

LEASING REALTY'S  
TOP 100+  
LEASING INTERVENTION™  
TIPS



Leasing **RE**ality

MASTER YOUR LEASING DOMAIN

POWERED BY



ABRAMS GARFINKEL  
MARGOLIS BERGSON, LLP

*PRESENTED BY*

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Attorney & CPA

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# 1. WHAT DO THE FOLLOWING HAVE TO DO WITH COMMERCIAL LEASING?

- A. *The Albert Einstein, Drake, Snoop Dogg & "Channel Your Inner Gus" Theory*
- B. *The Snagglepuss, Groucho Marx, The Clash & Steve McQueen Great Escape Theory*
- C. *The Ho Ho Ho, Dr. Evil & Jerry Maguire "You Complete Me" Theory*
- D. *The Mariano Rivera, John Wooden, Billy Idol & Annie "The Sun Will Come Out Tomorrow" Theory*
- E. *The Winston Wolf, Vivian Greene & Gene Kelly "Be Part of the Solution" Theory*
- F. *The Ben Franklin, 5 P's, JFK & John Wooden Cub Scout Theory*
- G. *The Luv The 1 U R With, George Benson & Sting "So Lonely Drive-In Movie" Theory*

(See the last few slides for the answers)



## 2. WHAT IN THE WORLD DOES DRAKE HAVE TO DO WITH COMMERCIAL LEASING?

Crazy as it sounds, many songs of hip-hop artist *Drake* can be applied to the manner in which brokers should conduct themselves. With that said, in order to succeed, brokers need to build a foundation by knowing the nuts and bolts of commercial leasing, and in order to do so, like *Drake* you have to:

- A. "Know Yourself," and
- B. have "Started From The Bottom" if you want to...
- C. fulfill your "Dreams Money Can Buy,"
- D. because if you don't make yourself a student of your craft with an unquenchable thirst for knowledge, you will no longer have access to your "Hotline Bling."
- E. but more importantly, you will have to "Shut It Down,"
- F. because you were going about your job by "Doing It Wrong,"
- G. leaving your clients to be telling you "Look What You've Done,"
- H. and as a consequence of your not being a MASTER OF YOUR LEASING DOMAIN, your iPhone will not only no longer "Light Up" with calls or texts from your customers,
- I. but you will instead leave yourself pondering over and over again why you didn't heed the advice posed by the question "How About Now" when it came to mastering your craft and using your time more efficiently (or as JFK once said while president, that you *"must use time as a tool, and not as a couch."*),
- J. and with that lesson behind us my friends - "Hold On We're Going Home" - and how about a loud and robust leasing hallelujah!

### 3. A BAKER'S DOZEN REASONS OF THE HOW & WHY BROKERS MAKE A DIFFERENCE

1. Showing tenants and landlords what they are truly looking for!
2. At the end of the day, there are no savings, especially for a tenant, if it doesn't hire a broker!
3. Brokers add value and level the playing field!
4. A broker's mantra of *"we can work it out"* (by simultaneously channeling *John Lennon* and *Mahatma Gandhi*)!
5. Brokers are matchmakers (with props to Yente from *Fiddler on the Roof*)!
6. The knowledge possessed by a broker is power!
7. When it comes to convincing a landlord that tenant retention is the proper path, brokers have the talent to properly advocate by simultaneously channeling the song titles *"Never Give Up on a Good Thing"* (*George Benson*) and *"What's So Funny 'Bout Peace, Love and Understanding"* (*Elvis Costello*)!
8. Brokers create competition for the space being leased and tenants as well!
9. Brokers channel *Aretha Franklin* by creating *"R-E-S-P-E-C-T"* for their customer!
10. Brokers prevent tenants from being "brokered" by a landlord's broker!
11. Brokers help to manage the leasing process from goal line to goal line!
12. Brokers have the ability to help restructure lease obligations if and when the need arises!
13. Brokers promote awareness, tolerance and acceptance for their customer's negotiating position!



# 4. CO-BROKERAGE AGREEMENTS

In the context of a commercial lease (or the sale and purchase of real estate), a co-brokerage agreement is a contract in which two (or more) real estate brokerage firms agree in writing as to the following:

- A. Which broker is the listing agent of the premises on behalf of the landlord or seller.
- B. The listing agent and co-broker are the sole brokers who brought about the leasing or sale.
- C. The listing agent and co-broker are the sole brokers entitled to receive a commission, and the method and manner under which they will each be paid (and commission split, e.g., 50/50 or 60/40).
- D. The terms and conditions of the co-brokerage agreement that govern when payments are received.
- E. Whether or not the brokers will be entitled to commission upon a renewal or expansion of the space (or for purchase of the building by the tenant).
- F. Confirmation by the broker/listing agent and co-broker that they are licensed in the state where the property is located, and confirmation that they have the authority to sign.
- G. The sharing by the broker/listing agent and co-broker in any out-of-pocket fees, costs and expenses in the collection of the commission and filing any liens against the premises.
- H. Outline rights and remedies in regard to potential litigation disputes between the parties.
- I. Provide for the broker/listing agent and co-broker representations and indemnities.

## 5. FINANCIAL COMPONENTS OF A COMMERCIAL LEASE

The primary financial terms ordinarily included in a commercial lease are:

- A. Base rent
- B. Real estate taxes
- C. Operating expenses, CPI, porter's wage and/or utility escalations
- D. Charges for utilities
- E. Other landlord provided services or amenities

### Landlord Advocates:

- A. Attempt to include in the base rent the profit component landlord would like to achieve over and above the upfront and recurring costs it will incur relative to the lease.
- B. Ideally, if the market does not allow for a straight pass-through, the tenant would be responsible for increases in landlord's operating expenses and real estate taxes (and possibly utility charges for the building) over an established base year.
- C. The amount of fixed rent initially charged should not only cover landlord's operating costs for the building at the time the lease is entered into, but also take into account financing costs for the mortgage on the building.
- D. Make sure tenants pay their proportionate share of real estate back taxes based on the amount of square footage tenant has in proportion to the total square footage of the building.
- E. In New York City, given that real estate taxes take into account a landlord's income and expenses of its building, the rental amount from a retail space may be proportionately larger than those relative for its office or residential rental rates in a mixed-use building. In such cases, a larger percentage share of real estate taxes should be allocated to a retail space than an office or residential space.

## 6. FINANCIAL FACTORS OF A COMMERCIAL LEASE

- A. Upfront Landlord Costs Incurred (generally in the first 6 to 12 months of the lease term). See “B”, “C”, “I” and “L” below.
- B. Free Rent Concessions
- C. Brokerage Commissions
- D. Real Estate Tax Escalations
- E. Operating Expenses
- F. Utilities
- G. Compliance with Law “Cost” Provisions
- H. Assignment and Subletting “Cost and Profit” Provisions
- I. Tenant Improvement Allowances and Landlord and Tenant Work Costs to Prepare the Premises for Tenant’s Occupancy
- J. Good Guy Guaranty “Cost Reimbursement” Provisions
- K. Security Deposit
- L. Legal, Architectural and Engineering Fees

# 7. FREE RENT CONCESSIONS

- A. Determining the amount of free rent:
  - i. Current market conditions;
  - ii. Whether the lease is for office, retail or industrial space;
  - iii. Other concessions tenant hopes to receive from the landlord;
  - iv. Term of a tenant's lease;
  - v. Financial strength and/or track record of the tenant; and
  - vi. Reimbursement for early termination of the lease.
- B. Incentivizing Tenant Renewal
  - i. Consider giving a "hometown discount" to tenants upon lease renewal. Its better to maintain your current tenant than to risk vacancy turnover costs (loss of revenue, brokerage commission payment, legal and architectural fees).
- C. Bifurcating Free Rent - Tenants should try to split up the free rent over the course of the lease rather than request it all upfront.
- D. Landlords typically prefer to grant free rent over a tenant improvement allowance.
- E. Landlords should include language providing that tenant must give back the full amount (or unamortized portion) of any free rent concessions granted in the event of an (i) uncured default, (ii) lease termination or (iii) as a condition to get out of a guaranty.

Tenant Counteraction: Try and delete the above or at least attempt to negotiate that the recapture provision shall "sunset" (i.e., no longer be in effect) after a pre-specified date in the lease.

# 8. INTRO TO NEGOTIATING SECURITY DEPOSITS & GOOD GUY GUARANTEES

Generally stated, it's all about minimizing and managing short and long term risks for landlords, while conversely, how tenants can react to and counteract a landlord's attempts to do so.

**Landlord's Mantra:** Channel the "Zen Master" (aka Phil Jackson to you NBA fans out there) and ask yourself a Zen like question "How Much Is Enough?" when it comes to the amount of (a) security deposit to require of your tenant and (b) legal and business "steroids" to insert into your good guy guarantees!

**Tenant's Mantra:** Channel the legendary rock legend *Pete Townshend* of *The Who* and his song "*A Little is Enough*," by attempting to have the security deposit be (and the good guy guaranty contain when it comes to "legal and business steroids" as) little as possible.

A basic "good guy" guaranty requires one or more of the tenant's principals to guarantee the tenant's rent obligations under the lease through the date tenant surrenders the leased premises to landlord. The "good guy" guarantee normally contains a specifically negotiated set of limitations or conditions that, if satisfied, releases the guarantor from personal liability thereunder.

Landlord Advocates: When negotiating the letter of intent "LOI", think narrowly and insert "*tenant's principals to shall sign landlord's standard good guy guaranty ("GGG")*". Little do they the steroid laced GGG that awaits them!

Tenant Advocates: While you're being seduced by the landlord during the LOI stage, the time is never more appropriate to be proactive and clearly define exactly what is to be contained in the GGG. For example, "Tenant's principal(s) to guarantee the payment of rent while occupying the premises. The GGG can be unilaterally terminated by tenant or guarantor (a) giving landlord 60 days' notice of its intent to surrender, (b) delivering the premises broom clean and vacant, and (c) paying all rent due and owing to landlord through the surrender date.

# 9. SECURITY DEPOSITS

Factors which can potentially reduce (or increase) a tenant's security deposit:

- A. Free rent concessions (and the timing of when they will be granted)
- B. Brokerage commissions (and the timing of when they will be granted)
- C. Landlord's work cost
- D. Tenant improvement allowance amount
- E. Attorney's fees
- F. Architectural and engineering fees
- G. Other miscellaneous costs
- H. Strength of the prospective tenant's balance sheet and profit & loss statement
- I. Tenant's liquidity
- J. Tenant's net worth allocable to goodwill
- K. Tenant's historical track record
- L. Tenant's past successes
- M. Is the tenant entity a shell (i.e., newly created)?
- N. Nature of the tenancy (retail, office or industrial)
- O. Length of the lease term
- P. Tenant's skin in the game (i.e., the tenant's build-out cost and decorative vs. "systems installation" breakdown)
- Q. Whether there will be a guaranty (straight, personal, corporate and/or GGG)
- R. Tenant entity type (non-profit, foreign or trade association)
- S. What rent is the deposit based on (first year, last year or average)?
- T. Will there be a security deposit reduction (a.k.a. burn down)?
- U. How much of tenant's work and build-out will be reusable after tenant's lease?
- V. Is the security deposit cash or a letter of credit?

Generally speaking, the *greater* the commission, concessions and allowances, the *shorter* the term, and the *worse* the financials, the *larger* the security deposit.

# 10. BURN DOWN CLAUSE

A burn down clause essentially states that, so long as tenant is not in default at a particular point in the future, the tenant's security deposit will be reduced.

For example, if, after the third year from rent commencement, tenant is not then in default of the lease beyond the expiration of any applicable notice and cure period, tenant's security deposit will be reduced by a specific dollar amount or anywhere from 1 to 3 months of the initial or then monthly rental amount.

Theoretically at least, this is fair to landlord, since by that time, it will have recouped its initial upfront costs, and tenant will have evidenced that it is in compliance with the terms and conditions of the lease.

For a letter of credit, upon the burn down date, tenant must provide landlord with the instruments and authorizations required by the issuer of the letter of credit to have the amount reduced, or alternatively, have an amendment to the LOC issued by its bank.

## A. Tenant Advocates:

- i. Ensure that the clause is applicable so long as tenant is not in default "beyond any applicable notice and cure period."
- ii. Negotiate for language stating that, upon receipt of the instruments and authorization from the issuing bank, landlord must promptly execute and deliver the excess security to tenant.

# 11. LETTER OF CREDIT VS. CASH

Generally stated, the benefits of having a Letter of Credit vs. a Cash Security Deposit:

- A. As a consequence of bankruptcy laws, upon a tenant's declaration of bankruptcy, landlord must submit the cash security deposit it holds to the bankruptcy trustee, and landlord must accordingly stand side by side with the tenant's other creditors, in the hopes of receiving that security deposit back. If tenant is in poor financial condition, landlord runs the risk of losing the cash to senior creditors.
- B. Conversely, with a Letter of Credit ("LOC"), since the LOC is essentially a contract between the bank, landlord and tenant, it effectively withstands the tenant's bankruptcy. In this rare instance, cash is not king!
- C. Subtenants should insist, applying the foregoing logic to that of its sublandlord, that their security deposit be in the form of a LOC and not cash.
- D. If landlord is small in nature, it may require a cash security deposit for cash flow purposes. For example, it may not have the cash on-hand to pay any upfront costs at the commencement of the lease, and thus, it intends on using the security deposit, and subsequently paying it back once it makes its money back. Note that "co-mingling" is against public policy in many jurisdictions.



## 12. LETTER OF CREDIT

Generally, a lease will provide that tenant must maintain a Letter of Credit (“LOC”) issued by a banking corporation reasonably satisfactory to landlord located within the state. The amount specified in the letter essentially acts as a security deposit. Some things to negotiate:

- A. Letter of Credit Specifications
- B. Restoring Proceeds
- C. Application of Funds upon Default
- D. Landlord Assignment
- E. Issuer Bank Replaced
- F. Time is of the Essence
- G. Instruments Required by Issuer Bank
- H. LOC Being Self-Renewing
- I. LOC Remaining in Effect for 60 Days Subsequent to Lease Expiration

# 13. GOOD GUY GUARANTEE

The following are a few ways that landlords strengthen their Good Guy Guarantees (“GGG”), along with counteractive measures for tenants:

- A. The guarantee is for monetary and non-monetary obligations. Tenant Counteraction: Delete “non-monetary” requirement
- B. Landlords often make it a condition for the guarantor to terminate the GGG for tenant to surrender the space in the *“condition otherwise required under the lease.”* Tenant Counteraction: Delete!
- C. Landlords tend to require the guarantor to give 3-12 months’ notice before exercising their rights to create a back door limited personal guaranty based on the length of the notice period. Tenant Counteraction: Make the time period as short as possible.
- D. Require that landlord be reimbursed for the unamortized costs of any free rent concessions, tenant improvement allowances, brokerage commissions, legal fees and/or landlord’s work costs before guarantor can unilaterally terminate the GGG. Tenant Counteraction: Delete or have it “sunset” after 2 years.

## 13. GOOD GUY GUARANTEE (CONTINUED)

- E. Landlord may include language making the guarantor liable if the lease is assigned. Tenant Counteraction: Add language that the guarantor is released from the GGG upon assignment if the assignee's principals sign a replacement GGG or the assignee's net worth is above a certain monetary threshold.
- F. Where more than one principal will be signing as guarantor, the guarantors are jointly and severally liable. Tenant Counteraction: If more than one principal will be signing as a guarantor, if one principal later withdraws from the corporate tenant, negotiate that the obligations of the withdrawn member under the GGG may be terminated unilaterally, provided the remaining guarantor(s) remain and reaffirm their GGG obligations.
- G. All tenant work and other repairs required must be completed lien free before the guarantor can get out of the GGG. Tenant Counteraction: Attempt to delete this, although this may prove to be difficult!

# 14. USE CLAUSE (WHAT'S THE USE?)

- A. Breadth of the Use Clause
  - i. Landlord Advocates: Make the use clause as narrow as possible to control the mix of who exactly is a tenant in your building. Example: A nail salon, and no other purpose.
  - ii. Tenant Advocates: Negotiate the use clause to be as broad as possible to provide flexibility. Down the road this would help a tenant if it's looking to sublet or assign its space. Example: A nail, health, and/or beauty facility, with the sale of men's and women's clothing, health related products, and non-alcoholic beverages and pre-packaged food.
- B. Tenant Mix and Use
  - i. Landlord Advocates: Insert language stating that tenant cannot sublet or assign any portion of the premises to anyone who will use the space for certain undesirable uses.
  - ii. Tenant Advocates: Make sure that none of the restrictive designated uses interfere with how you plan to use the premises.
- C. Exclusive Use Provisions
  - i. Tenant Advocates: Consider inserting language in the lease preventing landlord from renting space in the building/shopping center to tenants for a similar use to yours (i.e., an exclusive use clause with significant abatement of rent or other penalty language if landlord leases space in violation of such exclusive use provision).
- D. Certificate of Occupancy
  - i. Tenant Advocates: Request from the landlord a representation that the Permitted Use of the Premises conforms to the Certificate of Occupancy.

# 15. RESTRICTIONS ON USES

## Examples:

- A. Federal, state or local governmental division, department or agency which generates heavy public traffic, including, without limitation, court, social security offices, labor department office, drug enforcement agency, motor vehicle agency, postal service, military recruitment office;
- B. Union or labor organization;
- C. Office for the practice of medicine, dentistry or the rendering of other health related services;
- D. Chemical or pharmaceutical company provided, however, that the subletting or assignment to such a company which will use the premises only for executive, general and sales offices and waive the right to conduct any research and development shall not be prohibited;
- E. Insurance claims office, including, but not limited to, unemployment insurance or worker's compensation insurance;
- F. Brokerage firm;
- G. Courier or messenger service;
- H. A restaurant of any kind or nature (or if a restaurant use is allowed, prohibit fast food restaurants); and
- I. A bar, nightclub, cabaret or any use requiring a public assembly permit.

