruptcy Code is interpreted or amended during the Term of this Lease to so permit, or is superseded by any act so permitting, the following additional acts shall be deemed an Event of Default under this Lease: (i) if Tenant is adjudicated insolvent by the United States Bankruptcy Court or (ii) if a petition is filed by or against Tenant under the Bankruptcy Code and such petition is not vacated within thirty (30) days. In either of such events, this Lease and all rights of Tenant hereunder shall automatically terminate with the same force and effect as if the date of either such event were the date stated herein for the expiration of the Term, and Tenant shall vacate and surrender the Premises, but shall remain liable as herein provided. Landlord reserves any and all rights and remedies provided herein or at law.

13.5.6. No Event of Default by Tenant, either prior to or subsequent to the filing of any such petition, shall be deemed to have been waived unless expressly done so in writing by Landlord.

13.5.7. Tenant's "bankruptcy" means: (a) the application by Tenant or any guarantor of Tenant or its or their consent to the appointment of a receiver, trustee or liquidator of Tenant or any guarantor of Tenant or a substantial part of its or their assets, (b) the filing of a voluntary petition in bankruptcy or the admission in writing by Tenant or any guarantor of Tenant of its inability to pay its debts as they become due, (c) the making by Tenant or any guarantor of Tenant of an assignment for the benefit of its creditors, (d) the filing of a petition or an answer seeking a reorganization or an arrangement with its creditors or an attempt to take advantage of any insolvency law, (e) the filing of an answer admitting the material allegations of a petition filed against Tenant or any guarantor of Tenant in any bankruptcy, reorganization or insolvency proceeding, (f) the entering of an order, judgment or decree by any court of competent jurisdiction adjudicating Tenant or any guarantor of Tenant a bankrupt or an insolvent, approving a petition seeking such a reorganization, or appointing a receiver, trustee or liquidator of Tenant or any guarantor of Tenant or of all or a substantial part of its or their assets, or (g) the commencing of any proceeding under any bankruptcy, reorganization, arrangement, insolvency, readjustment, receivership or similar law, and the continuation of such order, judgment, decree or proceeding unstayed for any period of sixty (60) consecutive days after the expiration of any stay thereof.

13.5.8. Neither Tenant's interest in this Lease, nor any estate created hereby in Tenant nor any interest herein or therein, shall pay to any trustee or receiver or assignee for the benefit of creditors or otherwise by operation of law except as may specifically be provided by the Bankruptcy Code, Title 11 U.S.C. (the "Bankruptcy Code").

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SAMPLE ASSIGNMENT/SUBLEASE CLAUSES

Space Lease:

10. ASSIGNMENT AND SUBLETTING

(a) Tenant will not assign this Lease in whole or part, nor sublet all or any part of the Leased Premises, without the prior written approval of the Landlord in each instance which approval shall not be unreasonably withheld, delayed or conditioned, provided that (i) Tenant is not in default under any of the terms and conditions of this Lease and (ii) if Landlord has any reasonable concern about the environmental impact of any proposed Subtenant or assignee on the Leased Premises any such concern shall be deemed to be a reasonable basis for withholding consent. Notwithstanding the foregoing, Tenant shall have the right, without Landlord's consent, to assign this Lease or sublet all or any portion of the Leased Premises to a corporation or other entity which controls, is controlled by or is controlled, directly or indirectly, in common with Tenant or to a successor by merger, consolidation or a sale of all or substantially all of the assets or the capital stock of Tenant, including, without limitation, in connection with an initial public offering of stock by Tenant. The term "control" as used herein shall mean holding more than _____ percent (____%) of the voting interest in such entity. Notwithstanding any permitted or approved assignment or sublease, the Tenant shall remain fully liable on this Lease and shall not be released from performing any of the terms, covenants and conditions of this Lease. Tenant shall reimburse Landlord for the reasonable out-of-pocket costs and expenses of Landlord in reviewing and approving such sublease or assignment, including, without limitation, reasonable attorneys fees.

(b) For purposes of this paragraph the terms listed below shall be defined as follows:

"Rent Per Square Foot" shall mean the sum of the then annual Basic Rent and any additional rent divided by the Space Factor.

"Sublease Profit" shall mean the product of (x) the Sublease Rent Per Square Foot less the Rent Per Square Foot, and (y) the number of rentable square feet constituting the portion of the Leased Premises being sublet by Tenant.

"Sublease Rent" shall mean any rent or other consideration paid to Tenant directly or indirectly by any Subtenant or any other amount received by Tenant from or in connection with any subletting (including, but not limited to, sums paid for the sale or rental, or consideration received on account of any contribution, of any of Tenant's personal property, equipment or machinery in the Leased Premises), less the Sublease Expenses.

“Sublease Expenses” shall mean: (i) the reasonable out-of-pocket costs and expenses of Tenant in making such sublease, such as brokers' fees, advertising fees paid to unrelated third parties, and attorney's fees, (ii) any sums paid to Landlord for approving any such sublease including attorneys fees, (iii) in each year a prorated portion of the cost of improvements or alterations made by Tenant expressly and solely for the purpose of preparing the Leased Premises or any portion thereof for such subtenancy, such proration being the total cost divided by the number of years in the term of the sublease (excluding any renewal term), and (iv) each year an amount equal to one-[length of initial term] (1/___) of the total cost of any of Tenant's personal property, equipment or machinery installed in the Leased Premises that are sold, rented or contributed to the Subtenant as part or in connection with the sublease transaction, and then the amount so calculated further divided by the Space Factor, with such sum then multiplied by the number of rentable square feet being subleased.

“Space Factor” shall mean [square foot size of Leased Premises].

“Sublease Rent Per Square Foot” shall mean the Sublease Rent divided by the rentable square feet of the space demised under the sublease in question.

(c) In connection with any subletting of all or any portion of the Leased Premises, Tenant shall pay to Landlord fifty percent (50%) of any Sublease Profit derived therefrom. All sums payable hereunder by Tenant shall be calculated on an annualized basis, but shall be paid to Landlord, as additional rent, within ten (10) days after receipt thereof by Tenant. Sublease Profit shall be recalculated from time to time to reflect any corrections in the prior calculation thereof due to (i) subsequent payments received or made by Tenant, and (ii) mistake. Promptly after receipt or final adjustment of any such payments or discovery of any such mistake, Tenant shall submit to Landlord a recalculation of the Sublease Profit, and an adjustment shall be made between Landlord and Tenant, on account of prior payments made or credits received.

