CHAPTER 2

Creating the Commercial Tenancy*

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§ 2.1 Introduction—Commercial Versus Residential Sales 2–2

§ 2.2 Marketing Commercial Leaseholds—The Brokerage Agreement 2–3

§ 2.2.1 Term of the Agreement 2–4
§ 2.2.2 Commission 2–4
§ 2.2.3 Responsibilities of Broker and Landlord 2–5
§ 2.2.4 Reimbursement of Expenses 2–6
§ 2.2.5 Posttermination Commissionable Leases 2–6
§ 2.2.6 Exclusivity and Excluded Prospects 2–6
§ 2.2.7 Limitation on Broker's Authority 2–6

§ 2.3 Term Sheet or Letter of Intent 2–7

§ 2.4 The Lease Document 2–7

§ 2.4.1 Parties to the Lease 2–8
§ 2.4.2 Premises 2–9
(a) Description of Premises 2–9
(b) Usable Area Versus Rentable Area 2–9
(c) Appurtenant Rights 2–10
§ 2.4.3 Condition of the Premises 2–10
§ 2.4.4 Term 2–12
(a) Term for Years Versus Tenancy-at-Will 2–12
(b) Extension Options; Termination Options 2–12
§ 2.4.5 Base Rent 2–14
§ 2.4.6 Security Deposit 2–15
§ 2.4.7 Additional Rent 2–16
(a) Cost Escalators, General 2–16
(b) Administration of Additional Rent 2–17
(c) Real Estate Taxes 2–18
(d) Operating Costs 2–18
(e) Percentage Rent 2–19
§ 2.4.8 Operating Costs: Tenant's Obligation to Pay Operating Costs Under a Commercial Lease 2–20
(a) Definition of Operating Cost or Common Area Costs 2–21
(b) Exclusions from, and Limitations of, Operating Costs 2–21
(c) Base Years 2–25
(d) Taxes 2–26
(e) Tenant's Proportionate Share 2–27
(f) Tenant's Audit Rights 2–27
(g) Caps and Other Limitations 2–28
(h) Manner of Payment 2–28
§ 2.4.9 Operational Covenants 2–28
(a) Covenant to Stay Open 2–28
(b) Compliance with Law 2–29
(c) Maintenance and Operational Covenants 2–29
(d) Signage 2–29
(e) Hazardous Materials 2–30
(f) No Build Area 2–30
(g) Exclusive Rights 2–30

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(h) Radius Restrictions ... 2–31
(i) Cotenancy ... 2–31
§ 2.4.10 Alterations and Additions ... 2–31
§ 2.4.11 Repairs and Maintenance ... 2–31
§ 2.4.12 Utilities and Building Services ... 2–32
§ 2.4.13 Assignment and Subletting ... 2–33
§ 2.4.14 Indemnity and Assumption of Risk ... 2–34
§ 2.4.15 Insurance ... 2–35
§ 2.4.16 Casualty ... 2–36
(a) Obligations to Repair or Restore ... 2–36
(b) Termination of the Lease ... 2–36
(c) Rent Abatement ... 2–37
§ 2.4.17 Eminent Domain ... 2–37
§ 2.4.18 Default ... 2–38
§ 2.4.19 Retail Lease Provisions ... 2–39
(a) Exclusives ... 2–40
(b) Cotenancy Rights ... 2–40
(c) Kickouts ... 2–40
§ 2.4.20 Mortgagee Protective Provisions ... 2–41
§ 2.4.21 Miscellaneous Provisions ... 2–42
(a) Covenant of Quiet Enjoyment ... 2–42
(b) Force Majeure ... 2–42
(c) Waiver ... 2–42
(d) Prevailing Parties ... 2–43
(e) Estoppels ... 2–43
(f) Nonrecourse ... 2–43
(g) Interest ... 2–43
(h) Notice ... 2–43
(i) Brokers ... 2–44

EXHIBIT 2A—Exclusive Leasing Agreement ... 2–45

EXHIBIT 2B—Lease ... 2–51

EXHIBIT 2C—Definition of Percentage Rent ... 2–74

EXHIBIT 2D—Definition of Breakpoint and Gross Sales; Payment of Percentage Rent and Landlord's Audit Provisions ... 2–77