# 16. EXIT STRATEGIES

Exit Strategies from a Commercial Lease:

- A. How a tenant can make like *Steve McQueen* and pull off a “*The Great Escape*” from its lease is one of the most important clauses to be negotiated by a tenant.
- B. During the LOI negotiations, tenant advocates need to channel *Groucho Marx* from *Animal Crackers* and adopt his “*hello, I must be going*” mindset.
- C. Landlords like to control to whom they will rent their space, and as a rule, they feel it is they, and not the tenant, who should be the one who:
  - i. Receives rental profits from the space leased; and
  - ii. Controls who will occupy its space upon a tenant’s departure.

Tenant Advocates: It is preferable to have as much business and financial flexibility as possible when it comes to the space leased both for today and the foreseen or unforeseen events of tomorrow.

As a result, the Assignment and Subletting and Use Clauses, along with the (Good Guy) Guaranty, are amongst the most important clauses to negotiate in a commercial lease. For greater detail, please see Leasing REality’s 15 Part Assignment and Subletting Series and 7 Part Security Deposit & Good Guy Guaranty Series!

## 16. EXIT STRATEGIES (CONTINUED)

The following are 8 important conditions and restrictions landlords should insert into their initial lease drafts:

- A. Include a right to recapture and/or leaseback a tenant's space if and when a tenant wishes to assign its lease or sublet its space
- B. Restrict space usage rights with a narrow use clause
- C. Require that tenants must secure, for a lease assignment or sublease of the premises, the landlord's consent. Although not always possible, have it subject to the landlord's sole (but reasonable) discretion.
- D. Insert language requiring tenant to not be in default at the time of a request to assign or sublet, as well as at the time it becomes effective, and at any time during the lease
- E. Attempt to include: 50% to 100% of all gross profits from a sublet or assignment, an increase of the base rent in the event of an assignment, and/or 2 or 3 additional months of security in the case of an assignment
- F. Tenant (assignor) and any of its guarantors shall remain liable in the case of an assignment
- G. Limit all renewal and expansion options of tenant to the original named tenant only
- H. To give landlord's more time, the required information should include the fully executed sublease or assignment (and not just the executed letter of intent).

# 17. TENANT RETENTION AND LEASE RENEWAL

The ability to retain a tenant as well as to control the mix of tenants in a building is critical to a landlord. If a tenant's existing space works for the tenant but for certain cosmetic improvements and/or space efficiency reconfiguration, a tenant's broker can be the conduit for keeping the current marriage between landlord and tenant alive and full of spark!

Landlord Advocates: To maintain control over your tenant mix, you want as narrow and tight a renewal clause as possible. That said though, do not lose sight of the fact that:

- A. Secure and stable cash flow that comes from an existing tenant is akin to the oxygen that a landlord breathes;
- B. Having vacant space likely means you are losing money by getting no return and loss of revenue is a bi-product of a tenant relocating to another building
- C. When a tenant relocates to another building, not only does it lose a revenue stream, it will incur great costs in the form of full brokerage commissions, TI allowances, landlord demolition and space build-out costs, free rent concessions and/or legal, architectural and engineering fees.



# 17. TENANT RETENTION AND LEASE RENEWAL (CONTINUED)

Tenant's goal is to keep the renewal clause broad. The following are several steps a tenant can take to ensure that they get the best renewal possible:

- A. Negotiate that any tenant renewal options extend to any parent, affiliate, subsidiary, permitted assignee or subtenant of the named tenant
- B. Attempt to have the landlord provide a TI allowance at lease renewal of no less than \$5 to \$10/square foot to allow tenant to paint, carpet or improve its "tired space"
- C. Ensure tenant has the right to renew as long as tenant is not *then* in default (beyond the expiration of any notice and cure period) as opposed to *ever* being in default
- D. Negotiate for the notice required to exercise the renewal option to be within 6 months of the lease expiration (versus a landlord requirement of 9 to 12 months prior thereto)
- E. Negotiate for a set increase in rent as opposed to rental being at FMV
- F. If the rent is FMV for the renewal term, define exactly what FMV truly means
- G. If tenant must take FMV, try for 95% of FMV and/or if market conditions or location then permit, attempt for the rent to be the lesser of FMV or the then escalated rent
- H. If using FMV to establish new rent, tenant needs to make sure that they receive a new Tax and Operating Base Year for that of the period in which the renewal commences

# 18. FAIR MARKET VALUE RENT

Fair Market Value (FMV) is the rent per square foot that a willing non-sublease tenant would pay and a willing landlord would reasonably accept, taking into account all relevant factors:

- A. Primary Factors:
  - i. Length of lease term;
  - ii. Size and location of premises; and
  - iii. Whether tenant improvements or allowances are being provided for such comparable space, taking into consideration the quality and age of the building.
- B. Other Factors Include:
  - i. Extent of leasehold improvements to be provided for the premises;
  - ii. Rental abatements;
  - iii. Lease takeovers/assumptions;
  - iv. Moving expenses and other concessions;
  - v. Extent of services to be provided;
  - vi. Distinction between “gross” and “net” lease;
  - vii. Method of space measurement; and
  - viii. Time the particular rental rate under consideration became or is to become effective.

# 19. SUBORDINATION, NON-DISTURBANCE, ATTORNMEN AGREEMENTS (SNDA)

- A. A subordination and non-disturbance attornment agreement is a document wherein the lender will agree that tenant's occupancy will remain undisturbed (and as such its lease not terminated at the option of the lender or the holder of lender's interest), notwithstanding the foreclosure of the landlord's mortgage.
- B. More often than not, landlords will not agree to make the subordination of the lease contingent on the landlord securing for the benefit of a tenant an SNDA (despite the fact that to virtually any retail tenant, and to many office tenants, securing an SNDA is absolutely imperative). Sometimes reality conflicts with desire, and a request to receive an SNDA is met with a flat out "no" from a landlord's attorney, or alternatively, with a response that the landlord will only use "commercially reasonable efforts" to secure an SNDA.
- C. Factors That Impact an SNDA:
  - i. Office versus retail use?
  - ii. Size of the tenancy?
  - iii. What is the loan to value of the landlord's mortgage?
  - iv. Who is the landlord?
  - v. How much "skin" in the form of financial and sweat equity does the tenant have in the game?
  - vi. Landlord's affirmative obligation to deliver the SNDA versus a "commercially reasonable efforts" standard
  - vii. Does the landlord's lender require the tenants in a landlord's building to sign an SNDA?
  - viii. Who pays for the legal costs incurred in securing an SNDA?

## 19. SUBORDINATION, NON-DISTURBANCE, ATTORNMENT AGREEMENTS (SNDA) (CONTINUED)

D. Retail Leases: When representing a tenant, given the context of the deal and after a tenant advocate has thrown many factors into its “analytical blender,” it will need to decide whether or not (as early as the letter of intent) the subordination of the lease will need to be conditioned upon that tenant receiving an SNDA.

Why a Greater Need for a Retail Tenant to Secure an SNDA?

- i. The location for the majority of retail businesses is one of the more driving forces behind the traffic it generates and its revenue stream;
- ii. If a tenant’s landlord was foreclosed upon and the holder of the mortgage (or buyer of it at foreclosure) elected to terminate the tenant’s lease:
  - a. Tenant would be out of business; and
  - b. Tenant would lose the financial and sweat equity investment it had in its space.
- iii. In the vast majority of retail deals, a landlord provides little or no tenant improvement allowance or landlords work, and as a consequence thereof, if their landlord is foreclosed upon, the retail tenant will not have a chance to “monetize” such investment in its business.

## 19. SUBORDINATION, NON-DISTURBANCE, ATTORNMENT AGREEMENTS (SNDA) (CONTINUED)

### E. Mortgage Tips for a Tenant:

- i. Tenants need to be aware that the landlord's mortgagee or any successor owner of the building due to foreclosure of the mortgage shall generally not be:
  - a. Liable for any previous act or omission or negligence of the landlord under the lease;
  - b. Subject to any counterclaim, defense or offset, not expressly provided for in the lease and asserted with reasonable promptness which had previously accrued to the tenant against landlord;
  - c. Bound by any previous modification or amendment to the lease made after the granting of such senior interest, or by any previous prepayment of more than one month's fixed rent or additional rent, unless the mortgagee or successor owner received notice of such modification or prepayment and approved it in writing; and
  - d. Held liable if the landlord didn't deliver the tenant's security deposit it (once) held to the mortgagee or successor owner.



## 20. ESTOPPEL CERTIFICATE

It is imperative that a landlord require within its lease that their tenants furnish from time to time when requested by landlord, a prospective purchaser or mortgagee, or the holder of any deed to secure debt or mortgage covering the building, the premises, or any interest of landlord therein, to execute and return a certificate signed by the tenant confirming and containing such certifications and representations within no more ten (10) days following receipt of said certificate from landlord.

Tenant Advocates: Please be aware that although many estoppel certificates are generally just a few pages, great caution should be taken when signing them as essentially they can act as an amendment to the lease! Accordingly, at a bare minimum, in addition to reviewing each and every term contained in the estoppel, it is advisable that tenants have their attorney review the estoppel (and make comments thereto) prior to its execution.



## 20. ESTOPPEL CERTIFICATE (CONTINUED)

### Basic Estoppel Certificate Provisions to Include (and Possibly Negotiate):

1. Date of estoppel certificate
2. Name of entities benefitting from the estoppel
3. Basic tenant certifications and/or representations to the named entities should include:
  - a. the date of the lease, names of the landlord and tenant, and the exact premises
  - b. that the lease has not been modified, changed, altered or amended in any respect
  - c. that tenant has made no agreements with landlord or its agents or employees concerning free rent or any other type of rental concession
  - d. the exact rent per month and when it has been paid through
  - e. that the lease is in force and effect
  - f. that to the actual knowledge of tenant, landlord is in not default under the lease
  - g. that tenant has not assigned, sublet or transferred any portion of its lease interest
  - h. that landlord is under no obligation to tenant with respect to payment of the cost of tenant improvement work to the premises
  - i. that the lease does not contain and tenant does not have any options or rights of first refusal to purchase the premises
  - j. that the estoppel certificate is made by tenant knowing that purchaser [and its lenders (if any)] will rely upon the truth of tenant's certification
  - k. the security deposit amount
  - l. the lease expiration date
  - m. that there are no options to extend the term of the lease

# 21. LOSS FACTORS

There is a key distinction between “rentable” and “useable” square feet and the building loss factors.

## A. Landlord Advocates:

- i. Consider any “loss” to common areas of the building and the proportional share of common areas attributable to a specific space
- ii. Depending on the market, building layout, landlord and other factors, the RSF for which an office tenant is charged generally runs from 20% to 40% above the USF of a space
- iii. Attempt to base any TI allowances on RSF. A high loss factor can be beneficial in that the calculation is based on the higher RSF and not the lower USF

## B. Tenant Advocates:

- i. Be aware, loss factors are greater for multi-tenanted floors due to the common areas
- ii. Don't be afraid to ask for verification of the RSF and what percentage landlord uses for the loss factor in the proposal
- iii. When it comes to loss factors, given that the percentage established is a case of “it is what it is,” tenants need to be tolerant, accepting, and aware



## 22. REMOVAL AND RESTORATION OBLIGATIONS

Normally, fixtures, partitions and like installations installed by a tenant, or a landlord on behalf of a tenant, become the landlord's property once the tenant vacates at the conclusion of the lease term. However, landlords can elect to relinquish their rights, by notice to a tenant prior to the termination of the lease, requiring the tenant to remove the fixture, partition, and/or installation prior to the lease's expiration and at the tenant's expense. If the items are not removed by the tenant and the landlord does not want such items, at the election of the landlord, such alterations or any other property in question can be removed from the premises by the landlord at the tenant's sole cost and expense.

- i. Landlord Advocates: Pass-through to the tenant any money spent for alterations or improvements to the building which are required to be made pursuant to law or regulation after the lease commencement date.

## 22. REMOVAL AND RESTORATION OBLIGATIONS (CONTINUED)

- ii. Tenant Counteractions: The following is a list of several steps a tenant can take to ensure that their restoration and removal obligations are in line:
  - A. Negotiate to only have to pay tenant's proportionate share of such cost.
  - B. If the lease provides that improvements installed by a tenant (or by owner on tenant's behalf) can in landlord's sole discretion be required to be removed by tenant at lease expiration, delete it!
  - C. Regarding any alterations the tenant is permitted to make, ensure that you are not required to remove such alterations at or prior to the expiration of the term of the lease.
  - D. In a tenant's worse-case scenario, attempt to negotiate that when a tenant seeks landlord's approval to perform any alteration to its space, the tenant shall not be required to remove the alteration unless landlord requests it to be removed when landlord grants approval to the alteration.
  - E. Include language that decorative alterations up to a certain dollar amount do not require landlord's consent.
  - F. Include language that the landlord shall use reasonable efforts to cooperate with tenant in connection with any permits, approvals, consents of third parties and licenses required in connection with any alterations, improvements or additions to be made by tenant.
  - G. Attempt to negotiate into the lease, "In no event shall tenant be required to restore the Premises to the condition prior to the construction of leasehold improvements."
  - H. Tenants will generally have to remove any Specialty Alterations (i.e. built-in vault, sound room or decorative floor) at the expiration of the lease.

## 23. COMPLIANCE WITH LAW

Landlords will often attempt to have tenants pay their proportionate share of the landlord's cost to comply with local laws and regulations.

- A. Required alterations/improvements to the building
  - i. Landlord Advocates: Tenants should pay their proportionate share of alterations or improvements required pursuant to applicable laws enacted after the lease commencement date.
  - ii. Tenant Advocates: Attempt to delete or mitigate this.
- B. Tenant's hazardous materials on the premises
  - i. Landlord Advocates: Make sure tenant is liable for any damages caused by his introduction of "Hazardous Materials."
  - ii. Tenant Advocates: Make sure you're not liable for hazardous materials existing on the premises or in the building prior to the lease commencement date or introduced by landlord.
- C. ADA Compliance: Generally, landlords must warrant to tenants that the building is in compliance with the ADA, which means that it provides accessibility features required by the law.
  - i. Tenant Advocates: Landlord should be solely liable for existing and future compliance under the ADA, and should indemnify and hold tenant harmless from and against all damages, claims, liabilities, actions and proceedings relating to any breach or failure by landlord to comply with the ADA.
  - ii. Landlord Advocates: Make sure to include language in the lease reciprocating the above indemnification language with regard to tenant's obligations to comply with the ADA within the demised premises.

## 24. LANDLORD'S AND TENANT'S WORK; DESIGN AND CONSTRUCTION DRAWING LEASING TIPS

### Tenant Advocates:

- A. Regardless of who is performing the build out of the space, communicate what type of workplace you need for your business and staff.
- B. Before hiring an architect, do your due diligence and research as to whose price, personality and competence is the right fit for your team. Also prepare a request for proposal ("RFP"), clearly setting forth exactly what the scope of that architect's work will entail, which may also include, among other things, project administration during the construction process.
- C. Before choosing a space, make sure it is the right fit on all levels. Get a test fit done early in the process by an architect or space planner.
- D. To save time and money, get landlord's pre-approval at lease execution of your plans and contractors.

## 24. LANDLORD'S AND TENANT'S WORK; DESIGN AND CONSTRUCTION DRAWING LEASING TIPS (CONTINUED)

- E. Request that landlord pre-approve cosmetic alterations up to a certain dollar amount in the aggregate over a 12 month period.
- F. Attempt to include language in the lease stating that if landlord does not issue its consent or denial within 10 business days, then landlord shall be deemed to have consented to tenant's plans.
- G. Landlord's consent should be followed the phrase "*not to be unreasonably withheld, conditioned and/or delayed*" must always follow consent or approval language. If anything is subject to landlord's "sole discretion," include that it must be exercised reasonably.

## 25. LANDLORD'S AND TENANT'S WORK; NEGOTIATING A TENANT WORK CLAUSE

### Cost Reimbursement

- A. Landlord Advocates: The lease should require tenant to pay all costs and expenses incurred in reviewing tenant's plans or in changing reviewed plans, including the cost of hiring architects and engineers.
  - i. Tenant Counteraction: Include language that any fees required to be reimbursed must be reasonable and necessary, actual out-of-pocket third parties costs of landlord, and capped or waived for tenant's initial build-out of the space.

### Work Performance and Materials

- A. Landlord Advocates: The lease should contain an express requirement that tenant commence its work immediately, proceed diligently in order to complete the work in a reasonable period of time, and use "first class materials."
  - i. Tenant Counteraction: Revise such language to allow for flexibility allowing for the use of "new or like new materials," and to commence the work "promptly."

### Improvement Allowance "Use It or Lose It"

- A. Landlord Advocates: If giving tenant an improvement allowance, require a specific time period for tenant to perform the work and use the allowance.
  - i. Tenant Counteraction: Try to insert language that if the allowance is not used within that period, landlord will credit the unused allowance as additional free rent.