(d) In connection with the assignment of this Lease, Tenant shall pay to Landlord, upon receipt thereof, an amount equal to fifty percent (50%) of all Assignment Profits. For purposes of this subparagraph (d), **“Assignment Profits”** shall mean all consideration payable to Tenant, directly or indirectly, by any assignee, or any other amount received by Tenant from or in connection with any assignment (including, but not limited to, sums paid for the sale or rental, or consideration received on account of any contribution, of Tenant's personal property, equipment or machinery) after deducting therefrom: (i) the reasonable out-of-pocket costs and expenses of Tenant in making such assignment, such as brokers' fees and advertising fees paid to unrelated third parties, and attorney's fees, (ii) any sums paid by Tenant to Landlord for approval of any proposed assignment including attorney's fees, (iii) the cost of improvements or alterations made by Tenant expressly and solely for the purpose of preparing the Leased Premises for such assignment, and (iv) the unamortized cost of any of Tenant's personal property, equipment or machinery installed in the Leased Premises that are being sold, or conveyed to the assignee in connection with the assignment transaction, which unamortized cost shall be equal to (a) the total cost of any of Tenant's personal property, equipment or

machinery installed in the Leased Premises that are being sold, or conveyed to the assignee in connection with the assignment transaction, (b) divided by [length of initial term] (___), and (c) the result multiplied by [length of initial term] minus the number of years (prorated if applicable) from the Commencement Date to the effective date of the assignment.

Ground Lease:

Form 1:

SECTION 11.

ASSIGNMENT

11.1 No Assignment until Completion of Construction. Lessee will not without the prior written consent of Lessors, which consent may be withheld by Lessors in their sole and absolute discretion, assign this Lease, it being understood that Lessors will not consent to any assignment of this Lease except by way of mortgage prior to completion of construction of all buildings and other improvements specified in the Specific Provisions.

11.2 Premium. As a condition precedent to the effectiveness of Lessors' consent to any assignment of this Lease, Lessee shall pay to Lessors as additional rent, an assignment premium equal to fifty percent (50%) of the gross selling price less the total of (A) Lessee's acquisition cost for this Lease; (B) the unamortized cost of any improvements to the Premises made by Lessee and approved by Lessors; and (C) the amount of any reasonable and ordinary real estate sales commission payable by Lessee in connection with such sale to any unrelated third party specifically as commissions calculated by reference to the selling price of such sale.

11.3 Gross Selling Price. For purposes of this section 11, "gross selling price" shall mean the total valuable consideration agreed to be paid to Lessee by the assignee, and shall be presumed to include any valuable consideration agreed to be paid to any employee, officer, director or equity participant of Lessee by the Assignee including such payments as consultant's fees, payments for covenants not to compete, guaranteed future salaries to any person affiliated with Lessee whether as officer, director, employee or equity participant. In the event any of such gross selling price is due to be paid at any time in the future, Lessors may at their option require that the present value of its share of such payments be paid Lessors at the time of execution and delivery of the consent to the assignment, or in the alternative Lessors may require that Lessors be paid their share of such future payment at the time such future payments are due to Lessee from the assignee.

11.4 Unamortized Cost of Improvements. For purposes of this section 11, in determining the assignment premium, Lessee's unamortized cost of any improvements to the Premises shall include all direct costs of such improvements and shall exclude all indirect costs. Direct and indirect costs shall be determined under the principles applicable to "producers" of

property under section 263A of the IRS Code and section 1.263A-1 of the Income Tax Regulations (“IRS Reg.”) in effect on the Amendment Effective Date. Thus, only “direct material” and “direct labor” costs, as specifically defined in IRS Reg. 1.263A-1 (e) (2) (i) (A) and (B), will be taken into account in determining Lessee's unamortized cost of such improvements. “Indirect costs,” as specifically defined in IRS Reg. 1.263A-1 (e) (3) (including both indirect costs that must be capitalized for federal income tax purposes and indirect costs that are not required to be capitalized for such purposes) will not be taken into account in determining Lessee's unamortized costs of such improvements. In determining the unamortized cost of any improvements, federal income tax amortization (or depreciation) shall be used, unless otherwise agreed in writing by Lessors and Lessee; provided, however, that all costs of improvements by Lessee made for use by another party shall be deemed to be fully amortized at the end of the lease term with the other party with respect to which the improvements were made.

11.5 No Duplication. Lessors and Lessee agree that it is the purpose and intent of this section 11 that no amounts previously deducted be duplicated by the various deductions permitted in this section 11, and that Lessors' participation rights shall not extend to any amount in which Lessors shall have previously received an assignment premium pursuant to this section 11. The premium provision of this section 11, however, shall apply to all assignments of this Lease after the Amendment Effective Date.

11.6 Failure to Pay is Lease Default. The failure of Lessee to make any payments to Lessors required under this section 11 shall constitute a default and shall give Lessors all rights and remedies available to Lessors in the event of default under this Lease. Upon an assignment, Lessee shall not be released from its obligations under this Lease.

11.7 Amendment of this Section. Notwithstanding any provision of this Lease to the contrary, Lessors shall be entitled in their sole discretion at any time to amend this section 11 in order to address any potential adverse tax effect of this section 11 on Lessors so long as the economic impact of such amendment on Lessee is not more severe than it would be under the current language.

11.8 Lessee's Affiliate. Notwithstanding any provision of this section 11 to the contrary, Lessee may assign this Lease without the consent of Lessors or the payment of an assignment premium to an affiliated entity which means that the relationship between Lessee and the proposed assignee is either that of a parent or subsidiary that the parent “controls.” The term “controls” as used in this section 11 shall have the same meaning as under section 368(c) of the IRS Code.

11.9 Assumption of Obligations By Assignee. Any assignment of this Lease shall specifically state that the assignment is made subject to all terms, covenants and conditions of this Lease, and all such terms, covenants, and conditions shall be specifically assumed and agreed to by the assignee.

11.10 Information to be Provided by Lessee. Lessee shall provide to Lessors all financial statements, documents, and other information reasonably requested by Lessors on the proposed assignee to determine whether the proposed assignee has the reputation, competency, financial strength, and ability to assume and perform Lessee's duties and obligations under this Lease.

11.11 Lessors' Response Only After Receipt of Requested Information. Lessors shall respond to any request for its consent to an assignment of this Lease no later than thirty (30) days following Lessors' receipt of all financial statements, documents or other information reasonably requested by Lessors to make their determination.

11.12 Definition of an Assignment. The term "assignment" in this section 11 shall include one or more sales or transfers by operation of law or otherwise by which (a) an aggregate of more than fifty percent (50%) of (1) the total capital stock of a corporate lessee, (2) the total partnership interests of a general partnership lessee, (3) the total membership interests of a limited liability company lessee, or (4) the total beneficial interests of a trust lessee, or (b) if the lessee is a limited partnership, fifty percent (50%) of the interest in the general partner of such limited partnership or, if there is more than one general partner, fifty percent (50%) of the interests in all such general partners in the aggregate, or (c) if the lessee is a limited liability company that is manager-managed, fifty percent (50%) of the interest in the manager of such limited liability company or, if there is more than one manager, fifty percent (50%) of the interests in all such managers in the aggregate, shall become vested in one or more individuals, firms or corporations who or which are not stockholders, partners, members, or beneficiaries thereof, either legally or equitably, as of the Amendment Effective Date or of Lessee's subsequent acquisition of this Lease by assignment, it being understood that ownership of such capital stock, partnership interests and beneficial interests shall be determined in accordance with the principles enunciated in section 544 of the IRS Code; provided, however, that the foregoing definition shall not apply with respect to a corporate lessee whose capital stock is listed on a recognized stock exchange.

11.13 Conditions to Lessors' Consent to an Assignment. In connection with any assignment of this Lease, Lessors may, and shall have the right to, condition their consent to such assignment upon: (a) the reputation, quality, competency, and financial strength and ability of the assignee to assume Lessee's duties and obligations under this Lease; and (b) being provided with a guaranty of lease, in form and substance satisfactory to Lessors, from an individual or entity of size and substance reasonably satisfactory to Lessors guaranteeing payment of the rent and the due observance and performance of Lessee's obligations under this Lease. Lessors may and shall have the right to withhold Lessors' consent to any assignment if the proposed transferee's projected use of the Premises does not satisfy the requirements of section 5 above.

11.14 Assignment Invalid Without Lessors' Consent. No assignment or other transfer of this Lease other than in accordance with the foregoing provisions of this section 11, whether voluntary or involuntary, by operation of law, under legal process, through receivership or bankruptcy or otherwise, shall be valid or effective without the prior written consent of Lessors. Should Lessee attempt to make or suffer to be made any assignment or other transfer of this Lease, except as allowed pursuant to this section 11 or section 12 below, or should any right or interest of Lessee under this Lease be attached, levied upon or seized under legal process and the same shall not be released within sixty (60) days thereafter, then any of the foregoing events shall be deemed a default under this Lease. Should Lessors consent to an assignment or other transfer of this Lease pursuant to the foregoing sentence, none of the restrictions of this section

11 shall be thereby waived, but shall apply to each successive assignment or other transfer, if any, and shall be severally binding upon each and every encumbrance, assignee, transferee, Subtenant and other successors in interest of Lessee.

SECTION 12.

MORTGAGE OF LESSEE'S LEASEHOLD INTEREST IN THE PREMISES

12.1 Lessors' Consent Required. Lessee may, with the prior written consent of Lessors, assign this Lease by way of mortgage; provided however that: (1) the mortgage shall be made to a bank, insurance company or other established lending institution registered to do business in the State of Hawaii, as mortgagee; (2) the amount secured by such mortgage shall not at any time exceed the fair market value of the leasehold interest in the Premises and any building or other improvement to be built and paid for with the proceeds of such mortgage; (3) the proceeds of all loans secured by any such mortgage shall be used exclusively for acquisition of the Premises and direct and indirect costs of construction on the Premises; (4) the mortgage shall be subject to all of the terms and provisions of this Lease; and provided also that (5) Lessee shall, upon execution of such mortgage, promptly deliver a true copy thereof to Lessors. If Lessors shall believe that the amount secured by such mortgages exceeds such fair market value, Lessee will, promptly on demand by Lessors and at Lessee's own expense, cause such value to be determined by one qualified real estate appraiser satisfactory to Lessors and, if the amount so secured shall exceed such value as determined by such appraiser, will promptly reduce the amount so secured to such value; provided, however, that if such value as determined by such appraiser shall be equal to or exceed the amount so secured, Lessors shall reimburse to Lessee the cost for such appraisal. The mortgagee or its assigns may enforce such mortgage and acquire title to the leasehold estate in any lawful way, and pending foreclosure of such mortgage (or pending sale of this Lease in lieu of foreclosure of such mortgage), may take possession of and rent the Premises, and upon foreclosure thereof (or upon such sale in lieu of foreclosure thereof), may with consent of Lessors sell and assign the leasehold estate by assignment in which the assignee shall expressly assume and agree to observe and perform all the covenants of Lessee contained in this Lease, and such assignee may make a purchase money mortgage of this Lease to the assignor, provided that upon execution of any such mortgage, a true copy thereof shall be delivered promptly to Lessors and that no other or further assignment of this Lease for which any provision hereof requires the written consent of Lessors shall be made without such consent. The mortgagee or its assigns of such mortgage shall be liable to perform the obligations imposed on Lessee in this Lease only during the period such person has possession or ownership of the leasehold estate. Nothing contained in such mortgage shall release or be deemed to relieve Lessee from the full and faithful observance and performance of Lessee's covenants contained in this Lease or from any liability for the nonobservance or nonperformance thereof, nor be deemed to constitute a waiver of any rights of Lessors under this Lease, and the terms, covenants and conditions of this Lease shall control in case of any conflict with the provisions of such mortgage.

12.2 Estoppel Certificates. Lessors hereby agree that, provided that Lessee is not then in default of Lessee's obligations under this Lease, Lessors shall, upon request of Lessee, review and amend to Lessors' satisfaction, if necessary, and execute and deliver such estoppel certificates and reaffirmation statements (in both cases, in recordable form, if requested) in favor

of Lessee, or any mortgagee of Lessee's interest hereunder, or any other person or entity reasonably requiring the same, certifying (if such is the case in each instance) that: (a) this Lease is in full force and effect and unmodified (or stating the modifications); (b) Lessee is not in default in the payment of rent or to the knowledge of Lessors any of Lessee's other obligations under this Lease; (c) to the knowledge of Lessors, Lessors have not notified Lessee in writing of an event of default under the Lease; and (d) an authorized mortgagee of Lessee's interest hereunder is entitled to the protection and benefits of section 12.1 above. With respect to clause (c), Lessors shall not be deemed to have waived any default under the Lease, whether known to Lessors at time the estoppel certificate was issued. The clause relates only to written notice by Lessors to Lessee of an event of default under this Lease.

SECTION 13.