## 25. LANDLORD'S AND TENANT'S WORK; NEGOTIATING A TENANT WORK CLAUSE (CONTINUED)

### Removal of Tenant Improvements at Lease Expiration or Earlier Termination

- A. Tenant Advocates: Negotiate for language allowing initial improvements to remain at lease expiration.
  - i. Landlord Counteraction: If agreed to, include language requiring “specialty alterations” to be removed. Specialty alterations consist of raised floors, vaults, filing systems, internal staircases, dumbwaiters, pneumatic tubes, vertical and horizontal transportation systems and any alterations that are structural in nature or penetrate any floor slab in the premises.
  - ii. Tenant Counteraction: Ask landlord to confirm upon consent of the plan whether or not such alterations will need to be removed at lease expiration.

### Removal of Tenant's Furniture, Fixtures, and Equipment

- A. Landlord Advocates: Many commercial leases require, at landlord's option, for items affixed to the premises to remain at the space at lease expiration.
- B. Tenant Advocates: Tenant should add language that all of tenant's trade fixtures, materials and equipment, even if affixed, may be removed during the term and at lease expiration, but any damage caused thereby shall be repaired by tenant.
  - i. Landlord Counteraction: Provide that at landlord's option, equipment that should not be removed shall include HVAC and kitchen equipment.

## 26. LANDLORD'S AND TENANT'S WORK; COMPATIBLE LABOR, UNION/NON-UNION LABOR & LEGAL COMPLIANCE

### Compatible Labor

- A. Landlord Advocates: Include language in the lease requiring that *“any labor employed by tenant shall be harmonious and compatible with the labor employed by landlord, it being agreed that if in owner’s judgment the labor is incompatible, tenant must immediately upon owners demand withdraw that labor from the premises.”*
  - i. Tenant Counteraction: Be aware that the word “reasonable” always needs to be included when it comes to the exercise of judgment, discretion or consent.

### Union vs. Non-Union Labor

- A. Tenant Advocates: Be aware whether the building is a union or non-union building, given that the use of union workers versus non-union workers adds a significant cost to a tenant’s build-out.

### Work Schedules and Rules and Regulations

- A. Landlord Advocates: Include language that any work performed by tenant must comply with reasonable work schedule as well as the rules and regulations of the building.

### Early Access by Tenant

- A. Tenant Advocates: Negotiate for language stating that somewhere between 10 to 20 days prior to landlord’s substantial completion of its work, tenant shall have the right to access the premises for the purpose of installing its telecom and data wiring contemporaneously with the landlord’s installation of any of its own work. In addition, request that 10 to 20 days prior to the substantial completion date, if the flooring in the premises is completed as required under the lease, furniture can be stored in the premises as well.



## 27. LANDLORD'S AND TENANT'S WORK; TENANT WORK RELATED PROTECTION CONCERNS

### Lien Free Completion of Work

- A. Landlord Advocates: Require tenant to (a) deliver proof in advance of the lease signing that it has funds available for the approximate cost of construction and (b) establish a segregated bank account specifically earmarked for 125% of the cost of all work to be performed and furnished in connection with tenant's work.
- B. Tenant Advocates: When entering into a construction contract, it should specify that the contractor will not get paid unless and until it delivers partial or full lien waivers.

### Payment and Performance Bonds

- A. Landlord Advocates: Have tenant take out a payment and performance bond, which insures that the work commenced will be completed.

### Take Out Insurance

- A. Tenant & Landlord Advocates: Prior to the commencement of any work, tenants should procure and deliver to landlord Worker's Compensation, public liability, property damage, builder's risk and other insurance policies. Tenant should shoot for limits closer to \$1 million.
  - i. Landlord Counteraction: Limits should be no less than \$3 million with respect to personal injury or death, and \$1 million with respect to property damage.

### Compliance with Law & Permits

- A. Landlord Advocates: The aforesaid policies must name landlord, its managing agent, and any mortgagees of the landlord, at the bare minimum as additional insureds. Also, require tenant and any contractor should provide a duplicate original of its insurance policy.
- B. Tenant Advocates: Prior to commencing any work, tenants must obtain all necessary consents, authorization and licenses from any governmental authority having jurisdiction over the building.

## 27. LANDLORD'S AND TENANT'S WORK; TENANT WORK RELATED PROTECTION CONCERNS (CONTINUED)

### “I Got My Eye on You”

- A. Landlord Advocates: Require in the lease that (a) all of tenant's work be performed in accordance with tenant's approved plans and in compliance with the laws, rules and regulations of any governmental authorities and (b) landlord has the right to be reimbursed for its third party costs incurred relative to its oversight of such tenant compliant performance.

### Back It Up Buddy

- A. Landlord Advocates: Include language within your lease that if a lien is placed on your building as a consequence of the performance of tenant's work, tenant must either bond, discharge or pay off that lien in no greater than 10 to 20 days.

### Landlord Access

- A. Landlord Advocates: Include language stating that landlord can enter tenant's space at any time to examine the course and completion of tenant's work.
  - i. Tenant Counteraction: Condition the entry on being at reasonable times, upon reasonable notice and it should not interfere with the completion of work.

### Contract Assignability

- A. Landlord Advocates: Require in any contract with tenant concerning work to include language making it assignable to landlord in order to provide protection to landlord in the event it has to take over construction.

## 28. LANDLORD'S AND TENANT'S WORK; HAZARDOUS MATERIAL, GARBAGE, FREIGHT & SECURITY PROVISIONS IN A TENANT WORK CLAUSE

### Hazardous Materials

- A. Tenant Advocates: Include language that any pre-existing hazardous materials be the responsibility of landlord to remove and/or remediate.
  - i. Landlord Counteraction: Include language stating that tenant acknowledges that it has inspected the premises and that it will comply with all rules regarding hazardous materials.
- B. Landlord Advocates: Include language that if any asbestos containing material ("ACM") currently in compliance with law is disturbed by tenant's work, then tenant will be responsible for the remediation associated with its removal.
  - i. Tenant Counteraction: Delete this language. Secure a representation from landlord that on the lease commencement date, floors, ceiling, insulation, fireproofing or columns do not contain asbestos or other hazardous material. Request an ACP-5 or the equivalent in other jurisdictions. Require landlord to perform any and all demolition work to the premises before lease commencement.

### Garbage & Debris from Tenant Work

- A. Landlord Advocates: State that any garbage, debris or other materials generated as a consequence of tenant's work must be discarded at tenant's sole and expense.

### Freight Elevator

- A. Tenant Advocates: Negotiate that as to the freight elevator, landlord should provide no less than 10 to 25 hours of free freight elevator time depending on the scope of the build-out.

# 29. LANDLORD'S AND TENANT'S WORK; A LANDLORD'S NEED TO BE A CONTROL FREAK

## Pre-Approved and Required Contractors

- A. Tenant Advocates: Try to secure language that any contractors be pre-approved by landlord in advance.
- B. Landlord Advocates: Have a list of pre-approved contractors in each trade where you want to exert control.

## HVAC

- A. Landlord Advocates: Include language requiring tenants, at their sole cost and expense, to perform all maintenance to HVAC systems. Further, require that tenant maintain the actual service with landlord's preferred HVAC contractor.
  - i. Tenant Counteraction: Insert language that short of the reason for HVAC replacement being attributable to tenant's neglect or improper conduct, landlord must pay for (or tenant must share in) the cost of HVAC replacement.

## Tenant's Required Work

- A. Landlord Advocates: Exert controls on the tenant as to what work must and cannot be done.

## Tenant's Non-Compliance

- A. Landlord Advocates: Include language stating that any tenant violation of tenant work restrictions will give landlord the right to injunctive relief, self-help and the right to terminate the lease.
  - i. Tenant Counteraction: If confronted with the landlord's right to terminate the lease, fight long and hard to eliminate it.

## 30. LANDLORD'S AND TENANT'S WORK; NEGOTIATING A TENANT IMPROVEMENT ALLOWANCE

### Timing for Initial Tenant Improvement Allowance Disbursements

- A. Landlord Advocates: Ideally, the tenant should pay for the work and seek reimbursement after its completion.
  - i. Tenant Counteraction: A deposit of 10% to 25% is normally required by the contractor. Landlord should fund such deposits and disburse progress payments throughout the work.

### Hard vs. Soft Costs

- A. Landlord Advocates: Require that all or most tenant improvement allowance be spent on hard costs (e.g. costs directly related to construction, including labor, materials, equipment, basic building services)
  - i. Tenant Counteraction: Negotiate to allow the use of the allowance on a combination of hard and soft costs. Consider negotiating a soft cost percentage between 20% and 25%.

### What is a Tenant Improvement ("TI") Disbursement Request and What Should it Contain?

- A. A request for disbursement from the TI allowance signed by the president, CFO or controller of tenant, together with:
  - i. A statement that the amount requested does not exceed the actual TI allowance;
  - ii. Copies of all contracts, work, purchase and change orders associated with the request;
  - iii. Copies of documents such as bills and invoices indicating that all applicable work has been completed or the applicable materials furnished; and
  - iv. A certificate from tenant's licensed architect or the president or person requesting the disbursement stating that in their opinion, all work has been completed and performed in a good and workmanlike manner.

## 30. LANDLORD'S AND TENANT'S WORK; NEGOTIATING A TENANT IMPROVEMENT ALLOWANCE (CONTINUED)

### Show Me the Money Landlord

- A. Tenant Advocates: If tenant is considering moving its business, it should seek to have a representation in the LOI or term sheet before the lease stage that the landlord must provide documentation evidencing clear proof that the monies for the TI allowance are in fact available and segregated.

### Covering a Tenant's Monetary Shortfall

- A. Landlord Advocates: If landlord is providing a TI allowance and performing the build-out of tenant's space, and the amount of TI allowance will not cover the full cost, landlord should ask for 100% of the shortfall from tenant upon lease signing. Short of that, taking 50% at lease signing and 50% at the time 50% of the project is completed is a fair compromise.
  - i. Tenant Counteraction: Negotiate to keep the shortfall until no less than 50% of the project is completed by landlord. If the cost of the build-out will exceed the amount provided by landlord and tenant's own contribution, tenant should consider politely asking the landlord to underwrite the differential in costs.
    - 1. Landlord Counteraction: Include language that this financed additional tenant improvement allowance is to be paid by tenant as additional rent. Landlord should have the same remedies for non-payment that they would have for rent. Request from tenant's principals that if they do not live up to the full terms of the lease, they will be personally liable.

# 31. LANDLORD'S AND TENANT'S WORK; NEGOTIATING WORK CLAUSES & AIA CONSTRUCTION CONTRACTS

## Architectural Smorgasbord of Services

All architects should:

- i. Have expertise in all applicable laws
- ii. Be able to dispense advice, consultation and evaluation of tenant's desired build-out
- iii. Relationships with engineers and contractors
- iv. Be able to administer the construction process

## Choosing an Architect

Interview multiple architects. Make sure the architect shares your vision and creativity.

## What is the Construction Game Plan?

Questions to ask a potential hire:

- i. Have you worked on projects of this size?
- ii. What services are going to be needed?
- iii. What is the budget for the project both for the architect and contractor?
- iv. Is there a basic design or concept in mind?
- v. What is the anticipated start date and substantial completion date of the project?
- vi. What type of experience do you have?
- vii. How much of their practice involved the type of work required?
- viii. What type of errors and omissions liability policy do you have?

## The Architectural Contract

Standard B101 or B141

## Business and Legal Muscle

Agreement with Architect must:

- i. Establish financial and time parameters
- ii. Name owner's and architect's representatives
- iii. What happens if there is a change in services?
- iv. What happens if there is a need for a change in the plans?
- v. Termination provisions



# 32. LANDLORD'S AND TENANT'S WORK; NEGOTIATING CONSTRUCTION CONTRACTS

## The Form

- A. Whose form agreement will be used? Contractor's or AIA?

## Commencement Date

- A. Should be no later than 5 to 10 business days from the date of execution

## Establishing Pricing of Contractor

- A. Stipulated sum based on contractor's cost of completing the project.

## Payment Before Its Time and/or Not Properly Acknowledged

- A. You put yourself at risk if you pay the contractor prior to substantial completion of the work. Be sure to obtain documentation evidencing payment to contractor.

## The Deposit

- A. Somewhere around 10% to 20% is reasonable. This should assist the contractor in covering initial costs incurred to mobilize the project. Be sure to obtain documentation evidencing payment of the deposit.

## Lien Waivers

- A. Acknowledgement by contractor that the receipt of a check will constitute payment of all (or part of) sums due.
- B. The contract should state that contractor expressly agrees to submit a partial lien waiver for the current progress payment requested
- C. Partial lien waivers acknowledge partial progress payments made throughout the duration of the project.

## Retainage

- A. The approximately 10% portion of each progress payment which is held back from payment to the contractor. Contractors will likely request a reduction in retainage to about 5% once the project is about 60% complete.

## The End Game & Job Completion

- A. The definition of Full Completion should include the delivery of:
  - i. The final certificate of payment
  - ii. All lien waivers from both the contractors and subcontractors
  - iii. A certificate of occupancy or certificate of completion
  - iv. Close-out binders
  - v. Operational and maintenance manuals
  - vi. Warranties required under the contract
  - vii. Delivery of "attic stock", and
  - viii. Sign-offs from the owner that the job is complete

## Insurance Policies

- A. The contractor should carry various policies to protect the owner and/or the tenant from any events causing damage during the project (i.e., commercial liability, property damage, independent contractor coverage, builders' risk, completed operations and contractual liability coverage, workers comp, automobile insurance)



## 33. LANDLORD'S AND TENANT'S WORK; NEGOTIATING A LANDLORD WORK LETTER

### Language

- A. Landlord should keep the level of detail to be included within the work letter to be as narrow as possible. Tenant should attempt to be as precise as possible as to the level of detail required for each item the landlord is performing and/or supplying.

### Structural Work

- A. If landlord is performing work, landlord's goal should be to supply "building standard" carpeting/tile/doors/ceiling/walls/windows in the premises.

### Utilities

- A. Tenant Advocates: Ensure that the space has the minimum electrical capacity for tenant's needs. Electrical receptacles should be provided in all offices on no less than 2 of the 4 walls in the room. Request that HVAC be provided by landlord to maintain "year-round comfort." Ask that all fire alarm devices be provided in compliance with all applicable codes, and all sprinklers in good working order. High-speed data and internet access should be a basic building amenity.

### Substantial Completion

- A. Tenant Advocates: Insert language that the lease commencement date will not begin until tenant has received no less than 5 business days' notice that the space will or has been substantially completed.

## 34. LANDLORD'S AND TENANT'S WORK; TIMING ISSUES IN A LANDLORD WORK LETTER

### Details

- A. Establish a date certain that tenant must provide specific details as to exactly what tenant wants done to its space.

### Preparation and Response Time

- A. Tenants should request language that within a 4 to 5 week period from the date design plans are approved, landlord's architect will deliver to tenant the actual construction documents for its approval. Landlord should insert language that within 5 to 7 business days of tenant's receipt of the construction documents, tenant must provide landlord with approval or reasons for disapproval.

### Delays

- A. Tenant's failure to reply to any draft of construction documents or to pricing provided for the cost of the build-out will generally be referred to as a "tenant delay." Tenant should request outside date language requiring substantial completion of landlord's work.

## 35. LANDLORD'S AND TENANT'S WORK; NEGOTIATING A TENANT CHANGE ORDER & TENANT EXTRA WORK CLAUSES

### Change Orders

- A. Reasons for change orders include:
  - i. Conditions discovered in the field during construction that causes a deviation from the original construction plan; and
  - ii. Simply a tenant changing its mind.
- B. If tenant wants extra work done, tenant would be better off asking landlord to complete it, as opposed to obtaining a separate contractor to do so.
  - i. Although a tenant might perceive the request as being a “shakedown”, landlords should require the tenant to pay for its (or its contractors) extra costs for its overhead and profit components.

## 36. LANDLORD'S AND TENANT'S WORK; LANDLORD'S SUBSTANTIAL COMPLETION & TENANT'S OBJECTION THERETO

- A. Generally, Substantial Completion occurs when the build-out has been completed “except for minor items or defects that can be completed or remedied after the tenant occupies the space without causing interference with tenant’s business operations or use of the premises.”
  - i. Some consider this the definition of “substantially yet insubstantially completed,” however the minor imperfections are of an immaterial nature and can be readily completed by landlord.
  
- B. These minor imperfections are commonly called “punch list” items
  - i. Generally completed within 30 days.
  
- C. Non-Substantial Completion Notice of Tenant
  - i. In the event that subsequent to a tenant’s inspection of the premises, a tenant believes in its reasonable opinion that the improvements have not in fact been substantially completed, the tenant should provide landlord with a non-completion notice within no more than 3 to 5 business days following tenant’s inspection.

# 37. TENANT DECORATIVE WORK

Decorative work carve-out and no removal obligations:

## A. Landlord Advocates:

- i. Differentiate between alterations that are decorative and non-structural and those that are structural.
- ii. Make all alterations subject to (i) landlord's consent, (ii) tenant supplying landlord plans and specifications and any necessary permits, and (iii) all applicable laws.
- iii. Include a minimum written notice period, insurance requirements, and type of contractors that can be used.

## B. Tenant Advocates:

- i. Try and negotiate for a carve-out allowing tenant to make decorative alterations up to a certain dollar amount without landlord's consent (but on prior notice to the landlord along with a proper COI).