SUBLETTING AND ATTORNMENT

13.1 No Subletting of Land Without Lessors' Consent. Lessee will not, without the prior written consent of Lessors, rent, sublet or part with possession of the Land or any part thereof and prior to granting such approval for subletting of such Land only, Lessors shall have the right to review and approve the proposed sublease and to revise the Minimum Annual Rent, Percentage Rent, and/or Additional Rent reserved under this Lease (which shall in no event be reduced) on the basis of the proposed subrent. The increase in the amount of the Rent payable under this Lease on account of said subletting shall not be less than one-half of the amount by which such subrent for Land exceeds that portion of the Minimum Annual Rent, Percentage Rent, and Additional Rent reserved under this Lease for the same rental period fairly allocable to the sublet Land. Subletting for the purpose of avoiding the assignment provisions of section 11 above shall be deemed a breach of this Lease.

13.2 Tenant Leases; No Subletting of Air Rights. Notwithstanding the foregoing, Lessee may, without the consent of Lessors, sublet space in any building or buildings on the Land to Tenants under Tenant Leases, provided that the purpose of such Tenant Leases is not the avoidance of the provisions of this section 13, that all such Tenant Leases shall be negotiated and consummated in good faith with the intention of providing commercially reasonable rental revenue from the building or buildings that are a part of the Premises. Lessee shall provide an annual rent roll to Lessors (in a form prescribed by Lessors) within thirty (30) days after the end of each calendar year during the Term of this Lease, stating with respect to each Tenant Lease, the name of Lessee, the term of the Tenant Lease, the space leased, the permitted use(s), and all rent payable. Lessee will not at any time during the Term of this Lease separately sublet, assign, surrender or otherwise transfer any air rights in respect to the Land, other than easements for access, drains, sewers, water, electricity or other utilities with the approval in writing of Lessors. Specifically, Lessee will not lease air space to a wireless, cellular, or similar company without the prior written consent of Lessors, which consent may be withheld in the sole discretion of Lessors.

13.3 Attornment. Lessors acknowledge that Lessee will from time to time enter into Tenant Leases. Lessors agree with respect to any Tenant Leases which comply with the provisions and conditions contained in sections 13.3 and 13.4 of this Lease, that in the event of a termination of this Lease prior to its expiration date, except for termination by reason of

condemnation or destruction and the election of Lessee not to reconstruct the Premises, as provided in sections 15 and 16 below, Lessors will allow each Tenant of any part of the Premises who is not then in default under its Tenant Lease and shows evidence of financial ability to continue to meet such Tenant's obligations under its Tenant Lease to attorn to Lessors, and thereby continue its Tenant Lease in full force and effect on the same terms and conditions as set forth in the Tenant Lease, but as a direct lease to Lessors, subject to (a) the payment, when due, of all rentals payable under the Tenant Lease for any period after the termination of this Lease, (b) the full and faithful compliance on the part of each Tenant with each and every term and condition of its respective Tenant Lease, (c) Tenant's agreement that each of the Trustees of the Estate of Bernice Pauahi Bishop will be acting in such Trustee's fiduciary (or trustee) capacity and not in an individual (or personal) capacity, and that any liability of such Trustee under the Tenant Lease which may arise as a result of such Trustee acting as Landlord is a liability limited to the assets of the Estate of Bernice Pauahi Bishop and not the a personal liability of such Trustee, and (d) Lessors and Tenant, promptly upon Lessors' request, amending the Tenant Lease with respect to y and all provisions that Lessors reasonably determine to be ambiguous or inconsistent with then customary ground 'lease practice in the State of Hawaii, provided, however, that such amendment shall not materially alter the basic economic terms of the Tenant Lease. The holder of any authorized mortgage of such surviving Tenant Lease shall be entitled to the same rights and protection with respect thereto as such Tenant is entitled.

13.4 Conditions to Attornment. Each Tenant's right to attorn to Lessors shall be subject to the conditions set forth below.

(a) Term and Compliance With This Lease. The term of the Tenant Lease, including any options to extend the term of Tenant Lease, may not extend beyond the Term of this Lease. The Tenant Lease shall comply with all of the provisions set forth in sections 4 and 5 above, including but not limited to (1) the payment of rent, general excise tax, real property taxes, insurance premiums and any additional assessments and charges, and (2) the use as permitted under this Lease.

(b) Insurance.

(1) Tenant shall effect and maintain commercial general liability insurance with respect to the Premises and operations of Tenant with coverages and limits no less than those required of Lessee under this Lease. All insurance policies shall name Lessors as additional insured, and shall be primary to any other insurance that may be available to Lessors.

(2) Tenant shall keep all of its improvements, alterations, additions, repairs and, personal property on the Premises insured under a Special Form (or ISO equivalent) form of property insurance, including business interruption coverage, in an amount as near as practicable to the full replacement cost thereof. Tenant will also insure any owned or installed boilers or other pressurized vessels on the property against rupture or explosion. All insurance policies shall name Lessors as additional loss payee and shall be primary to any other insurance that may be available to Lessors.

(3) For the purpose of waiver of subrogation, Lessors, Lessee and Tenant shall mutually release and waive unto the other, all rights to claim damages, costs or expenses for any damages to property caused by a peril of any type whatsoever in, on or about the Premises which would be covered by any policy of insurance required hereunder or actually covered by any other policy of insurance in effect. Such waiver and release shall include all losses as to which a party may self insure by deductible, under insurance, coinsurance or otherwise. All policies of insurance carried by either party shall contain a provision or include an endorsement allowing pre-loss waiver of subrogation.

(c) **Deposit.** Tenant shall submit to Lessors prior to attornment, a new security deposit representing all rents and charges for one (1) month under the Tenant Lease and acknowledges and agrees that Lessors shall not be liable for any and all deposits previously paid to Lessee.

(d) **Other Requirements.** Lessors may impose the requirements under section 10.2 above related to the approval of plans and specifications, bonding, and protection against mechanic's and materialmen's lien if Tenant intends to construct any improvements on the Premises.

(e) **Conflicts.** If there is any conflict between the terms and conditions of the Tenant Lease and any of the material terms and conditions of this Lease the terms and conditions of this Lease shall control.

(f) **Minimum Annual Rent.** The sum of the minimum monthly rents payable under all existing, current Tenant Leases, including the Tenant Lease in question, must at a minimum equal one twelfth (1/12) of the Minimum Annual Rent then payable under this Lease.

(g) **Lessee's Default.** Lessors shall not be liable to Tenant for any default by Lessee under the Tenant Lease occurring prior to the termination of this Lease and the effective date of the attornment.

13.5 Assignment of Tenant Rents. Lessee does hereby assign to Lessors all of Lessee's right, title and interest in and to all rents due and to become due under the Tenant Leases as security for the payment of all sums payable by Lessee to Lessors under this Lease; provided, however, that Lessee shall have the right to collect and retain such rents as they become due and payable until default by Lessee of any term, provision or covenant in this Lease contained and on the part of Lessee to be performed. After any such default by Lessee, Lessors shall apply any amounts collected by Lessors from Tenants to the Rent and other charges or payments due under this Lease. No collection of rent by Lessors from a Tenant shall constitute a waiver of any of the provisions of this section 13 or an acceptance of the Tenant a Tenant of Lessors or a release of Lessee from performance by Lessee of its obligations under this Lease. In the event of the failure of any Tenant to pay Rent to Lessors pursuant to the foregoing assignment after the happening of an event of default, any such Rent thereafter collected by Lessee shall be deemed to constitute a trust fund for the benefit of Lessors. In the event, however, that Lessee shall have remedied such event of default, such assignment of rents shall be deemed to be terminated as to such default and Lessee shall be deemed to be reinstated with all

13.6 of the rights with respect to such rents; provided, however, that such termination and reinstatement shall not extinguish this section 13.5 or be deemed a waiver of Lessors' right to a further assignment of rents for any other default by Lessee.

Form 2:

11.18. Assignment and Subletting.

11.18.01. Assignment and Subletting During the Pre-Construction Term. At any time during the, Pre-Construction Term, _____ may assign this lease to _____ or a developer of _____'s choice (collectively referred to in this section only as “_____”). Thereafter, _____, as the lessee hereunder, shall have the right only to sublease the entire premises to may assign this lease back to _____ at any time during the term of this lease.

11.18.02. Assignment and subletting During the Construction and Regular Terms. Except as otherwise provided in this Section 11.18, Lessee shall not, without the prior written consent of Lessor, assign this lease or any interest therein in the premises, or sublet the premises or any part thereof, or mortgage this lease or any interest therein during the Construction or Regular Terms. Neither this lease nor any interest herein shall be assignable as to the interest of _____ or any party other than _____ by operation of law without the prior written consent of Lessor. As used herein, the term “assignment” shall include, without limitation, the transfer or conveyance of either this lease or a sublease covering the premises. As used herein, the term “sublet” shall include, without limitation, any use or occupancy of any portion of the premises by any person other than or through a sublease or a sub-sublease. No assignment, subletting or mortgaging can be made if Lessee is in material default under this lease at the time of any proposed assignment or sublease. Lessor may condition its consent on the imposition of the profit sharing arrangement as set forth in Section 11.18.04 below.

11.18.03. Exception. Notwithstanding the provisions of Section 11.18.02 above, but subject to the conditions set forth in Section 11.18.04 below, _____ shall have the right to assign either this lease or its sublease with _____ as the case may be, or to either sublet or subsublet, as the case may be, all or a portion of the demised premises at any time or from time to time, (which is generally referred to in this Section 11.18 as “assign or sublease”); provided that _____ may not assign or sublease during the Construction Term, at all, and during the first sixty (60) months of the Regular Term.

11.18.04. Conditions of Assignment or Subletting. Except as otherwise provided in this Section 11.18, and except if (1) _____ assigns or subleases pursuant to this section, whether or not Lessor's consent is required, the following provisions will apply except where (1) _____ assigns or subleases to a wholly owned subsidiary (except for _____, if _____ is a Tenant of Lessor at a location within a one-mile radius of the premises) or (2) _____ enters into a sale leaseback arrangement involving this lease or a sublease covering the premises, and only so long as _____ continuously occupies the premises under such an arrangement, assignment and subletting shall be subject to the following conditions:

(i) Restriction or Use. The use to which the premises will be put shall not violate any of the restrictions on use set forth in Exhibit "C";

(ii) Profit Sharing. Lessor shall be entitled to one-half (1/2) of any profit realized by-as a consequence of the assignment or subleasing. The term "profit" shall mean the gross amount of all consideration the assignor or sublessor will receive from the proposed assignment or subletting, (including the fair market value of any non-cash consideration) less only:

(a) the rent and other costs under the lease or sublease, as the case may be, (or pro rata portion thereof, if less than the entire premises is being sublet) paid by _____ after the date it vacated the premises (or a portion thereof, if less than the entire premises is being sublet) until the date that the assignment is effective or the date when the new occupant of the space in question, in the case of a sublease, begins paying rent, provided that this amount shall be no more than an amount equal to six (6) months of the base rent which is in effect at the time.

(b) The cost of any concessions or inducements reasonably incurred by _____ in order to accomplish the assignment or subletting, as the case may be.

(c) The unamortized cost of _____'s Tenant improvements to the building and/or the price of personal property, if any, that may be included in the rent or other consideration paid to _____.

(d) All other out-of-pocket costs such as advertising fees, brokerage commissions and legal fees incurred in connection therewith.

(iii) Notice and Lessor's Right to Terminate or Assume. If _____ wishes to assign either this lease or its sublease with _____, or its sublease from an Investor assignee (as that term is used in Section 11.18.05), or to either sublet or sub-sublet in the aggregate more than forty percent (40%) of its store on the premises, it must furnish Lessor with at least ninety (90) days' prior written notice that it intends to either actually assign or sublease or to attempt to assign or sublease. If _____ is proposing an actual assignment or sublease, this written notice will be accompanied by a copy of the proposed assignment or sublease and all other documentation evidencing the complete agreement between and the proposed assignee or Subtenant. Within forty-five (45) days after receiving this notice of intent, Lessor shall have the right to either (1) terminate the lease if _____ is then the lessee, in which case Lessor shall be obligated to pay _____ an amount equal to the depreciated net book value of the building and site improvements paid for by _____ (exclusive of fixtures and improvements which will remain _____'s personal property, and which amount shall be in no event less than an amount calculated on a straight-line depreciated basis over forty (40) years, or (2) assume _____'s position as sublessee if _____ is the lessee, in which case _____ shall immediately assign the sublease to Lessor and _____ will consent thereto. If

Lessor terminates this lease or assumes its position as set forth above, will be released from further liability and obligation under this lease. If Lessor does not notify _____ of its intent to exercise its option pursuant to this subsection within the specified time period, _____ may proceed with its efforts to assign or sublease in accordance with the provisions of this section.

(iv) Payment of Share of Profit. In the case of an assignment, one-half (1/2) of the profit shall be paid to Lessor promptly after the assignee makes its payment. In the case of a sublease, one-half (1/2) of such profit shall be paid to Lessor at the end of each calendar year during which such profit is actually collected. Each payment shall be made with a detailed statement of the amounts received and the exclusions therefrom in accordance with the above provisions. Lessor shall have the right to audit _____'s books and records to verify the accuracy of the detailed statement.