## 38. CONSTRUCTION COMPLETION & PAYMENT

### Top 6 Construction Risk Mitigation Tools

- A. Construction Escrow Agreement
- B. Payment Bond
- C. Performance Bond
- D. Individual and/or Corporate Construction Completion and Payment Guaranty
- E. Builder's Risk Insurance
- F. Requiring Periodic Delivery of Lien Waivers Throughout Construction Project

## 39. ASSIGNMENT AND SUBLETTING: INTRODUCTION

- A. Landlord's Goal: Landlords should seek to control the mix and strength of the tenant base and the ability to maximize profits.
- B. Tenant's Goal: The tenant's goals will usually be directly opposed to that of the landlord. Tenants will want to have as much business and financial flexibility as possible throughout the term of the lease, be it a five (5) or fifteen (15) year lease.
- C. Landlord Advocates: Any landlord should seek to include a well-crafted assignment and subletting clause containing language showing that the landlord has complete control over how, if and when an assignment or sublet will be effectuated and, if in fact one or the other occurs, the terms under which the landlord will play a starring role as to how it will benefit as a consequence thereof.
  - i. Tenant Counteraction: Politely inform the landlord during the negotiation that:
    1. It needs to channel *Bill Murray* from *Stripes* and "*lighten up Francis*" as to its control freak disposition; and
    2. The change has come and that although the tenant recognizes that the landlord needs to control both the mix of its tenants, the negotiation of the clause will result in the tenant not being under the landlord's proverbial thumb!

## 40. ASSIGNMENT AND SUBLETTING: CONCERNS AND PROVISIONS

At a minimum, the following are the *Top 18* items that should be addressed by both landlords and tenants in the subletting and assignment clause of a commercial lease:

- A. Tenant's right to sublease and assign;
- B. What a tenant's written request to landlord for consent should include;
- C. Landlord's recapture and leaseback rights;
- D. Carve-outs from recapture and leaseback rights;
- E. Landlord's conditions to its consent to an assignment and/or sublet on;
- F. Landlord and tenant splitting profits and key-money;
- G. Landlord's right to increase fixed rent upon assignment;
- H. When an assignment or sublet is binding upon owner and tenant's continuing liability thereafter;
- I. The connection between an assignment and subletting, use and guaranty provisions;
- J. Owner's rights with respect to an assignment;



## 40. ASSIGNMENT AND SUBLETTING: CONCERNS AND PROVISIONS (CONTINUED)

- K. Who pays for landlord's review of an assignment or subletting request;
- L. What transfers are "deemed" to be an assignment;
- M. Safeguards for landlords in the event of an assignment;
- N. Making each sublease subordinate to the original lease;
- O. Landlord's use prohibitions and restrictions;
- P. Carve-outs to require landlord's consent to a sublet or assignment;
- Q. Desk sharing and permitted occupants; and
- R. Pro-tenant exclusivity rights.

Landlord Advocates: Be sure to keep your clauses as restrictive and filled with leasing subterfuge as your heart desires.

Tenant Counteraction: Be absolutely sure to clean up the assignment and subletting clause in order to eliminate portions of the provision that work against the tenant.



## 41. ASSIGNMENT AND SUBLETTING: LETTER OF INTENT PROVISIONS

Introduction: Although a letter of intent (“LOI”) or term sheet is a non-binding document, it plays an integral part in setting the playing field on which the lease will be prepared and negotiated. Most importantly, a tenant will never have more leverage during the lease negotiating process than during the LOI stage as the landlord is often trying to convince the tenant to either relocate to or remain in its building.

- A. Once in the actual stages of negotiating the lease, the tenant has lost a degree of power in that it has either:
  - i. Lost the spaces that it had liked in addition to the one that the lease is being negotiated for;
  - ii. Gotten financially pregnant in that it has hired a third-party professional such as an attorney or an architect; and/or
  - iii. Is facing a time constraint in that it has a prohibitive holdover clause at the space it currently occupies or simply needs to start its new business in the new location as quickly as possible.
  
- B. Landlord Advocates: Limit the language in the letter of intent (“LOI”) to *“tenant to sign landlord's standard assignment and subletting clause”* or *“subletting and assignment language to be negotiated in the lease.”*
  - i. Tenant Advocates: Although “never” is an awfully big word, NEVER agree to the foregoing.

## 41. ASSIGNMENT AND SUBLETTING: LETTER OF INTENT PROVISIONS (CONTINUED)

- A. Landlord Advocates: Assuming you are not in the position to merely get the above language, insert into the LOI, *"Landlord shall not unreasonably withhold or delay its consent to Tenant's request to sublet or assign, subject to Landlord's standard recapture and profit sharing rights. Remaining subletting and assignment provisions to be negotiated in the Lease."*
- B. Tenant Advocates: At a bare minimum, the tenant should include language similar to following in the LOI:
- i. "Landlord shall not unreasonably withhold, condition or delay its consent to an assignment or subletting (but Landlord's consent shall be deemed granted if not approved or denied within 15 days of Landlord's receipt of all the required information)."
  - ii. "Landlord shall have no recapture or profit sharing rights for transfers to a Related Entity, permitted transferee or for "Permitted Occupants" (as hereinafter defined)."
  - iii. "Subject to proper prior notice to Landlord and the delivery of a proper Certificate of Insurance, Landlord's consent shall not be required for transfers to a Related Entity, and subject to the terms of the Lease, for transfers relating to the sale or acquisition of Tenant's business or assets."
  - iv. "Provided Tenant is not in default of the Lease beyond the expiration of any applicable notice and cure period, Tenant shall be allowed to sublet or license up to one-third (1/3) of its space for uses similar to that of Tenants permitted use (a "Permitted Occupant")."

## 42. ASSIGNMENT AND SUBLETTING: RESTRICTIVE TERMS AND CONDITIONS

Introduction: A tenant should have the right to assign its lease or sublet all (or a portion) of its space, with such consent being conditioned on a myriad of variables including the tenant not being in default when:

- A. Consent is requested; and
- B. When the assignment or sublet becomes effective.

Tenant Advocates: The following are a few of the key considerations for a tenant when negotiating restrictions on the landlord's right to consent to any assignment or sublet:

- A. Tenants must insert into the lease that landlord's consent to an assignment or sublet *"shall not be unreasonably withheld, conditioned or delayed."*
- B. Tenants should attempt to insert in the lease that landlord shall respond to a request for its consent to an assignment or sublet within a 10-20 business day period from landlord's receipt of all requested materials.
- C. Furthermore, tenants should insert in the lease that if landlord has not responded to a request for its consent to an assignment or sublet within ten (10) business days, landlord's consent shall be deemed granted.

## 42. ASSIGNMENT AND SUBLETTING: RESTRICTIVE TERMS AND CONDITIONS (CONTINUED)

### A. Landlord Counteraction:

- i. Delete the language to be inserted by the tenant above; or
- ii. Insert language that in the event the landlord does not respond to the tenant's initial request for consent within the specified time period, the tenant may then deliver a writing containing **BOLD CAPS** and 12 font size language that provides for landlord's deemed consent after seven (7) business days of landlords receipt of the second request.

### B. Include that the landlord's time to consent to a request for an assignment or sublease does not begin to run until landlord receives the required financial information of the assignee/subtenant, the terms of the assignment/sublease, and the executed version thereof.

- i. Tenant Counteraction: Attempt to negotiate that the landlord's time to reply starts to run upon receipt of:
  1. The necessary financial information required of the subtenant/assignee;
  2. An executed term sheet or LOI signed by both parties; and
  3. The proposed assignment form or sublease and not the executed version thereof (which can be delivered to the landlord at a date in the near future).

## 43. ASSIGNMENT AND SUBLETTING: RECAPTURE AND LEASEBACK

Landlord Advocates: Include a recapture or leaseback provision stating that before the landlord will entertain a tenant's request to sublet or assign, the landlord will have the option to either terminate the lease by recapturing the tenant's space or leasing all or a portion of the space the tenant is trying to sublet.

- A. Tenant Counteraction: Make sure to delete the above or at least be prepared to heavily negotiate it (especially retail tenants). If the lease does include recapture or leaseback rights, tenants need to carve out from the landlord's right language that *"in no event shall the landlord be entitled to exercise its leaseback or recapture right in the event of a transfer pursuant to a bona fide sale of tenant's business or tenant's assets or a transfer to or the use by an entity related to the tenant."*

Landlords most often seek to recapture the premises in the following two scenarios:

- A. When the market rent for the tenant's space sufficiently or far exceeds the rent which the tenant is currently paying under the lease.
- B. Where the space can be used to either lure a "big fish" tenant to a landlord's building or alternatively, allow an existing tenant more important to the landlord to expand its footprint in the building and possibly extend its lease for a longer term.

## 44. ASSIGNMENT AND SUBLETTING: WHO PROFITS?

The overwhelming majority of landlords feel that if anyone is going to make profit on its space, it is going to be the landlord and not the tenant. When it comes to the financial consideration that a tenant may receive on the assignment of its lease or subletting of its space, many landlords feel that one hundred percent (100%) of that consideration should inure to the benefit of the landlord.

- A. Tenant Counteraction: Negotiate that 50%, and not 100%, of any profits realized from an assignment or sublet (net of all expenses incurred) are shared with the landlord.
  
- B. Landlord Advocates: Taking the foregoing point a step further, consider narrowing the definition of allowable deductions to the tenant. The key issue is determining what expenses are to be deducted from the consideration received by the tenant for a partial or full sublease or assignment of the lease.
  - i. Tenant Counteraction: Attempt to include accountant, architect, and engineering fees and any other concessions or work provided to the subtenant, such as free rent concessions, improvement allowances and any construction costs, in the allowable deductions. Make it so that any profits from an assignment or sublet are only shared with the landlord as they are received by tenant.

## 45. ASSIGNMENT AND SUBLETTING: KEY TOPICS AND RENT INCREASES

At a minimum, landlords need to ask (and tenant's need to secure carve-outs) for:

- A. Landlord's rights to recapture and/or leaseback;
- B. Profit sharing participation;
- C. Rent bumps on assignments and certain sublets;
- D. Language pertaining to what "transfers" are and are not considered assignments;
- E. Timing to secure consent, deemed consent and what gets a landlord's "consent clock ticking";
- F. Use restrictions;
- G. Whether or not "permitted occupant-desk sharing" arrangements for up to 33% of a tenant's space will be allowed without landlord's consent; and
- H. Whether there will be a strict requirement that the tenant use the landlord or its designated broker to effectuate a tenant's assignment or sublease.

Many landlords like to take my theory a step further with the hope they can increase their assignment or subletting profits even further.



## 45. ASSIGNMENT AND SUBLETTING: KEY TOPICS AND RENT INCREASES (CONTINUED)

Landlord Advocates: Consider adding language into the lease wherein the *“Fixed Rent payable under the lease shall increase by ten percent (10%) on the first day of the first month of the first anniversary of the assignment or sublease date and on each succeeding anniversary thereof by three percent (3%) of the Fixed Rent payable for the immediately preceding year.”*

- A. Tenant Counteraction: Delete any rent increases in the event of an assignment or sublet or limit it to a 3% bump (i.e. take a surgical machete to such a provision).

If deleting the rent increase isn't successful, consider adding the following carve-outs:

- i. Reducing the potential rent increase for an assignment or a sublease (in the event there is in fact a profit) to five percent (5%) in lieu of ten percent (10%);
- ii. Making the provision non-applicable in the event of an assignment of the lease to a related entity or in respect to a bona fide sale or acquisition of a tenant's assets or business; and
- iii. Making the provision non-applicable to a partial subletting or licensing of the space.

## 46. ASSIGNMENT AND SUBLETTING: CONTROLLING YOUR EXISTENCE

As a continuing theme, the landlord and tenant have two key issues that constantly predominate the negotiation of a lease's assignment and subletting clause, these are the:

- A. Control a landlord must attempt to have over its building, profits and tenant mix; and
- B. Mindset a tenant must have in negotiating an assignment and subletting clause in order to remain "Gumby" like and flexible in its business as possible, given landlord's thirst for control and power and the myriad of things that can happen during a ten (10) year or so term of a lease.

Tenant Advocates: Insert that landlord's consent shall not be required, and the provisions of the assignment and subletting clause shall not apply, to an assignment or sublet in the following scenarios:

- A. "to a Related Entity (i.e. a wholly-owned subsidiary of Tenant or any corporation or entity which controls or is controlled by Tenant or is under common control with Tenant);
- B. the merger or consolidation of tenant into another entity where such entity has a net worth greater than or equal to tenant;
- C. the direct or indirect sale of a non-controlling interest in tenant; and
- D. the direct or indirect sale of a controlling interest of tenant or a sale of all or substantially all of Tenant's assets provided both the assignee and assignee's principals have a have a net worth equal or greater to tenant and the guarantor under the lease."

## 47. ASSIGNMENT AND SUBLETTING: PERMITTED OCCUPANTS AND DESK SHARING

From a tenant's perspective, it is critical to ensure that you have enough flexibility to deal with the many issues that may be encountered during the period of a long term lease. Stated another way, not having to ask for a landlord's permission every time a tenant would like to license or sublease an office or cubical to a potential licensee or subtenant can be a beautiful thing!

- A. Tenant Advocates: As such, whether requested during the lease or preferably letter of intent negotiation stage, a basic "Desk Sharing/Permitted Occupants" clause states that provided the tenant is not then in monetary or material non-monetary default beyond any applicable notice and cure periods, the tenant shall have the right to license or sublet in the aggregate up to one-third (1/3) of its space.
- B. Landlord Counteraction: While the landlord may consider a request for the inclusion of permitted occupant language, the tenant should only be allowed to license or sublet a portion of its space without the landlord's consent:
  - i. If the use of the permitted occupant is within the permitted use set forth in the lease;
    - a. provided that:
      - 1. the named tenant is in occupancy of substantially all of the leased space and tenant is continuing to use the premises for the conduct of its business;
      - 2. landlord is given prior notice of such sublet/license;
      - 3. tenant shall furnish landlord with (i) the names of such permitted occupants prior to same occupying the premises under any such license and (ii) a certificate of insurance naming landlord and its managing agent (and any other entity reasonably requested by landlord, such as the landlord's mortgagee) as an additional insured;
      - 4. the sublease or license is made expressly subordinate to the tenant's lease; and the space is not separately demised. (Note to Tenant Advocates: Please make sure that you negotiate that profit sharing and recapture shall not apply to any such permitted occupant or desk sharing arrangement); and
      - 5. to exert some semblance of control over the nature of the prospective permitted occupant, require that such person or entity have an existing business relationship with the tenant. (Note to Tenant Advocates: Do not include the foregoing language in your request to landlord, and if the landlord demands it, attempt to strike it from the lease).

## 48. ASSIGNMENT AND SUBLETTING: SUBLEASING RISKS AND REWARDS

In a sublease, generally stated subtenants would prefer: (1) below market rents; (2) pre-built office space without the necessity of large capital expenditures; (3) the potential inclusion of modern phone, furniture, and modular work station systems, not to mention filing cabinets and chairs at little or no cost to the subtenant; and to some; (4) the “flexibility” that comes with a short-term “plug and play, move in with your toothbrush” type of deal.

However, when it comes to a “tenant turned sublandlord,” what is good for the subtenant is generally stated not good for the tenant/sublandlord. The four primary ways of lowering a tenant’s/sublandlord’s existing exposure are:

- A. Subletting your excess space;
- B. Buying out the remaining term of the lease;
- C. Hoping that the tenant’s landlord will recapture its space, which very well may be achieved by finding a financially attractive potential long-term tenant to hand deliver to the landlord; or
- D. Writing off the remaining term of the lease.

When a sub-landlord collapses financially, a subtenant’s security deposit may very well be lost along with the right to its space. Whether or not a subtenant is successful in securing a landlord non disturbance and attornment agreement (“NDA”) during the sublet consent process, a subtenant should in lieu of posting a cash security deposit, subtenants should, insist on delivering to its sub-landlord a letter of credit escrow (as generally stated a cash security deposit held by its sub-landlord will be subject to the risk of the sub-landlord’s bankruptcy).

## 48. ASSIGNMENT AND SUBLETTING: SUBLEASING RISKS AND REWARDS (CONTINUED)

### Key Considerations for Tenants:

- A. Consider a landlord's right to participate in the profits a tenant will receive from subleasing its space, whether that percentage is one hundred percent (100%) or the more common fifty percent (50%), what expenses are allowable in calculating the net profit, whether the expenses are netted up front against any profit or amortized over the sublease term, and lastly, whether they are paid to a landlord up front or as any tenant generally will prefer, "as and when received."
- B. Some leases are drafted to not allow for a partial sublet (should be a non-starter if you are a tenant when reviewing an initial draft of a lease).
- C. The "Melting Ice Cube Theory" - A tenant turned sublandlord remains on the hook financially when it sublets its space, emphasizing the need for subtenant advocates to conduct significant due diligence on a potential subtenant. Rationale: The sublandlord would be stuck with a diminishing asset (known to some as a "melting ice cube") in a lease for a space with a short term remaining which won't be easy to sublease again without taking a major haircut!
- D. Most well drafted sublease and assignment clauses will not allow the subtenant (or assignee) to exercise a tenant's renewal rights under the lease though the tenant should try to negotiate for it.

# 49. FIRE AND CASUALTY

Top 10 list as to the minimum language or concepts a tenant should seek to have included in its fire and casualty clause and/or to be aware of:

## 1. Getting Out of the Lease:

Landlord Advocates: Given that a landlord needs to work through many issues with its insurance company, a pro-landlord lease should allow the landlord a significant amount of time to inform a tenant as to whether the landlord will rebuild after a fire or casualty, and how long it will take the landlord to do so.

Tenant Advocates: Tenants should seek to have the option to cancel its lease if (a) the casualty occurs during the last two years of the lease term; or (b) the casualty occurs at any time, and the restoration will take between 90 to 180 days from the fire or casualty, depending on the type of tenancy.