(v) _____’s Continuing Liability. Except as provided for in subsection (iii) above, no assignment or sublease of this lease shall release or be deemed to relieve _____ from the full and faithful performance of any covenants, provisions and conditions contained in this lease and on the Lessee's part to be observed and performed, or from any liability for the nonobservance or nonperformance thereof, nor be deemed to constitute a waiver of any rights of the Lessor hereunder, and the terms, covenants and conditions under this lease shall control in case of any conflict between this lease and any assignment.

(vi) Other. Any assignment, mortgage, encumbrance or sublease which occurs contrary to the provisions of this section or any assignment or sublease which is being made or agreed for the purpose of circumventing the rights or obligations under this Section 11.18, shall be null and void and shall constitute an event of default under this lease. Except as to _____ or as otherwise provided in Section 11.18.05 below, and excepting any transfer of partnership interests in _____ to affiliates of the transferring partner or to affiliates of any partner, any merger, consolidation or liquidation of _____ or any change in the ownership of or power to vote a majority of the outstanding voting stock of _____ or _____’s corporate partners or any other permitted assignee or sublessee, shall constitute an assignment of this lease for purposes of this paragraph. Lessee shall pay Lessor a reasonable fee, not to exceed \$500, to reimburse Lessor for processing costs incurred in connection with any request by Lessee for consent to a proposed assignment or sublease.

11.18.05. Sales/Leaseback Transactions. Should _____ (as lessee hereunder) elect to construct the Project itself (rather than to assign this lease to for that purpose) or should _____ assign this lease back to, _____ at any time during the term of this lease whether or not the Project is then fully constructed, _____ shall have the right to assign this lease to an investor and then to sublease the premises back in what is commonly known as a “sale/leaseback transaction”, without Lessor's consent. Moreover, said investor-assignee’s interest in this lease shall be freely assignable, and should the sublease from said investor assignee to _____ be terminated prior to the expiration of the term of this lease, said investor-assignee shall have the same right to sublet the Premises to third parties as _____ would otherwise have had, albeit subject to the restrictions and conditions set forth in Section 11.18.04 above.

11.18.06 Use, Assignment and Subletting. The demised premises may be used for any lawful purpose not expressly prohibited by applicable law or by any restrictions set forth on Exhibit "C". Tenant agrees, for a period of at least one (1) year commencing on the Commencement Date, to operate all of the demised premises, fully stocked and fully staffed and with due diligence and efficiency so as to produce the maximum gross sales which may reasonably be produced by such manner of operation.

So long as Tenant is _____, Tenant may, without the prior written consent of Landlord or Ground Lessor, assign this Lease or any interest therein in the demised premises, or sublet the demised premises or any part thereof, or mortgage this Lease or any interest therein during the lease term; provided that Tenant may not assign or sublease at all during the first sixty (60) months of the lease term and no assignment, subletting or mortgaging can be made if Tenant is in monetary default under this Lease at the time of any proposed assignment or sublease. The following provisions will apply to any assignment or sublease by _____, except where Tenant assigns or subleases to a wholly owned subsidiary of _____.

(a) Restriction or Use. The use to which the demised premises will be put shall not violate any of the restrictions on use set forth in Exhibit "C".

(b) Profit Sharing. Tenant acknowledges that the Ground Lessor shall be entitled to one-half (1/2) of any profit realized by Tenant as a consequence of the assignment or subleasing. The term "profit" shall mean the gross amount of all consideration the assignor or sublessor will receive from the proposed assignment or subletting, (including the fair market value of any non-cash consideration) less only:

(i) The rent and other costs under the lease or sublease, as the case may be, (or pro rata portion thereof, if less than the entire premises is being sublet) paid by Tenant after the date it vacated the premises (or a portion thereof, if less than the entire premises is being sublet) until the date that the assignment is effective or the date when the new occupant of the space in question, in the case of a sublease, begins paying rent, provided that this amount shall be no more than an amount equal to six (6) months of the base rent which is in effect at the time.

(ii) The cost of any concessions or inducements reasonably incurred by Tenant in order to accomplish the assignment or subletting, as the case may be.

(iii) The unamortized cost of Tenant's improvements to the building and/or the price of personal property, if any, that may be included in the rent or other consideration paid to Tenant.

(iv) All other out-of-pocket costs such as advertising fees, brokerage commissions and legal fees incurred in connection therewith.

In the case of an assignment, one-half (1/2) of the profit shall be paid to the Ground

Lessor after the assignee makes its payment. In the case of a sublease, one-half (1/2) of such profit shall be paid to the Ground Lessor at the end of each calendar year during which such profit is actually collected. Each payment shall be made with a detailed statement of the amounts received and the exclusions therefrom in accordance with the above provisions. Ground Lessor shall have the right to audit Tenant's books and records to verify the accuracy of the detailed statement.

(c) Notice and Right to Terminate or Assume. At any time following the expiration of the initial term, if Tenant wishes either to assign this Lease or to sublet in the aggregate more than forty percent (40%) of its store on the premises, it must furnish Landlord and Ground Lessor with at least ninety (90) days' prior written notice that it intends to either actually assign or sublease or to attempt to assign or sublease. If Tenant is proposing an actual assignment or sublease, as aforesaid, the written notice will be accompanied by a copy of the proposed assignment or sublease and all other documentation evidencing the complete agreement between Tenant and the proposed assignee or Subtenant. Within forty-five (45) days after receiving this notice of intent, Tenant acknowledge that Ground Lessor shall have the right, at its option, to assume Tenant's position as sublessee under this Lease, in which case Tenant shall immediately assign this Lease to Ground Lessor and Landlord will consent such assignment. If Ground Lessor assumes Tenant's position as set forth above, Tenant will be released from further liability and obligation under this Lease. If Ground Lessor does not notify Tenant of its intent to exercise its option pursuant to this subsection within the specified time period, Tenant may proceed with its efforts to assign or sublease in accordance with the provisions of this section. The foregoing shall not be construed as imposing any limitation upon the exercise by Tenant or any assignee of Tenant of its rights pursuant to Article 8 after an assignment or sublease that is consummated prior to the expiration of the initial term.