2. Maintain insurance against loss of rent or rental value due to fire or casualty in an amount equal to the annual rental for the demised premises.

## 3. "We Didn't Start the Fire":

Landlord Advocates: Props to *Billy Joel* aside, if the landlord can prove that a tenant's negligence caused the fire, consider having your initial lease draft provide that a tenant will not receive a rent abatement from the date of casualty to the date of restoration, and maybe worse, the tenant will be liable for restoration costs.

# 49. FIRE AND CASUALTY (CONTINUED)

## 4. Beware of a Landlord's Backdoor Boot:

Tenant should include language that provides that in order for the owner to cancel the lease, the landlord must concurrently terminate leases affecting at least 35% to 50% of the rentable area of the space leased to tenants in the building exclusive of any rentable area leased by the owner.

## 5. No Such Thing as Being a Little Pregnant:

Landlord Advocates: Your lease should only allow for a full abatement of rent in the case of a substantial casualty, which will effectively force many tenants to continue to operate their business in less than desirable conditions after a partial casualty.

Tenant Advocates: Fight for the inclusion of language which provides that the tenant's space shall be deemed substantially damaged if more than 20% of the premises are damaged, or if the premises are not accessible, or, if in tenant's reasonable judgment, are not usable for the proper conduct of tenant's business operations.

## 6. Timing and the Vanilla Box:

Landlord Advocates: Generally speaking, a landlord's restoration obligations should only extend to delivering the premises back to a tenant as a vanilla box, without the improvements made by tenant prior to its occupancy. A well drafted lease should provide that the rent abatement will cease upon (or within 5 business days of the) delivery of the vanilla box.

Tenant Advocates: Attempt to negotiate language stating that tenant's liability for rent shall resume 30 to 45 days after the landlord has performed its required restoration work and delivered the premises to tenant.

## 7. "The Waiting is the Hardest Part":

Landlord Advocates: The lease should allow a landlord no less than 180 days to inform its tenant whether or not the landlord will demolish, rebuild or terminate the lease, or alternatively, deliver its decision to tenant within 60 to 90 days of when the landlord settles with its insurance carrier.

Tenant Advocates: With that said and with *Tom Petty's* lyrics "*The waiting is the hardest part*" in mind, tenants need to be aware of the foregoing and consequently, should secure language requiring the landlord to inform you of their decision within the earlier of 90 to 120 days of the casualty date or when it knows how much insurance money it will be receiving.

# 49. FIRE AND CASUALTY (CONTINUED)

## 8. Tenant in Default at the Time of Casualty:

Landlord Advocates: Consider adding language that the tenant will not be entitled to a rent abatement from the casualty date to the landlord work substantial completion date if the tenant is then in default of the lease.

Tenant Advocates: At the bare minimum, insert language which provides that as long as the tenant shall not be in monetary or material nonmonetary default under the lease after the expiration of any applicable cure period, then the tenant will receive the rent abatement.

## 9. Insurance is a Two-Way Street:

Tenant Advocates: "Owner must maintain during the term of the lease a policy or policies of insurance insuring the building for not less than 95% of its replacement value against loss or damage due to fire and other casualties."

## 10. Look Elsewhere, as We Want No Part of That:

Landlord Advocates: The lease should provide that landlord shall not be held liable to a tenant for any loss or damage resulting from any other tenant occupying space adjacent to or adjoining the demised premises, unless (at most) that such loss or damage is occasioned by the willful acts, negligence or willful misconduct of owner or its agents, contractors, servants or employees.

Tenant Advocates: This is all the more reason to make sure your insurance coverage is adequate for all the mayhem life may throw your way.



# 50. HOLDOVER

A holdover clause provides landlord a remedy if tenant remains in possession of the premises past lease termination.

## A. Landlord's Protections:

- i. If tenant does not vacate the premises by the lease termination date, Tenant is obligated to pay landlord a sum of money per day for each day of the holdover.
- ii. Consequential Damages: Tenant should reimburse landlord for any claims made by succeeding tenant or purchaser.
- iii. Tenant should indemnify landlord against any losses resulting from the holdover.
- iv. Landlord should have a judicial remedy against the holdover tenant.

## 50. HOLDOVER (CONTINUED)

Landlord Advocates: Ideally, the lease should include both indemnity and rental penalty language in the event of a tenant holdover.

*Example: "Tenant hereby indemnifies and agrees to defend and hold Owner harmless from and against any loss, cost, liability, claim, damage, fine, penalty and expense (including reasonable attorneys' fees and disbursements) resulting from delay by Tenant in surrendering the Demised Premises upon the termination of this Lease as provided in the preprinted form of this Lease and elsewhere in this Lease, including any claims made by any succeeding tenant or prospective tenant or Successor Owner founded upon such delay."*

Tenant Counteraction: If possible, attempt to delete any indemnity language contained within a holdover clause. As a fallback, attempt to negotiate that the indemnity holdover language will not apply for the first 30 days of such holdover.

# 51. NOISE AND VIBRATIONS

For those who prefer to channel *Jennifer Lopez* (as in “*Let’s Get Loud*”) when it comes to the build out of a space, please know that more often than not – with props out to *Gloria Estefan*, that the “*Rhythm Is Gonna Get You.*”

- A. Landlord’s Right to Situate Machinery
  - i. When the space is being built out, address the placement, design, weight, and position of machinery, and how to minimize vibrations and noise.
- B. Acoustics
  - i. Look into decorative echo absorbing panels, which do the job when it comes to minimizing reverberations.
- C. Noise Interference; Quiet Enjoyment
  - i. A tenant’s noise level should not interfere with the quiet enjoyment of other tenants.
  - ii. Tenants should be aware of subtle yet potentially offensive and/or narrow language
- D. Sound Travels; Confidentiality
  - i. Ways to mitigate noise:
    - a. Sheet rock the ceiling, extend the walls upwards to the top of the structural ceiling, install extra insulation

# 51. NOISE AND VIBRATIONS (CONTINUED)

- E. Noise Rules as Material Inducement
- F. Encouraging Tenant Compliance
  - i. Remedies with teeth:
    - a. Right to injunctive relief, right to install sound and vibration attenuation countermeasures, tenant payment of attorney's fees
- G. Noise Cancelling Technology
  - i. Tenants: Look for spaces that have newer windows and technological bells & whistles which help alleviate airborne sounds while imposing obligations upon landlord to install soundproofing and absorption materials
- H. Notifying Landlord of Noise Complaints Received
  - i. Tenants should notify landlord about any noise complaints about other tenants
- I. Landlord Remedies for Tenant Nuisance
  - i. Landlords: Include language that tenant agrees to take reasonable steps to eliminate any unreasonable noise or vibrations
  - ii. A violation of noise rules should give landlord the right to injunctive relief and self-help rights

# 52. ELECTRIC

## Direct vs. Through Landlord (Rent Inclusion & Submetering)

The lease should state how tenant will pay for electricity. Either tenant will pay directly to the local public utility company, or it will pay landlord for its electrical consumption. If tenant pays landlord, landlord may either include the cost in rent, or meter tenant's electricity use and charge accordingly. For the most part, all electricity clauses will contain the same protections for landlord.

### Landlord Advocates:

- A. Include in the lease a provision stating that tenant must pay landlord for use of electricity. Ideally, landlord should provide for monitoring tenant's electrical use by way of a sub-meter. Landlord can meter tenant's use in order to charge tenant the precise amount and landlord may also pass on certain expenses to charge higher rates, such as the cost of metering and other "administrative fees" that can increase revenues.
- B. If the building doesn't have a submetering system installed, include language stating that landlord shall install, at tenant's sole cost and expense, a submetering system for landlord to meter tenant's electrical use.

Tenant Counteraction: Attempt to negotiate to pay directly to the public utility for electrical use, as this will likely cost less. If landlord demands a submetering system, push back on tenant's responsibility to pay for its installation. Tenant should not have to pay for an improvement to landlord's building.

Electrical Capacity Clause: Landlord represents and warrants the electrical capacity in the premises:

- A. Notwithstanding anything to the contrary contained in this Lease, Landlord represents that the Premises currently contain the following electrical capacity the Premises will have no less than six (6) watts per square foot amperage exclusive of HVAC.

## 52. ELECTRIC (CONTINUED)

### Submetering

Landlord measures tenant's electrical use via a meter, and charges tenant accordingly. The terms and rates will be set in the lease, but may provide for changes from time to time. Landlords generally tack on "administrative fees" for use and maintenance of the meter.

- A. Landlord Advocates: Include language stating that if electrical charges are to be increased for landlord's building by reason of increase in charges or taxes, tenant's charges will be increased by the same percentage.
- B. Landlord Advocates: Consider adding a premium ("plus ten (10%) percent administrative fee to Landlord") onto the electricity charge.
  - i. Tenant Counteraction: If tenant cannot negotiate for direct or rent inclusion, attempt to remove any premium, costs or fees added by landlord to the metered cost.

### Generator

- A. If tenant requires a generator to run its business in the premises, it should negotiate for a provision in the lease providing for one. Such a provision will state that landlord will designate a location in the building where a generator will be installed.
- B. If the lease does not provide for a generator outright upon the commencement of the lease, it may provide that, upon 30 days notice of landlord's receipt of tenant's request, landlord will designate a space where tenant may install a generator.

## 53. CONDUIT USAGE

Some tenants may require additional electricity, water or gas for the operation of their business. If landlord has the capacity to meet tenant's utility needs, landlord can charge more for tenant's use. However, if the landlord cannot meet tenant's needs, the tenant may require the installation of additional risers, conduits, feeders, switchboards and/or appurtenances in the premises/building.

Landlord Advocates: Generally, landlords will install such facilities at the sole cost of tenant, payable upon demand in advance. The installation should be conditioned on a determination that such installation and use:

- A. Shall be permitted by applicable law and insurance regulations;
- B. Shall not cause permanent damage or injury to the building or adversely affect the value of the building or the premises; and
- C. Shall not cause or create a dangerous or hazardous condition or interfere with or unreasonably disturb other tenants in the building.

Landlord Advocates: Landlords should require the installation of a switch and metering system for the building so landlord can measure the amount of additional utilities or services being used by tenant. The cost of installation, maintenance and repair thereof should be paid by tenant upon demand.

A. Tenant Counteraction:

- i. Make sure to negotiate for language in the lease stating that landlord will not unreasonably withhold its consent to install any conduits or other facilities needed by tenant for additional power.
- ii. Attempt to negotiate for landlord to pay for a portion of the installation of the conduit, especially if it is unjustified and/or not cost-effective to bear the expense (e.g. the lease term is short and/or there is no guarantee of a renewed lease). Since landlord's building is receiving a long-term improvement, and it may even use the facilities or allow other tenants to use them, landlord should contribute to the cost.

# 54. HVAC MAINTENANCE, REPAIR & REPLACEMENT REQUIREMENTS

Landlord Advocates: A standard HVAC maintenance, repair & replacement clause should require that tenant, at its own cost and expense:

- A. Perform all maintenance, repairs and replacement on the HVAC (or air conditioning) system, equipment and facilities whether now existing or hereafter installed
- B. Maintain an air conditioning service repair and full service maintenance contract, satisfactory to landlord, with an air conditioning contractor or servicer approved by landlord
- C. The HVAC Service Repair and Full Service Maintenance Contract should expressly state:
  - i. It shall be an automatically renewing contract terminable by no less than 30 days prior written notice to landlord; and
  - ii. The contractor providing the services shall maintain a log at the premises detailing the service provided during each visit pursuant to the contract.

Tenant Advocates:

- A. Tenant should not have to pay for the full cost of the replacement of an HVAC system if such replacement is required near the end of the lease, since tenant will not in occupancy for the full useful life of the new system: Proposed calculation of payment: (cost of replacement) x (number of years remaining in the lease / number of years in useful life of the HVAC unit)
- B. In the first instance, attempt to delete any HVAC replacement requirement
- C. Insist on the landlord being responsible for replacement of “major components” provided that tenant has an air conditioning service repair and full service maintenance contract in place



# 55. EXHAUST

Tenant's obligations regarding exhaust/odors from the premises. Tenant:

- A. Shall not permit objectionable odors to emanate from the premises
- B. Shall install chemical extinguishing devices approved by the appropriate governmental agencies and shall keep such devices under service as required by such agency
- C. Shall, within 10 days after notice from landlord, install, at its own cost and expense, reasonable and additional control devices or procedures to eliminate such odors, if any
  - i. Landlord shall have the right to enter the premises at any time to inspect the same and ascertain whether they are clean and free from odors

Installation of gas cut-off devices, device specifications, and landlord's approval of the design. Tenant:

- A. Shall install gas cut-off devices, and must diligently commence, immediately after the execution of the lease, the installation of an exhaust stack up to and above the height of the tallest building adjacent to the building

Landlord's remedies in the event a condition or obligation of the tenant is not satisfied:

- A. Provide remedies in the event any condition referred to herein is not remedied (or in the case of any installation, not commenced and thereafter diligently prosecuted to completion) within a 10 to 15 day period

# 56. RELOCATION CLAUSE

A relocation clause in a commercial lease generally gives the landlord the right, upon notice, to move the tenant from the demised premises to similar premises within the building or shopping center. Given that the provision in the future can be a conduit in an attempt by a landlord to lure a new tenant to its building or to allow an existing tenant to expand, a relocation clause (or “substitute premises” provision as it is often called) can be a very powerful tool for a landlord.

Often times, a relocation clause will not appear on a term sheet. Somehow, it magically appears on the lease agreement, and most tenant representatives neglect to negotiate for modification of the provision.

## Landlord Advocates:

- A. Even a moderately pro-landlord relocation clause may provide that (1) the relocation premises will be substantially the same size as the original space, (2) landlord will pay tenant’s moving expenses to the relocation premises, and (3) landlord will improve the relocation premises to match the original at the time of substitution
- B. The clause may also provide that landlord and tenant will enter into an agreement upon relocation setting forth any adjustments in rent or other modifications
  - i. If landlord wants to be more rigid, it may provide that upon relocation, the lease will continue forward with the same terms, provisions, covenants and conditions, without any pro-tenant conditions of substitution (but subject to rent adjustment if the substitute space is larger)!

# 56. RELOCATION CLAUSE (CONTINUED)

## Tenant Advocates:

- A. Attempt to delete this clause in its entirety!
- B. If landlord won't delete the clause, try adding these items to the relocation clause:
  - i. Request that the actual relocation date not occur until at least 24 to 36 months from the lease commencement date.
  - ii. The substitute space must be comparable to the existing space in terms of finishes, amount of windows, bullpen space, windowed offices, USF, and location of the space.
  - iii. The relocation space must be on the same or higher floor of the building. Tenant should not agree to move more than 3 to 5 floors below it if asked "how low can you go." The views must be comparable as well.
  - iv. Allow tenants to be reimbursed for any and all costs associated with the move.
  - v. If the RSF of the substitute space is bigger than the existing space, then expenses (e.g., the base rent, additional rent, electricity infusion factor) will not be increased.
  - vi. If the RSF of the substitute space is smaller than the existing space, then the substitute can be no less than 5% smaller, and in such event, tenant's rent and pro-rata percentages will decrease.
  - vii. Tenant shall have no removal or restoration obligations for improvements to its existing space.
  - viii. Request the right to terminate the lease if in the last 12 to 24 months of the lease term.

# 57. SIGNAGE

The following are our Top 12 Signage Tips so that you, to play off of a song title from rock legend *John Fogerty*, will “Never be born [or operate a store] under a bad sign”:

- A. Suburban Tenants: Having a prominent monument and/or building signage is a must!
- B. Scaffolding and Urban Tenants: Scaffolding should not obstruct your signage
- C. Advertisement
  - i. Landlord Advocates: Do not readily give away the roof and sides of a building where zoning permits are essentially profit centers. Landlord can bring in substantial profits by providing signage for advertisers.
- D. Community Considerations: Consider the fabric, culture, demographics, ethnicity and politics of the community before hanging or allowing a particular sign.
- E. Lobby Directory: Generally limited to a tenant’s proportionate share of the building.
  - i. Tenant Advocates: Consider requesting the right to lobby signage during the negotiation of the letter of intent for the lease.
- F. Landlord Control Over Signage
  - i. Landlord Advocates: It is imperative that control be retained over the look, feel, and design over a tenant’s signage.

# 57. SIGNAGE (CONTINUED)

- G. Landlord's Consent:
  - i. Landlord Advocates: Tenant may not install a sign without landlord's consent, which will not be unreasonably withheld, conditioned or delayed.
  - ii. Tenant Advocates: Have a schematic or picture of the proposed signage pre-approved by the landlord and annexed to the lease, or else the approval should take no more than 10 business days.
- H. Tenant Compliance: Tenant should represent that it will comply with applicable laws, regulations and ordinances.
- I. Removal of Signage by Landlord
  - i. Landlord Advocates: Have the option, upon 10 days written notice, to compel tenant to remove any sign in the event such sign, in landlord's sole but reasonable discretion, interferes or conflicts with landlord's overall scheme of decoration or décor.
- J. Design & Safety: Both tenant and landlord should represent that it will comply with reasonable design, safety and construction considerations.
- K. Tenant May not Place Signs
  - i. Landlord Advocates: Include language preventing tenant from placing any further signage on the premises.
- L. Canopies and Awnings Provisions: Signage includes any words and/or designs on windows, doors, canopies, awnings, billboards, etc.