(d) Tenant's Continuing Liability. No assignment or sublease of this Lease shall release or be deemed to relieve Tenant from the full and faithful performance of any covenants, provisions and conditions contained in this Lease and on the Tenant's part to be observed and performed, or from any liability for the nonobservance or nonperformance thereof, nor be deemed to constitute a waiver of any rights of the Landlord hereunder, and the terms, covenants and conditions under this Lease shall control in case of any conflict between this Lease and any assignment; provided, however, that in the event that Kmart Corporation assigns this Lease to Ground Lessor in accordance with (c) above of the Ground Lease, and pursuant thereto, Ground Lessor expressly assumes the obligations of Tenant under this Lease, then, _____ shall be released from Tenant's obligations hereunder.

Any assignment, mortgage, encumbrance or sublease which occurs contrary to the provisions of this Article 16 or any assignment or sublease which is being made or agreed for the purpose of circumventing the rights or obligations of the parties and the Ground Lessor under this Article 16, shall be null and void and shall constitute an event of default under this Lease. Except as to _____ so long as it has continuing liability hereunder, any merger, consolidation or liquidation or any change in the ownership of or power to vote a majority of the outstanding voting stock of Tenant, shall constitute an assignment of this Lease for purposes of Article 16.

Tenant shall reimburse Landlord any fee due to the Ground Lessor under the Ground Lease for consent to any proposed assignment, including any general excise tax thereon in such amount so that Landlord shall not incur any general excise tax liability with respect to the payment of such fee.

Form 3 (Golf Course Ground Lease):

9. Assignments and Subleases. The Lessee shall not, without the prior written consent of the Lessor, assign this Lease or sublet the Premises, in whole or in part, save and except subleases and concession agreements covering operations related to the "Golf Course", as that term is defined in subparagraph 13(a) of this Article below, or otherwise part with possession of the whole or any part of the Premises; EXCEPT that such assignment or sublease shall be permitted without such consent in the following cases: (a) with respect to mortgages as provided in Article VI below; (b) an initial sublease of the entire Premises to an entity in which fifty-one percent (51%) or more of its equity interests are owned by Lessee or Lessee's current general and/or limited partners and/or their affiliated companies; provided, however, that Lessor shall have the right to reject any such sublessee prior to the execution of any sublease arrangement based on the financial viability of such sublessee and subject to the submission from Lessee to Lessor of all requested information necessary to verify such sublessee's financial viability; (c) the Lessee or sublessee's execution of a management agreement with the _____; (d) the sublessee's. execution of subleases, licenses and concession agreements in respect of golf-related activities; (e) any assignments of Lessee's partnership interests so long as effective control of Lessee is retained by one or more of Lessee's current general and/or limited partners; and (f) after Lessee has completed construction of the Improvements required by Article IV, Section 13 of this Lease, any assignment to any person or entity, so long as the assignee shall be obligated to continue to operate first-class championship resort golf facilities on the Premises under management by an independent, nationally-recognized hotel management company having a good repute for skill and experience in the management of first-class championship resort golf courses. In any assignment or subleases under the foregoing clauses (a)-(f), after Lessee has completed construction of all improvements as required by Article IV, Section 13 of this Lease, Lessee shall obligate the assignee or sublessee to covenant with the Lessor to operate or cause to operate first-class, championship, destination resort golfing facilities on the Premises under management by the or another hotel management company having the aforementioned national recognition and repute. Lessor's consent to any sublease or assignment shall not be unreasonably withheld or delayed. Any assignment or sale of partnership interests in Lessee shall constitute an assignment of this Lease. The Lessor may, at Lessor's sole discretion, require payment by the Lessee of the reasonable costs and expenses incurred by the Lessor in connection with the granting of any such consent.

Form 4:

26. ASSIGNMENT AND SUBLETTING. Except as provided in Paragraph 28 (Consent to Mortgage), Tenant shall not assign, transfer, mortgage, pledge, hypothecate not encumber this Lease, or any interest herein, and shall not sublet the Promises or any part thereof, or any right or privilege appurtenant thereto, nor suffer any other person to occupy or use the Premises, or any portion thereof collectively 'assignment or subletting), without the prior written consent of Landlord, and no consent given by Landlord to any such assignment or subletting shall relieve Tenant from the requirement of obtaining the written consent of Landlord to any subsequent assignment or subletting by any other person. Any such assignment or subletting without Landlord's prior written consent shall be void, and shall, at the option of Landlord, constitute a default. Any person occupying or using the Premises under color of such unconsented assignment or subletting shall be liable nonetheless for any violation of the terms and conditions of this Lease. Tenant shall in each case make a written request for Landlord's consent, which request shall set forth in detail the information required by Landlord, including without limitation a description of the specific use to be made of the Premises by the assignee or Subtenant.

In connection with any assignment or subletting to which Landlord may consent prior to completion of Tenant's Improvements and to the opening of Tenant's business on the Premises, Landlord shall be entitled to condition its consent upon Tenant's payment to Landlord of an amount equal to all of the net proceeds received by Tenant in consideration therefor.

Each assignee other than Landlord shall assume and be deemed to have assumed this Lease and shall become and remain liable jointly and severally with Tenant for observance and performance of all the terms and conditions of this Lease on Tenant's part to be observed and performed, including without limitation the payment of rent (notwithstanding the subsequent renegotiation thereof in accordance with the terms of this Lease). No assignment shall be binding on Landlord unless such assignee or Tenant shall deliver to Landlord a counterpart of such assignment and an instrument in recordable form that contains a covenant of assumption by the assignee, but the failure or refusal of the assignee to execute such instrument of assumption shall not release or discharge the assignee from its liability as set forth above.

Landlord's consent to any assignment shall in no event release Tenant from its continuing liability under this Lease unless such release is expressly set forth in a writing signed by Landlord. Unless so released, Tenant's liability shall continue notwithstanding any other or further assignment of this Lease or subsequent amendment or revision hereof, Tenant hereby expressly consenting thereto and waiving notice thereof. Tenant's continuing liability hereunder shall be direct, primary and absolute and not secondary or conditional.

Landlord shall not withhold such consent unreasonably nor (except as herein provided) require the payment of any monies other than to reimburse Landlord for reasonable attorneys' fees and out-of-pocket costs incurred in connection therewith and to pay Landlord a reasonable service charge therefor. Landlord's refusal to consent to an assignment or subletting involving a change in the use of the Premises from that which is specifically provided herein or that exposes Landlord to risks not previously accepted by Landlord with respect to the Premises shall not be deemed unreasonable.

It is understood and agreed that neither this Lease, nor any interest herein or hereunder, nor any estate hereby created, in favor of Tenant, shall pass voluntarily or by operation of law (except upon foreclosure by an authorized mortgages upon the terms set forth in Paragraph 28 (Consent to Mortgage), 29 (Protection of Mortgagee) and 30 (Further Protection of First Authorized Mortgages)) without the express prior written consent of Landlord, including, without limitation, under any state or federal insolvency or bankruptcy act, or any similar law now or hereafter in effect to any trustee, receiver, assignee for the benefit of creditors, or any other person whomsoever.