# 58. SCAFFOLDING

Landlord Advocates: The following concepts should be included in any well-crafted scaffolding provision:

- A. Landlord will not be liable to tenant or any other party for damages arising out of any changes to the building or a temporary diversion or partial obstruction including scaffolding or sidewalk bridges resulting from any alteration, construction, renovation or repair or any noise, dust or debris from performance of work or disruption of tenant's business or access to the Premises or entitle tenant to a claim for breach of quiet enjoyment or entitle tenant to an abatement of any kind or nature
- B. If/When a tenant objects, compromise to:
  - i. Landlord has the right to maintain all current and future scaffolding in and around the building; and
  - ii. Tenant acknowledges and agrees that it will not be entitled to any damages in connection therewith.

Tenant Advocates: Object to the above language and try to secure a pro-tenant compromise

- A. In the event of the placement of scaffolding or other obstruction, landlord will provide tenant with professional grade signage on the exterior of the obstruction.
- B. Landlord will ensure that the obstruction is installed in a manner the does not impede the ability to walk from the street or sidewalk in front of tenant's door.
- C. Include a solution (e.g. rent abatement) if the scaffolding or obstruction remains in place beyond a certain amount of time (or at lease commencement in the case of a retail space).

# 59. ANTENNA

Often, tenants will require an antenna or satellite dish for business or other reasons. If a landlord allows their tenant to install and maintain such a device on the roof of the building, the antenna will be for the installing tenant's exclusive use.

Tenant Advocates: When providing a "pro-tenant" antenna clause into a redraft of a lease, in order to satisfy the landlord that the language provided is somewhat reasonable, at the very least the inserted provision should require a tenant to:

- A. Install, maintain, service and replace the antenna at its own cost;
- B. Delivery of the plans and specifications, including a proposed location, for landlord's approval;
- C. Complete the installation of the antenna in accordance with the approved plans and specifications, and in accordance with all applicable laws and regulations; and
- D. Relocate the antenna.

Tenant should attempt to include a provision allowing for tenant to use roof space of the building for its antenna for no additional cost.

# 59. ANTENNA (CONTINUED)

Landlord Advocates: Generally, a pro-landlord antenna provision will be far more narrow and precise as to tenant's rights, and should at a minimum for landlord's protection include the following concepts:

- A. Designate a specific size limit, location for installation, and stricter installation guidelines
- B. Ensure that the antenna may not materially interfere with the use and operation of any other equipment or devices on or in the building or premises
- C. The area in which tenant installs the antenna will be treated as part of the premises
- D. Tenant is responsible for any repair or damage caused by the antenna or by tenant and any of its agents, and the antenna will be treated as if it were part of tenant's personal property
- E. All provisions of the lease with respect to tenant's alterations and tenant's obligations to comply with laws and insurance requirements, indemnifying landlord and performing repairs and maintenance will also apply to tenant's installation, use and maintenance of the antenna
- F. Upon termination of the lease, tenant will remove the antenna and related equipment at its own cost and repair any damage caused thereby
- G. Electricity used by the antenna will be metered, and tenant will pay the costs
- H. Tenant will have access to the roof [setback on the roof] on the roof for the purposes of installing, maintaining, and repairing the antenna at reasonable times
- I. Landlord or its agents may accompany tenant when they enter the setback of the building



# 60. LANDLORD TERMINATION AND DEMOLITION CLAUSES

Landlord termination and/or demolition clauses are often not found within a standard letter of intent or term sheet, but do tend to appear within the initial draft of the lease. For many landlords, the hope is that the inclusion, often with little or no compensation to the tenant, will go unnoticed.

Tenant Advocates: The following is a list of steps a tenant should take in negotiating the landlord termination and demolition clause:

- A. Negotiate a “Termination Bonus” in addition to unamortized tenant improvement reimbursement
  - i. There’s no set “market” amount, but look to negotiate an amount in line with what the tenant would have received for a sale of its business 5 or more years from the lease commencement date
- B. Negotiate the return of your security deposit prior to the termination date
- C. Try for the ability to vacate earlier than landlord’s specified termination date upon which you shall no longer have further obligations under the lease
- D. Negotiate any future rights to lease premises in the new or redeveloped project
- E. Negotiate as much as possible to plan for future plans and relocation of business
- F. If left with no choice but to accept some level of a demolition or straight termination provision, request that the landlord’s right to send a written notice to terminate the lease not “sunrise” until 4 to 6 years from the expiration of the rent commencement date
- G. Landlord should only have a 1 to 2 year window to terminate from the agreed upon “sunrise date”
- H. If landlord doesn’t send a termination notice within 6 to 18 months of the sunrise date, tenant should have the right to terminate the lease at any time on 6 months prior written notice to landlord
- I. Request that the termination be conditioned on receipt of approved and filed demolition plans

# 61. MONETARY DEFAULT NOTICE PROVISIONS

Provisions for use when landlord refuses to give notice or only limited notice. Notice requirements will often specify the amount of days prior to a particular event that notice must be given, whether such notice must be written, as well as the manner in which any notice must be sent. This is especially important when the notice concerns a monetary default by tenant.

## Landlord Advocates:

- A. Landlord will want to do as little as possible when providing notice to tenant of a monetary default. This will include only having to notify the tenant of the monetary default once (in a 12 month period), rather than multiple times.
- B. If landlord is required to send additional notices of monetary default for a fee, the landlord can counter with a higher fee for sending monetary default notices and include additional language that the tenant's failure to make such payments will negate the landlord's obligation to send additional notice

## Tenant Advocates:

- A. Notice provisions can often be skewed in favor of the landlord and the tenant should take steps to ensure that the notice provision provides them with some form of relief

# 62. REAL ESTATE TAXES

## A. Tenant Advocates:

- i. Definitions: Be specific regarding exactly what is included
- ii. Annual Tax Protest Proceeding: Make sure landlord files a tax certiorari proceeding upon the local tax authority
- iii. Base Year Tax: Compute as if the building was fully assessed and not subject to tax abatement
- iv. Tax Refund: Add language that tenant shall receive its proportionate share of a prior year's taxes; landlord will pay all real estate taxes in the first instance; all refunds will be deducted prior to calculation of tenant's proportionate share
- v. Landlord Billing Statement: Limit landlord's time frame for billing; try to negotiate a 90 to 120 day period to protest the amount due
- vi. Recovery of Tenant's Tax Balance: The amount you pay above the actual amount will be reimbursed; negotiate the right to audit
- vii. Assurances: Landlord should represent and warrant that the building is not subject to any tax abatement or tax incentive program
- viii. If the original base year taxes are reduced, the initial higher amount should remain the same

## 62. REAL ESTATE TAXES (CONTINUED)

### A. Landlord Advocates:

- i. Base Year Tax: Retroactively adjust if the base year tax is reduced as a result of a tax certiorari proceeding with the local tax authority.
- ii. Tax Escalation Payments: Should be made by tenant in a lump sum; monthly, quarterly, or semiannually.
- iii. Recovery of Tenant's Tax Balance: If the estimated amounts paid are less than the actual real estate taxes, tenant will pay the difference.
- iv. Tenant Audit: Require that it be done by a nationally or regionally recognized CPA on a non-contingent fee basis.

## 63. OPERATING EXPENSE ESCALATIONS

Landlord Advocates: In many markets, the majority of landlords prefer the lease to contain an operating expense escalation as opposed to a CPI or a straight predetermined percentage bump. Given the foregoing, landlords believe that they (i) will be protected in the event that operating expenses rise higher than expected and (ii) should not get stuck footing the bill for any (major) operating cost increases subsequent to lease commencement.

Tenant Advocates: Many tenants prefer a set percentage increase in rent in lieu of operating expense escalation. Depending on the market in which you are in, the percentage bump is generally in the range of 2% at the low end (good for tenants), and as high as 3% to 4% compounded annually (good for landlords).

Landlord Advocates: A strong argument can be made that a 3% or higher compounded annual percentage increase can be more attractive to a landlord than an operating expense escalation.

Items to negotiate:

- A. Deferred common area charges
- B. Base tax year calculation
- C. Tax reduction retroactive
- D. Payment options
- E. Audit of landlord's taxes

# 64. OPERATING EXPENSES

Definitions: Typically, operating expenses include:

- A. Ownership, management, maintenance and operating expenses
- B. Insurance premiums and deductibles
- C. Wages, salaries and benefits of personnel
- D. Management fees
- E. Service contracts
- F. Supplies and equipment
- G. Repairs
- H. Decorating
- I. Security
- J. Snow and ice removal
- K. Electricity, steam, oil, gas, and water

Landlord Advocates: Most operating expense definitions within commercial leases are very broad and many include a number of costs of a capital nature as well as those with built in profit components.

Tenant Advocates: Look out for the many holes and landmines in the operating expense definition



## 65. OPERATING EXPENSE ESCALATIONS

### A. Landlord Advocates:

- i. An operating expense escalation is typically more favorable to a landlord than a straight predetermined annual percentage increase.
- ii. The escalation passes all of landlord's expenses on to tenant, and can act as a potential profit center in many instances.

### B. Tenant Advocates:

- i. Be aware that some landlords add a 10% to 15% administrative fee on top of the total operating expense.
- ii. Attempt to negotiate the removal of such a fee.
- iii. Attempt to insert some carve outs into the operating expense clause. On larger deals, we have attempted to secure over 40 exclusions to the operating expense definition (See Sample Provisions on Leasing REality for the full list).

## 66. GROSS UP OF OPERATING EXPENSES

- A. Base Year (Pro-Tenant Language): If the Building is not at least ninety-five percent (95%) occupied, in the aggregate, during the Base Year or if Landlord is not supplying services to at least ninety-five percent (95%) of the Rentable Area of the Building and such other buildings, if any, at any time during the Base Year, actual Basic Costs for purposes hereof shall for the Base Year be determined as if the Building had been ninety-five percent (95%) occupied and Landlord had been supplying services to ninety-five percent (95%) of the Rentable Area of the Building.
- B. Base Year and Any Calendar Year (Pro-Landlord Language): If the Building is not at least ninety-five percent (95%) occupied, in the aggregate, during any calendar year of the Lease Term or if Landlord is not supplying services to at least ninety-five percent (95%) of the rentable area of the Building and such other buildings, if any, at any time during any calendar year of the Lease Term, actual Operating Expenses for purposes hereof shall, at Landlord's option, be determined as if the Building had been ninety-five percent (95%) occupied and Landlord had been supplying services to ninety-five percent (95%) of the rentable area of the Building. If Operating Expenses for any calendar year during the Lease Term are determined as provided in the foregoing sentence, Operating Expenses for the Base Operating Year shall also be determined as if the Building had been ninety-five percent (95%) occupied and Landlord had been supplying services to ninety-five percent (95%) of the rentable area of the Building.



# 67. AUDIT RIGHTS

Tenants need the ability to audit a landlord's operating and real estate tax charges in order to verify the accuracy of any such additional rent charged.

- A. Landlords want to limit the audit right, for example, by:
  - i. Limiting the amount of times that a tenant can audit
  - ii. Not allowing an audit if tenant is in default
  - iii. Providing that audits only be done by a CPA (on an hourly and not on a contingent fee basis)
  - iv. Providing notice, location, and timing restrictions
  - v. Confidentiality
- B. If tenant's audit alleges that landlord made an error in calculating additional rent:
  - i. Tenant: Will want to be reimbursed
  - ii. Landlord: Will want to verify audit

Tenant Advocates: See Leasing REality's Audit Rights Cheat Sheet and Sample Provisions

# 68. PERCENTAGE RENT

A retail landlord may require a share of profits as Additional Rent:

- A. Base Rent: Should be specified
- B. Breakpoint: An amount of gross sales that tenant must reach before landlord is entitled to any percentage of the profits
- C. Landlord Advocates:
  - i. In order to calculate the percentage rent for a full year in Year One, the breakpoint for Year One should be increased by a fraction
    - 1.  $(\text{Days between Lease Commencement Date and the next January 31}) / 365$
  - ii. Include language giving liquidated damages if tenant fails to continuously operate its business in accordance with the terms of the lease
  - iii. Define "Gross Sales" as broadly as possible

Tenant Advocates: See Leasing REality's Percentage Rent Cheat Sheet and Sample Provisions



## 69. PERCENTAGE RENT INCREASES

The following are a few additional negotiating strategies and theories to ponder when it comes to choosing a percentage rent increase over that of an operating expense escalation:

- A. Landlord Advocates: It is imperative that you insist upon the percentage increase being applied on an annual basis.
  
- B. Tenant Advocates: By attempting to have the increase applied every 5 years (or even every 2 years), the monetary shrinkage in additional rent paid can be quite significant. In short, the difference in the aggregate fixed rent on a 15 year lease with a \$500,000.00 initial fixed rent and 3% percentage rent increases applied annually (i.e., \$9,299,456.94), every 5 years as a 15% bump (i.e., \$8,861,250.00), and every 2 years as a 6% bump (i.e., \$9,145,652.78) can be quite dramatic!

## 70. LANDLORD'S ACCESS TO PREMISES

Landlord Advocates: There are numerous reasons why a landlord may require occasional access to its tenant's space. Accordingly, at a bare minimum, landlord advocates should include a provision that allows the landlord to enter the premises at any time upon reasonable notice, or without notice in the event of an emergency, in order to examine the premises and make any repairs or improvements landlord deems desirable or necessary.

Tenant Counteraction: Attempt to negotiate that (i) tenant or his representative must accompany landlord; (ii) landlord will use "commercially reasonable efforts" to minimize interference with tenant's use and occupancy of the premises; and (iii) landlord shall perform any required work within the premises with reasonable diligence. Tenant should attempt to negotiate that landlord is required to provide reasonable notice prior to any intended entry.

# 70. LANDLORD'S ACCESS TO PREMISES (CONTINUED)

## Landlord's Access When Tenant is Absent

Landlord Advocates: In the event that landlord requires entry into the premises when tenant is absent, landlord should have the right to enter without tenant's notice, permission or presence.

- A. Insert language that if tenant is not present to permit entry into the premises, landlord may enter, provided reasonable care is used to safeguard tenant's property and that landlord shall not be held liable for the entry.

Tenant Counteraction: Attempt to include language requiring that access without notice, permission, or the presence of the tenant only be allowed in the event of an emergency or after numerous attempts at contacting tenant.



# 70. LANDLORD'S ACCESS TO PREMISES (CONTINUED)

## Landlord's Access to Perform Work in or to the Premises

Landlord Advocates: Insert language stating that any equipment or building materials brought into the premises by landlord for the purpose of making repairs and/or improvements does not constitute an eviction of any kind.

- A. Include language that tenant will not receive any rent abatement while work is being done and tenant is not entitled to damages for loss of business incurred by work done by landlord.

Tenant Counteraction: Attempt to negotiate for language providing for (i) a rent abatement or reduction during landlord work; (ii) the removal of all equipment/materials from the premises overnight; and (iii) immediate removal of all equipment/materials upon completion of the work.



## 70. LANDLORD'S ACCESS TO PREMISES (CONTINUED)

### Landlord Showing the Premises During the Lease Term

Landlord Advocates: A landlord's primary goal should be to keep his property occupied. Toward the end of a lease term for a non-renewing tenant, a landlord should plan ahead in order to prevent losing money due to vacant premises.

- A. Include language allowing landlord to have the right to enter upon notice for the purpose of showing the premises to future tenants during the last year of the lease.

Tenant Counteraction: Attempt to negotiate that landlord may only show the premises during the last 6 months of the lease term.

## 70. LANDLORD'S ACCESS TO PREMISES (CONTINUED)

### Landlord's Access when Tenant Vacates Early

Landlord Advocates: If a tenant moves out before lease expiration, the prudent landlord will want to begin preparing or improving the premises for a subsequent tenant, or for display for potential tenants.

- A. Include language allowing landlord to enter prior to the end of the lease term if tenant has removed all or substantially all of his property from the premises, for the purpose of performing work or preparing the premises for future tenants.



# 70. LANDLORD'S ACCESS TO PREMISES (CONTINUED)

## Landlord's Alterations to the Building and Common Areas

Landlord Advocates: To provide a landlord with as broad rights and flexibility as possible when making future improvements to its property, landlords should insert language into its lease stating that the landlord has the right at any time, and without incurring any liability to tenant, to change the arrangement and location of public entrances, passageways, doors, doorways, corridors, elevators, stairs, toilets, or other public parts of the building, and to change the name or number of designation by which the building may be known.

Tenant Counteraction: Such changes can have a significant impact on a tenant's business. For example, the removal of a particular entrance or passageways could impact the foot traffic intersecting with a tenant's retail storefront.

# 71. TENANT'S ACCESS TO PREMISES

## Tenant's Early Access

Tenant Advocates: Negotiate for language in the letter of intent and the lease providing for the right to access the premises prior to the commencement date to prepare construction documents and install equipment, furniture, workstations, cabling, etc.

Landlord Counteraction: Include language that such entry and installation cannot interfere with the operations of the building and its other tenants. Make sure the liability and indemnification in the lease specifically includes damages that may occur during tenant's early access. State that the early access is a limited license and does not grant possession to tenant until the lease commences. Consider having tenant sign an Access and Indemnity Agreement.

# 71. TENANT'S ACCESS TO PREMISES (CONTINUED)

## Tenant's Access; Limited Hours

Landlord Advocates: Although the landlord intends to give tenant full possession and enjoyment of the premises, the landlord may have reasons to limit tenant's ability to access the premises during certain hours. For example, if the landlord shuts down a building's common areas after business hours, he will include a provision in the lease stating that tenant only has access to the premises during specified hours (e.g., "from 8:00 AM to 8:00 PM EST"), with access thereafter limited to entry through the freight entrance.