In the event Tenant shall be a corporation or partnership (collectively a "Tenant Corporation"), any transfer, sale, pledge, or other disposition by any one or more of the persons who hold 50% or more of the corporate stock or voting securities or Interests by which the Tenant Corporation is controlled (excepting transfers of such stock, vesting securities or interests between or among persons presently owning such stock, voting securities or interests, their families, personal representatives or trusts on behalf of any of them) of Tenant shall be deemed an assignment of this Lease and therefore prohibited without the express prior written consent of Landlord.

In the event the interests in Tenant Corporation are publicly held and traded regularly on a recognized stock exchange, for so long as such Tenant Corporation is publicly held and such interests are traded regularly on a recognized stock exchange the covenant of the immediately preceding paragraph shall not apply, nor shall the provisions relating to the transfer, sale, pledge or other disposition of corporate stock or voting securities or interests issued by Tenant apply; provided, however, that a merger or the acquisition of more than fifty percent (50%) of the outstanding stock of such Tenant Corporation by a single person or entity shall constitute an assignment and require Landlord's prior written consent.

All persons executing this Lease and any instruments relating to it on behalf of a Tenant Corporation shall be duly authorized to execute this Lease on behalf of the Tenant Corporation.

DIRECT RECOGNITION AGREEMENT

THIS DIRECT RECOGNITION AGREEMENT ("Agreement") is made as of _____, 200__, by and between:

[Name and address of Primary Landlord]

hereinafter "**Fee Owner**"; and

[Name and address of Subtenant]

hereinafter "**Subtenant**";

WHEREAS:

A. Fee Owner represents that it is the owner of the land (hereinafter called the "**Premises**") described on Exhibit A annexed hereto and is the Landlord under the lease dated _____ between Fee Owner and Tenant named below (hereinafter "**Lease**").

B. [Name of Primary Tenant/Sublessor] (hereinafter called "Tenant") presently holds the Tenant's interest under the Lease for a term expiring on _____ .

C. Tenant has entered into, or is about to enter into, a sublease (hereinafter "**Sublease**") dated as of ____ between Tenant, as sublessor, and Subtenant, as sublessee, covering [a portion][all] of the premises for a term ending on _____ (hereinafter "**Subleased Premises**").

NOW, THEREFORE, it is agreed by and between Fee Owner and Subtenant as follows:

1. Fee Owner hereby acknowledges receipt of a copy of, and consents to [and approves], the Sublease [and the terms thereof], and agrees that the exercise by Subtenant of any of the rights, remedies and options contained therein shall not constitute a default under the Lease.

2. Fee Owner agrees that (a) whenever it has an obligation with respect to the Premises, or its consent or approval is required for any action of Tenant and/or Subtenant under the Lease, then, to the extent such obligation, consent or approval relates to the Subleased Premises or Subtenant's use and occupation thereof, Fee Owner will perform such obligation and will not unreasonably withhold, unduly delay or place conditions on such consent or approval [specify any condition or circumstance under which event such consent or approval may be withheld or conditioned] and (b) Fee Owner shall not, in the exercise of any of the rights arising or which may arise out of the Lease, disturb or deprive Subtenant of its rights to possession of the Subleased Premises (except however, if Fee Owner terminates the Lease as a result of a fire or other casualty, or as the result of a condemnation, in accordance with the terms of the Lease), or of any right or privilege granted to or inuring to the benefit of Subtenant under the Sublease.

3. In the event of (a) the termination of the Lease by (i) re-entry, notice, conditional limitation, summary proceeding or 620 other action or proceeding or otherwise, or (ii)

surrender by Tenant (except in connection with a termination of the Lease as a result of a fire or other casualty or a condemnation in accordance with the terms of the Lease), or (b) if the Lease shall terminate or expire for any reason before any of the dates provided in the Sublease for the termination of the initial or renewal term of the Sublease (other than in connection with Fee Owner's termination of the Lease as a result of fire or other casualty or a condemnation in accordance with the terms of the Lease), Subtenant shall not be made a party in any removal or eviction action or proceeding (unless Subtenant shall be a necessary party) nor shall Subtenant be evicted or removed or its possession or right of possession be disturbed or in any way interfered with, and the Sublease shall continue in full force and effect as a direct lease between Fee Owner and Subtenant [subject to the following modifications _____].

4. Fee Owner covenants and represents that as of the date hereof, the Lease is in full force and effect and it knows of no default by Tenant under any of the terms and conditions thereof and of no circumstance which with the giving of notice or the passage of time or both would constitute a default by Tenant under the Lease.

5. Fee Owner and Subtenant agree that any agreement modifying (a) the Lease which would (i) effect any increase in Subtenant's rents or decrease the term of the Lease, or (ii) increase Subtenant's monetary obligations, or decrease Fee Owner's obligations, under the Sublease, or (b) the Sublease which would (y) effect any decrease in Subtenant's rents or the term of the Sublease, or (ii) diminish Subtenant's monetary obligations, or increase Fee Owner's obligations, under the Sublease, shall not be binding on Fee Owner or the Subtenant, as applicable, unless such party has consented thereto in writing.

6. Any notices, consents, approvals, submissions, demands or other communications (hereinafter "**Notices**") given under this Agreement shall be in writing. Unless otherwise required by law or governmental regulation, Notices shall be deemed given if sent by certified mail, return receipt requested, postage prepaid, or by a recognized overnight courier service that provides proof of delivery to the courier service and proof of receipt, (a) to Fee Owner, at the address of Fee Owner as hereinabove set forth or such other address as Fee Owner may designate by Notice to the other parties hereto, and (b) to Subtenant, at the address of Subtenant as hereinabove set forth with a copy to _____, or such other address or persons as Subtenant may designate by Notice to the other parties hereto. All Notices shall become effective only on the receipt or refusal of same by the proper parties.

7. No modification, amendment, waiver, or release of any provision of this Agreement or of any right, obligation, claim or cause of action arising hereunder shall be valid or binding for any purpose whatsoever unless in writing and duly executed by all of the parties hereto.

8. This Agreement shall be binding on, and shall inure to the benefit of, the parties hereto and their respective legal representatives, successors and assigns.

IN WITNESS WHEREOF, the parties have caused this instrument to be executed as of the date first above written.

[Signature Blocks and Acknowledgments & EXHIBIT A - Description of the Premises]