Tenant Counteraction: Make sure the lease provides that tenant has access to the premises 24/7/365.

# 71. TENANT'S ACCESS TO PREMISES (CONTINUED)

## Landlord's Failure to Deliver Premises

Landlord Advocates: In the event that landlord fails to deliver the premises on or by the lease commencement date for whatever reason (i.e., prior tenant or occupant holding over, ongoing construction, etc.), landlord should disclaim liability to the tenant for any such delay. This language is generally contained in a "failure to deliver possession clause."

Tenant Counteraction: If the above language is included in the lease, tenant should attempt to add outside date language in the event landlord fails to deliver the premises by a specified date. If the landlord has no obligation to deliver the premises to its tenant in a timely manner, nor to provide it by an outside date that would either postpone or cancel the lease, the tenant has no assurance as to when possession will occur.

## 72. “As-Is” CONDITION

Other than the completion of any landlord’s work, the lease should state that the tenant has inspected the premises and accepts them in their “as-is” condition as of the lease commencement date.

- A. Tenant will have no recourse against an unsatisfactory condition.
- B. Tenant Advocates: Make sure, at the very least, that on the lease commencement date:
  - i. The systems within the premises shall be delivered in good working order;
  - ii. The premises will be free and clear of all violations that would prohibit tenant from obtaining work permits for initial leasehold improvements;
  - iii. Premises is free of asbestos containing and other hazardous materials;
  - iv. Landlord shall have substantially completed all of landlord’s work;
  - v. As and if desired, all or a portion of the premises should be demolished by landlord at its sole cost and expense; and
  - vi. Landlord’s work will be free of defects for a period of one year after lease commencement date.

## 73. FAILURE TO GIVE POSSESSION

### Pro-Landlord:

- A. If the premises are not yet available for occupancy by the incoming tenant on the lease commencement date, landlord should include language disclaiming liability.
- B. For those in NYS: NY Real Property Law, Section 223-a
  - i. Every lease has an implied condition that landlord will deliver possession of the premises at the beginning of the term.
  - ii. Tenant has the right to rescind the lease & recover any consideration paid if the landlord fails to do so.
  - iii. Landlord Advocates:
    - 1. Add language stating that the provisions under the lease are intended to constitute “an express provision to the contrary” of the meaning of Section 223-a.

# 74. OUTSIDE DATE LANGUAGE

Tenants should negotiate outside date language in the lease, especially in the event the lease commencement date is based on substantial completion of landlord's work:

- A. In the event that the premises are not ready for occupancy upon the lease commencement date, this clause will provide tenant with a remedy in the form of a rent abatement and/or the right to terminate the Lease
  
- B. Example provision:
  - i. If Landlord is unable to deliver the Demised Premises to Tenant in broom clean condition with the Landlord's Work Substantially Complete on or before \_\_\_\_\_, 20\_\_ (the "Outside Date"), time being of the essence, Tenant shall receive an additional day of free rent for each day after the Outside Date that Landlord shall have failed to so deliver the Demised Premises to Tenant as required, provided that Landlord's failure to deliver the Demised Premises by the Outside Date is not due to a Tenant delay or force majeure
  
- C. Try to avoid the use of "force majeure" language in the above in order to broaden tenant's rights.

# 75. REPAIRS

- A. Landlord Advocates: Make tenant responsible for all repairs to the demised premises including building systems purely serving the demised premises.
  - i. Tenant Advocates: Make sure that landlord is liable for maintaining and repairing the exterior, public, and structural portions of the building.
- B. Negligence
  - i. Tenant Advocates: Attempt to avoid being on the hook for repairing damage due to the negligence, acts, omissions or willful misconduct of landlord or landlord's agents.
  - ii. Landlord Advocates: Make sure tenant is liable for damage due to such acts by tenant.
- C. Minimize interference with tenant's operations
  - i. Tenant Advocates: Try for material interruption language and self-help language.
  - ii. Landlord Advocates: Define the parameters of "interference."



## 76. MATERIAL INTERRUPTION OF SERVICES

The following are things to consider when negotiating material interruption of services:

- A. Suspension or interruption of services
  - i. Due to accident or repair; or
  - ii. Due to negligence or misconduct of landlord or those under landlord's control.
- B. A rent abatement after a certain number of days of the material interruption
- C. Tenant's inability to operate in the space
- D. Untenantability
- E. Failure to repair
- F. Force Majeure

# 77. FORCE MAJEURE

Protects the parties in the event timely performance is impossible due to an unforeseen event, such as a natural disaster, act of God, or other specified event.

## A. Landlord Advocates:

- i. If landlord is performing construction on a building subject to a deadline specified in tenant's lease, landlord should include language that will excuse it from performing by the deadline if a force majeure event occurs during construction.

## B. Tenant Advocates:

- i. If tenant is required to open and operate a business in the premises by a certain date, or for a certain amount of hours per day, tenant should include language that will excuse it from non-performance or delayed performance due to a force majeure event.

## 78. QUIET ENJOYMENT

- A. In exchange for complying with the terms of the lease, tenant may peaceably and quietly enjoy the premises
  
- B. Tenant Advocates:
  - i. Negotiate for quiet enjoyment to be solely conditioned on whether or not tenant is in default of the lease (beyond the expiration of any applicable notice and cure period); and
  - ii. To require landlord to use best efforts to ensure that other tenants do not interfere with tenant's right of quiet enjoyment.
  
- C. Landlord Advocates:
  - i. Initial lease draft should provide for quiet enjoyment to be subject to total compliance with all terms and conditions of the lease

# 79. PRO-LANDLORD INSURANCE PROVISION

Include language in the lease requiring tenant to obtain and keep insurance policies:

- A. Landlord covered by tenant insurance
  - i. Landlord should be insulated from liability if damage or injury occurs on the premises due to tenant's negligence or accident
- B. Proof of insurance policy
- C. Tenant's failure to maintain insurance
  - i. Landlord should have some recourse if tenant does not purchase insurance policy
- D. Insurance company qualifications
  - i. Ensures that tenant obtains reputable and high-quality insurance
- E. Landlord liability release
  - i. Tenant waives any claim for loss, damage or destruction of tenant's property by fire or casualty
- F. Increase in insurance coverage
  - i. Landlord will want the option to require tenants to change or increase their insurance coverage (amounts and types) during the term of the lease, to keep up with certain standards
- G. Indemnity
  - i. Landlord will not be liable for any injury or damage occurring on the premises or arising out of tenant's use of the premises

# 80. PRO-TENANT INSURANCE PROVISION

Tenant's response to insurance and indemnity provisions:

## A. Tenant's Insurance

- i. Tenant should avoid vague language that leaves the landlord discretionary power regarding tenant's insurance and indemnification costs

## B. Landlord's Insurance

- i. Tenant should require landlord to maintain insurance policies insuring the building and provide evidence of such insurance upon request
- ii. Tenant should avoid landlord passing costs onto tenant if landlord is liable for them and landlord's insurance will not cover them

## C. Indemnity

- i. Tenant will not indemnify landlord for any consequences of the wrongful acts, negligence or omissions of landlord or its agents
- ii. Landlord should indemnify tenant against injuries or damages arising from common areas, or arising from and out of any breach of landlord's representations, warranties, or covenants

# 81. CLEANING BY LANDLORD

Generally, a landlord will provide cleaning services for the premises that are typically performed by the landlord or its agents.

Landlord Advocates: Offer cleaning services for no extra charge, but specify that tenant should pay for any reasonable costs incurred for:

- A. Extra cleaning work in the premises required because of misuse or neglect on the part of tenant or its employees or visitors
- B. Use of portions of the premises for:
  - i. The preparation, serving or consumption of food or beverages,
  - ii. Data processing or reproducing operations,
  - iii. Other than normal internal office use,
  - iv. Private lavatories or toilets, or
  - v. Other special purposes requiring greater or more difficult cleaning work than office areas
- C. Any unusual quantity of interior glass surfaces; and
- D. Any non-building standard materials or finishes installed by tenant or at its request. Landlord, its cleaning contractor and their employees shall have access to the premises either during regular business hours or after-hours, and the free use of light, power and water.

## 82. CLEANING FOR RETAIL RESTRICTIONS

Landlord Advocates: Provisions regarding tenant's duty to clean the premises should include:

- A. Tenant will not clean the premises in a way that violates any laws, rules or codes asserted by any governmental entity or board
- B. Tenant will clean the premises at its own cost
- C. Cleaning staff must be approved by landlord
- D. Landlord will not unreasonably withhold or delay consent to a cleaning company proposed by tenant, provided that the cleaning company meets certain requirements
- E. Tenant will indemnify landlord from and against any and all damages, injuries, expenses arising out of the use of a cleaning crew

Tenant Advocates: Negotiate for landlord, at its sole expense, to regularly clean the common areas as well as the exterior windows of the premises. Tenant should concede that:

- A. It will pay landlord any reasonable costs incurred for any extra cleaning work required due to tenant's misuse or negligence
- B. It will pay landlord reasonable costs incurred for use of portions of the premises other than for normal internal use, or other purposes requiring greater or more difficult cleaning than offices
- C. Landlord, its cleaning contractor and their employees shall have access to the premises and free use of light, power, and water as is needed for the purpose of cleaning

## 83. BUSINESS OPERATING CONDITIONS

### Landlord Advocates:

- A. Landlord is relying upon tenant's assurance that the premises will be operated at all times in a high class manner
- B. Try to get tenant to agree to strict rules regarding cleanliness and neatness of a space, both inside and out
- C. Landlord will have certain expectations for how they wish to have the building maintained by tenants as well as the reputation of the building
  - i. In doing so, landlord can require the tenant to conduct its business in a manner consistent with the reputation the landlord seeks to achieve for the building

### Tenant Advocates:

- A. Attempt to negotiate for fewer rigid rules. Insert language that takes a "reasonableness" approach with regard to tenant's duty to operate the business and clean the premises in a reputable manner
  - i. For example, tenant should "maintain quality displays in the display windows" as opposed to cleaning all windows bi-weekly
- B. Attempt to soften landlord's language where landlord is given sole discretion in a matter
  - i. A landlord should be reasonable and should not unreasonably withhold consent or approval in a matter



## 84. FAILURE TO OPEN FOR BUSINESS OR OPERATE

In the commercial lease context, especially in a retail setting, landlords want their tenants to open and operate a successful business during their possession of the premises. Just as a successful retail space can increase the value of the underlying property, so can an unproductive space reduce its value. Accordingly, landlords should require tenants to open for business on or shortly after the lease commencement date. Landlord may also, at its discretion, include a daily minimum hour operational requirement.

### Landlord Advocates:

- A. Include a provision in the lease obligating tenant to open for business within a certain time period after the commencement of the lease
- B. The provision may broaden “failure to open for business or to operate” to include:
  - i. Abandonment, desertion or cessation of the operation within the lease term
- C. Tenant’s failure to comply will generally give the landlord the right to treat the event as a default
- D. Landlord may, at its discretion, include further penalties and fees for failure to open

# 85. CONTINUOUS OPERATION/HOURS OF OPERATION

Landlord Advocates: Typically, a landlord will require a tenant to continuously and uninterruptedly operate its business in the premises during normal business hours. Normal business hours will generally be defined within the lease.

Failure to operate during minimum required hours:

- A. Landlord may allow tenant to operate its business beyond the minimum required hours
- B. If tenant fails to abide by the minimum, landlord will generally deem such occurrence to be a material default under the lease
- C. Landlord should allow tenant to close on US national holidays and for refurbishing

Appearance of Business Operation:

- A. Landlord should include language in the lease stating that tenant shall keep the windows of the premises clean and keep the premises well-lit and well-appointed during the term of this lease or any renewal term so that tenant's business in the premises will not appear to the general public to have ceased operating.

# 86. SHOPPING CENTER OPERATING REQUIREMENTS OF LANDLORD

Landlord Advocates: Any landlord owning a shopping center will need specific language in any lease regarding:

- A. How tenant is permitted to operate the space, how landlord must maintain the shopping center and any common areas, what landlord is permitted to do within certain distances of the premises, and what, if any, exclusive use rights tenant may have.
- B. This may include restrictions on landlord's ability to pursue tenants in the same industry or field as tenant in the lease.

Tenant Advocates: As much as landlord will want to ensure that any tenants conduct their business in a manner beneficial to the shopping center, tenant should also seek protections in order to prevent landlord from taking certain steps that may harm tenant's business.

Other Provisions (Pro-Tenant):

- A. Provide roadways & passageways for tenant's customers (by vehicle or foot)
  - i. Between the premises, parking areas, public streets, and highways adjoining the shopping center
- B. Construct and maintain paved, black-topped and painted parking areas
- C. Keep and maintain the common areas and operate the shopping center in a first-class manner
- D. Do not rent or license any space of any kind or nature to any tenant, licensee or other occupant in violation tenant's exclusive use

## 87. ANCHOR TENANTS AND OPERATING CO-TENANCY REQUIREMENTS

When landlord starts leasing out space in a new building or shopping center, it must find one or more anchor tenants. An anchor tenant is usually a large tenant with prestige, name and brand recognition that will attract customers to the area. The anchor tenant generally pays a lower rental rate than ancillary tenants that follow suit.

Landlord Advocates: In order to induce tenants to open for business in landlord's shopping center, landlord may have to represent & warrant that major anchor tenants will occupy and operate their businesses in the building.

Tenant Advocates: Attempt to negotiate language stating that, if at any time during the lease:

- A. The Inducement Anchor Tenants fail to be open for business for a period of more than 30 days; or
- B. for a period of more than 30 days less than 85% of the gross leasable area occupied by the Inducement Anchor Tenant shall be fully occupied by retail tenants who are open for business.

Then tenant, at any time thereafter, shall have the right to do any one or more of the following:

- A. Terminate this lease by giving landlord 10 days written notice of its election to do so, and upon the giving of such notice, this lease shall be null and void and neither of the parties hereto shall be further obligated hereunder;
- B. cease business operations in the premises with a full abatement of all rents and charges until the operating co-tenancy requirement shall again be fulfilled; or
- C. elect to continue its business operations within the premises and pay to landlord in lieu of all rents and charges provided for herein, which shall abate until operating co-tenancy requirement shall again be fulfilled, as substitute rent a sum equal to \_\_% of its gross sales not to exceed, however, an amount equal to the monthly minimum rent otherwise provided for herein.

## 88. FLEA MARKET/VENDOR LICENSE

Commercial leases generally have clauses pertaining to the assignment or subleasing of the premises, which state that the landlord must consent to any such change in possession. If a tenant intends to use the premises as a flea market or trade show space, tenant will want to rent space out to many vendors. In this situation, it would be impractical for tenant to have to obtain landlord's consent for each and every vendor.

Tenant Advocates: Attempt to include a provision stating:

- A. Consent of landlord will not be required for any license of a portion of the premises to any entity or person of less than 10% of the premises
- B. Landlord will have no recapture or termination right, or profit sharing right triggered by the license of less than 10% of the premises
- C. All licensing agreements between tenant and the vendors will be prepared using the then-current standard for license agreement utilized by tenant, which shall be provided to landlord upon request
- D. All license agreements will be subordinate in all respects to the lease, and no license agreement will be deemed to amend, modify or waive any provision of the lease or release tenant from any obligation under the lease
- E. The occupancy by any vendor will not create any interest in the premises in favor of said vendor. Said space shall not be separately demised and any such arrangement shall be subject and subordinate to all of the terms and conditions of this lease

## 89. WAIVER OF FIXTURE FINANCING BY LANDLORD

A waiver of fixture financing by the landlord acts to protect any equipment, trade fixtures, inventory, or personal property financed or to be financed by the tenant.

In executing the waiver, the landlord and any of its mortgagees (in relation to the building in question) waive their right to repossess any of the equipment, trade fixtures, inventory, or personal property.

Landlord Advocates: Generally stated, if possible, always attempt to not agree to this tenant request.

Tenant Advocates:

- A. Such a waiver provision is a key protection for a tenant likely to invest resources in equipment, fixtures, inventory, and other property while occupying the premises.
- B. Execution of the waiver protects the aforementioned items from seizure by the landlord to satisfy the payment of unpaid rent as well as any of the landlord's creditors from utilizing them to satisfy any debts of the landlord.

## 90. SURRENDER

“Tenant shall relinquish and return possession of the premises to landlord prior to the lease termination date and tenant’s obligations shall be immediately extinguished.”

- A. Landlord Advocates: Provide for the following concepts in the lease:
- i. Tenant should return the premises free and clear of any party asserting right, title or interest;
  - ii. Tenant shall not have caused any encumbrances on the premises;
  - iii. Tenant has a free and clear right to immediately surrender the premises;
  - iv. Tenant has not dealt with any broker in connection with this declaration; and
  - v. Tenant indemnifies landlord from and against any claims from brokers claiming to have dealt with tenant in connection with this declaration.

# 91. EARLY SURRENDER

Landlords should hold tenants to their obligations to the lease termination date.

A. Obligations include:

- i. Payment of rent; and
- ii. Business operation requirements.

B. Landlord should include a provision stating that tenant:

- i. Is on the hook for all obligations under the lease until the term is up; and
- ii. Shall remain liable to landlord under such obligations.

C. Landlord may state that:

- i. Tenant will not be considered in default purely by surrendering the premises prior to the end of the term.



## 92. RIGHT OF FIRST REFUSAL (ROFR)

- A. Gives the holder the right to enter into a business transaction with the other party before anyone else can.
- B. Once the ROFR holder declines to enter into the transaction, the other party may freely solicit others to enter into the transaction.
  - i. Landlord may give tenant ROFR to renew the premises or for another similar space in the building.
- C. Landlord Advocates:
  - i. No assignment: Tenant may only exercise ROFR for its own use and occupancy.
  - ii. Tenant may not be in default at the time landlord is required to provide tenant with ROFR notice.
  - iii. Given that a landlord must generally negotiate, at the bare minimum, a letter of intent with a 3rd party, aside from the time and monetary costs associated with doing so, a ROFR acts to “chill” the marketplace. Accordingly, if given the choice between granting a ROFR or ROFO (see next page), choose the latter.

## 93. RIGHT OF FIRST OFFER (ROFO)

Under a ROFO provision, landlord must offer the premises designated in the provision to tenant before offering it to any other party.

- A. The offer must be in good faith, pursuant to the terms and conditions which landlord would reasonably offer to third parties
- B. If tenant accepts the offer, it will enter into an amended or new lease with the landlord pursuant to the new terms
- C. If tenant rejects or fails to accept the offer within a specified period, tenant will have no further rights under the ROFO provision and landlord will be free to offer a lease to any other party

ROFO vs. ROFR:

- A. A Right of First Refusal (ROFR) gives tenant the right to accept an offer identical to any offers landlord receives from a third party offeree
  - i. A ROFR is triggered if a third party seeks to enter into a transaction with landlord regarding the premises
- B. A ROFO is triggered if the landlord seeks to enter into another transaction regarding the premises
  - i. The landlord may not extend an offer to anyone but tenant

# 94. RESTRUCTURING (PRO-TENANT)

## Keys to a Tenant Successfully Restructuring a Lease

- A. Be proactive when approaching a landlord for a reduction in rent or some other concession
- B. Empower your landlord to make an informed and knowledgeable decision as to the granting of their requested lease concession and be ready with written authoritative documentation in support of your request
- C. To lay the foundation to negotiate, present the landlord with the following:
  - i. Basic intro and a quick pat on your own back;
  - ii. The “tale of woe;”
  - iii. Tenant’s game plan for recovery;
  - iv. The “plea for rental relief;”
  - v. Concessions;
  - vi. Tax returns (past few years);
  - vii. Historical financial statements;
  - viii. Year to date & comparative profit & loss statements;
  - ix. (Realistic) future projections of income/expense;
  - x. Daily sales logs; current/past 2 years; and
  - xi. Any other writings or dialogue in support of a tenant’s request for relief.

Channel *The Beatles* by adapting the mantra of “*We Can Work it Out*” and “*take a sad song and make it better.*”



# 95. RESTRUCTURING (PRO-LANDLORD)

Factors a Landlord Should Consider When Faced with a Request for Rental Relief:

- A. Secure and stable cash flow, even in an amount lower than they might otherwise prefer, is a truly good thing. A large percent of something is better than 100% of nothing.
- B. The devil you know is better than the devil you don't.
- C. Is the rental relief requested short term or long term?
- D. Given your rent roll & expenses for the building, are you in a danger zone as to complying with your debt service coverage ratio?
- E. What is the near or long-term tenant rollover for the building?
- F. Are there rising vacancies and declining rents in the market place?
- G. Is there increased competition from tenants trying to sublet their space at lower costs?
- H. Is the named tenant merely a shell corporation (or the parent entity)? What 'skin' does the tenant have in the game (e.g., is there a personal or good guy guaranty)?
- I. In the long term, is the tenant someone the landlord would like to renew its lease?
- J. What are the retention savings vs. vacancy costs?

## 96. COLLATERAL ASSIGNMENT OF LEASE

Used in leases to franchisors, as well as in the sale of a business to a buyer with partial seller financing, or on bank loans on income-producing property. A franchisor-friendly document will generally include the following, at a bare minimum:

- A. Notice of tenant default;
- B. Franchisor possession;
- C. Landlord's obligations upon franchisor's exercise of the collateral assignment;
- D. Franchisor's obligations;
- E. Franchisor replacing tenant;
- F. Assignment at franchisor's discretion;
- G. Franchisor liability discharged upon assignment; and
- H. Removal of proprietary marks from premises.

Landlord Advocates: Note that franchisors will require notice of tenant default, the right to step into tenant's shoes upon occurrence of uncured default, and the absolute right to assign the lease to a franchisee of its choosing.



# 97. CONFIDENTIALITY

Landlord Advocates: It is in the best interest of the landlord to avoid unwanted disclosure of the lease terms. Landlord should take steps to ensure that the tenant cannot disclose the terms of the lease to anyone other than those approved by landlord.

Tenant Advocates: Of course, a tenant should seek to have as much freedom as possible regarding who the tenant may disclose the terms of the lease to. This would include the tenant not being responsible for any disclosure of the terms of the lease as a result of theft or other incidents that are not within the control of the tenant. Landlord should also be required by tenant to keep the terms of the lease confidential.

Landlord Advocates: In light of tenant seeking to limit the landlord's ability to disclose confidential information, the landlord should also be sure to delineate in which circumstances the terms of the lease will not be considered confidential information.

Tenant Advocates: Ensure that confidential information remains the property of the tenant and that tenant, at its election, may demand landlord to return or destroy all confidential information provided by tenant. Furthermore, tenant can include language that in the event of an unauthorized disclosure of confidential information by landlord, tenant may seek specific performance in addition to remedy at law.

# 98. FOREIGN JURISDICTION/CONSENT TO JURISDICTION

Nearly all leases will contain a provision setting out what law will control disputes arising under the lease between the landlord and tenant. Such a provision will identify which state's laws will apply to such disputes as well as language indicating that the parties, especially the tenant, agree to submit themselves to the jurisdiction of the designated state.

Landlord Advocates: Landlord will want to ensure that tenant agrees to be subjected to the laws of its jurisdiction of choice.

- A. Allowing the governing law to be a state other than landlord's home base will result in increased expenses and inconvenience
- B. Ensure that any judgment against the tenant will be enforceable in another jurisdiction
- C. Seek to have the tenant waive any immunity in order to ensure that tenant is subject to the jurisdiction of the relevant court

Tenant Advocates:

- A. Because choice of law provisions are standard in leases, much of what tenant should strive for is to agree to a governing law jurisdiction that best supports their interests
- B. Seek to have the immunity provision removed from the lease



# 99. CATCH-ALL PROVISIONS

Leasing Mixed Bag of Catch-All Lease Insertions that are Generally Pro-Landlord:

- A. Default applies to all of tenant's premises;
- B. Submission of unexcused lease agreement to tenant is not an offer;
- C. Merger clause;
- D. Payment of taxes;
- E. No early occupancy;
- F. Lease will not be recorded in the public record;
- G. Landlord's consent not to be unreasonably withheld;
- H. "Including" defined;
- I. Lease does not create any easements or unspecified property rights;
- J. Delegation (by landlord);
- K. Headers are non-binding;
- L. Landlord indemnities extend to designated parties;
- M. Failure by landlord does not extinguish tenant's obligations;



# 99. CATCH-ALL PROVISIONS (CONTINUED)

Leasing Mixed Bag of Catch-All Lease Insertions that are Generally Pro-Landlord:

- N. Landlord not liable for governmental intervention of tenant's rights under the lease;
- O. Joint and several liability;
- P. Confidentiality and non-disclosure;
- Q. "All liabilities, costs and expenses" includes attorney's fees;
- R. Application of late payments, default interest;
- S. No accord and satisfaction;
- T. Choice of law & consent to jurisdiction;
- U. No presumption against drafter;
- V. Landlord not bound until full execution by both parties;
- W. Broken windows or doors;
- X. No air rights; and
- Y. Counterparts.



# 100. MOISTURE AND MOLD MEMORANDUM

## Tenant Representations

### A. In signing a typical Moisture and Mold Memorandum:

- i. Tenant acknowledges the potential development of mold spores and the necessity of proper cleaning, ventilation and moisture control of the premises to prevent mold (especially in kitchens, janitor's closets, bathrooms, break rooms and around outside walls).
- ii. Tenant represents that it inspected the premises and did not observe any mold, mildew, or moisture.
- iii. Tenant agrees to immediately notify Landlord if Tenant observes mold, mildew, or moisture, and Tenant agrees to allow Landlord to evaluate the issue and take action or make recommendations.
- iv. Tenant releases Landlord and its agents for any injury or property damages caused by excessive moisture or mold in the premises.
- v. Tenant acknowledges that the memorandum is incorporated into the lease, and moisture control is integral to its lease obligations.
- vi. Tenant acknowledges receipt of Landlord's Moisture and Mold Control Instructions (if any).

# 101. CONDENSER WATER

- A. Landlord Advocates: If landlord is willing to allow its tenant to have installed, at tenant's own cost, a water cooled supplemental air-conditioning system, subject to the capacity of the building's water tower, landlord should limit the amount of tonnage the tenant can receive (e.g., eight (8) tons to sixteen (16) tons).
  - i. Tenant Counteraction: Either delete the tonnage limit or, alternatively, negotiate the right to an additional amount of tonnage within the first one (1) to three (3) years of the lease term.
  
- B. Landlord Advocates: Indicate in the lease that tenant will bear the costs of purchasing, maintaining, operating and repairing the supplemental air-conditioning system (and for those who prefer to push the envelope a bit, that the unit be delivered in good working order at lease expiration).
  
- C. Landlord Advocates: The connection of the supplemental air-conditioning system to the building condenser water source shall be performed by landlord's building contractors, at tenant's sole cost and expense, including, without limitation, reasonable installation and engineering costs incurred by landlord in connection with same.
  - i. Tenant Counteraction: Items to potentially negotiate include:
    - a. having the right to have tenant's own contractor connect the system;
    - b. adding language that the rates must be competitive and/or specify a cap on such costs; and/or
    - c. either delete the engineering costs of landlord or request a cap on same.

# 102. AMERICANS WITH DISABILITIES ACT ("ADA") COMPLIANCE

- A. Tenant Advocates: Negotiate language such that the landlord should be solely liable for existing and future compliance under the ADA, and should indemnify and hold tenant harmless from and against all damages, claims, liabilities, actions and proceedings relating to any breach or failure by landlord to comply with the ADA. In addition, the landlord should be required to perform such acts necessary or appropriate in order for the leased premises (and building) to comply with the ADA. Additionally, tenant should have no obligation to comply with ADA except and only to the extent that which is applicable to the interior of the premises, if required by tenant's alterations or manner of (as opposed to permitted) use.
  - i. Landlord Counteraction: Make sure to include language in the lease reciprocating the above indemnification language with regard to tenant's obligations to comply with the ADA within the demised premises.
  
- B. Landlord Advocates: A well drafted pro-landlord LOI and lease should provide that not only shall the tenant take the "as-is", but as of the lease commencement date and at all times thereafter at Tenant's sole expense, the tenant must comply with all present and future laws, rules, codes, orders and regulations of all governmental and quasi-governmental entities, boards, departments and commissions (including but not limited to the ADA).

# WHAT DO THE FOLLOWING HAVE TO DO WITH COMMERCIAL LEASING?

**Question:** *What is the Albert Einstein, Drake, Snoop Dogg & "Channel Your Inner Gus" Theory?*

**Answer:** (1) The real estate world - as we know it - would be a better place if the attorneys, brokers, contractors, architects and other professionals inhabiting it heeded the words "Try Not to Become a Man of Success. Rather Become a Man of Value" by *Albert Einstein*. In order to build a foundation of knowledge and ultimately add value - channeling *Drake* - you need to have "Started From The Bottom." (2) With props out to *Snoop*, "If it's flipping hamburgers at McDonald's, be the best hamburger flipper in the world. Whatever it is you do you have to master your craft." (3) With kudos out to *Gus*, one of the greatest night watchmen in the world, take pride in workmanship!

**Question:** *What is the Snagglepuss, Groucho Marx, The Clash & Steve McQueen Great Escape Theory?*

**Answer:** As a tenant advocate, it is imperative that you create exit strategies for your client as early as the letter of intent stage for the myriad of things that can occur during a long term lease (including but not limited to the sale of a business and partners leaving and new ones joining a company). That said, among the *Hanna-Barbera* cartoon character *Snagglepuss's* greatest lines was "Exit, Stage Left," *Groucho Marx's* from the movie *Animal Crackers* was "Hello, I Must Be Going," a classic song from *The Clash* was "Should I Stay or Should I Go?" and *Steve McQueen* starred in the classic movie "Great Escape."

**Question:** *What is The Ho Ho Ho, Dr. Evil & Jerry Maguire "You Complete Me" Theory?*

**Answer:** Given that no real estate professional or owner for that matter knows everything (with a few of us sometimes being a can or two short of a full six pack), a key to success is filling in the holes in your base of knowledge by surrounding yourself with those capable of doing so (e.g., an agent or attorney should have a number of great contractors and architects as part of their "team"). With that said, Santa Clause wouldn't be half the man he is without none other than Mrs. Clause and his elves! *Dr. Evil* from the comedy classic *Austin Powers* didn't find true happiness and creativeness until *Mini Me* became part of his team. Lastly, real estate pros need to look no further than the movie *Jerry Maguire* starring *Tom Cruise*, when his character said to *Dorothy Boyd*, played by *Renée Zellweger*, "You complete me." Make this part of your mantra my leasing brethren, and prospective clients will be channeling *Dorothy Boyd* in response to your pitch and the skill set you bring to the table by saying "You had me at hello!"



## WHAT DO THE FOLLOWING HAVE TO DO WITH COMMERCIAL LEASING?

**Question:** *What is the Mariano Rivera, John Wooden, Billy Idol & Annie "The Sun Will Come Out Tomorrow" Theory?*

**Answer:** Aside from having a closer's mentality when it comes to hopefully bringing your deals to a smooth, expedited and successful conclusion, similar to that of THE greatest MLB closer of all time (yes, the one and only *Mariano Rivera*), real estate professionals need to (1) unfortunately accept that not every deal or game is going to have a happy ending, (2) acknowledge that when it comes to pitching business, more often than not you will end up being a bridesmaid and not the bride, and (3) come to grips with the fact that as a consequence of the foregoing, they need to adopt a "NEXT" mentality after a bad day at the office. After a rare poor outing, Mariano came to the ballpark the next day ready to throw the pitch that will (or depending on what year you may be reading this, did) get him elected to the Hall of Fame on the first ballot, notwithstanding that he might have given up a walk-off home run the night before to lose the game for the Yanks! Along the same lines, legendary basketball coach *John Wooden* once said "*Today is the only day. Yesterday is gone.*" As to the *Billy Idol* song that we have all heard at many events, namely "*White Wedding*," landlord and tenant advocates should consider repeating to themselves three times the lyrics "*It's a nice day to start again*" the day after a deal went south or sideways on them. Lastly, as to the famous Broadway show *Annie*, playing off the words from the iconic song, you can "*bet your bottom dollar*" that "*the sun will come out tomorrow*" after a down real estate cycle!

**Question:** *What is the Winston Wolf, Vivian Greene & Gene Kelly "Be Part of the Solution" Theory?*

**Answer:** Real estate professionals need to (1) embody the character *Winston Wolf* from *Pulp Fiction* and practice his mantra of "*I Solve Problems*," (2) embrace the words of poet *Vivian Greene* and her advice "*Life isn't about waiting for the storm to pass. It's about learning how to dance in the rain*," and (3) notwithstanding a few dark clouds surrounding your transaction, try and bring a sunny and optimistic approach to the deal by tap dancing and resolving the issues at hand like Hollywood legend *Gene Kelly* in the 1950's classic "*Singin' in the Rain*."



# WHAT DO THE FOLLOWING HAVE TO DO WITH COMMERCIAL LEASING?

**Question:** *What is the Ben Franklin, 5 P's, JFK & John Wooden Cub Scout Theory?*

**Answer:** Quoting one of the coolest dudes from the 1700's, namely that of *Benjamin Franklin*, always remember that *"Due diligence is the mother of good luck."* As to the not so elusive 5 P's theory, landlord and tenant advocates must know that *"Proper Planning Prevents Poor Performance!"* Taking it a step further, ponder the advice of former President *John F. Kennedy* when it comes to staying on top of your game and your deals by making sure that you *"use time as a tool and not as a couch."* Going back to the well one more time with Coach *John Wooden*, please keep in mind his mantra that *"If you fail to prepare, prepare to fail."* Last but not least, coming from a guy who wore the uniform in his third grade class picture, make the *"Be Prepared"* mantra of the Cub Scouts your very own!

**Question:** *What is the Luv The 1 U R With, George Benson & Sting "So Lonely Drive-In Movie" Theory?*

**Answer:** When it comes to tenant retention and lease renewals, and the consequential fallout associated with vacancy turnover, legal, brokerage, architectural, tenant improvement allowance, landlord work, and lastly, free rent concession costs associated with a tenant channeling the *Grateful Dead* song *"Truckin'"* and moving on to another office or retail space, landlords need to become bigger fans of the musicians known as *CSNY*, *George Benson* and *Sting* from *The Police*. Stated differently, landlords should respectively consider learning listening to the songs *"Love the One You're With,"* *"Never Give Up on a Good Thing"* and *"So Lonely"* as they stand in the once occupied space of a dearly departed and rent paying tenant who has made like *LeBron James* and taken his or its "talents" to another landlord's building. As to the drive-in movie theater aspect of our theory, it is our belief that having vacant space makes no sense, much like going to one of those old drive-in movie theaters by yourself ... in a taxi cab ... with the meter running ... and in the case of a single parent experiencing the foregoing, having to pay for a babysitter for the kids left at home!



# MASTER YOUR LEASING DOMAIN

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