EXHIBIT 2E—Office Definition of Operating Costs ... 2–80

EXHIBIT 2F—Retail Definition of Operating Costs ... 2–82

EXHIBIT 2G—Operating Costs Exclusions ... 2–83

EXHIBIT 2H—Tax Definition ... 2–84

EXHIBIT 2I—Audit Provision ... 2–85

EXHIBIT 2J—Subordination, Nondisturbance, and Attornment Agreement ... 2–86

Scope Note

This chapter provides guidance on creating a commercial tenancy. Included are important considerations and instructions for drafting brokerage agreements, term sheets or letters of intent, and commercial leases. The chapter highlights certain unique aspects of a commercial lease, such as operating costs and operational covenants. Exhibits include samples of an exclusive leasing agreement; a detailed commercial lease; and a subordination, nondisturbance, and attornment agreement. Also included are sample provisions addressing percentage rent, breakpoint and gross sales, operating costs, and tax-related issues.

§ 2.1 INTRODUCTION—COMMERCIAL VERSUS RESIDENTIAL SALES

This chapter deals with the commercial tenancy. It describes the differences between commercial and residential tenancies and discusses the attorney's role in the process of marketing commercial leaseholds. It also contains a detailed examination of the structure of the commercial lease and the function of the lawyer in the leasing transaction.

The primary difference between residential and commercial leases is the economic relation of the tenant to the lease transaction. The residential tenant enters into the lease as a consumer, buying use of the leased space as a personal residence. The commercial tenant, on the other hand, enters the lease to acquire a production asset to be used in the course of its business, i.e., as a place to house workers and equipment for an office or industrial tenant or a place from which to sell merchandise for a retail tenant. Put differently, in the commercial lease both the landlord and the tenant enter the transaction as part of a business enterprise, whereas in the residential lease only the landlord is engaged in a business enterprise—the tenant is a consumer.

Judicial Commentary

The Supreme Judicial Court has escalated significantly the rights of commercial tenants by finally abandoning the common law rule of independent covenants in commercial leases in favor of mutually dependent covenants as reflected in the Restatement (Second) of Property: Landlord and Tenant § 7.1 (1977). *Wesson v. Leone Enters., Inc.*, 437 Mass. 708, 709 (2002); *UMNV 205–207 Newbury, LLC v. Caffé Nero Americas Inc.*, No. 2084CV01493-BLS2 (Mass. Super. Ct. Feb. 8, 2021). *See generally* Hon. E. George Daher & Harvey Chopp, *Landlord and Tenant Law* (33 *Massachusetts Practice Series*) § 10:20 (West 3d ed. 2000 & Supp. 2012). But see *Humphrey v. Byron*, 447 Mass. 322, 327 (2006), where the Supreme Judicial Court was asked to extend the rule of *Young v. Garwacki*, 380 Mass. 162 (1980), to commercial landlords. It declined.

Ethics Commentary

As will become obvious in the discussions that follow, attorneys experienced in residential landlord-tenant law should not assume that the experience carries over to commercial transactions. The law of independent and dependent covenants, the scope of Chapter 93A, the rules governing when counterclaims are permissive and other procedural differences, the applicability of the statute of frauds, the complexity of commercial lease terms, and a myriad of other distinctions require that an attorney have training, experience, or appropriate consultation on the commercial side prior to undertaking representation. *See* Mass. R. Prof. C. 1.1 & cmt. 2.

This difference is reflected in the statutory treatment of the two types of lease transactions. Residential tenants have many of the statutory protections accorded consumers in other types of commercial transactions. Commercial tenants do not have the benefit of such broad, consumer-oriented protections and must rely instead on the more party-neutral provisions of conveyancing law and commercial law.

Generally, the law regards commercial leases as business transactions between parties of comparable sophistication and bargaining power and consequently imposes fewer restrictions on the nature and terms of the transaction than it does on residential leases. The assumption that the commercial landlord and tenant have equal sophistication and bargaining power often proves unfounded, particularly in the office-leasing context. Except for larger corporations with multiple locations, most office tenants engage in leasing transactions so infrequently that they do not develop an expertise comparable to that of the landlord, who is likely a real estate investment trust (REIT) or professional developer. Moreover, in some respects the office tenant is similar to the residential tenant as far as being a consumer of space goes, because the office tenant, unlike the retail tenant, simply uses the space to conduct a business that is unrelated to the space itself. The office tenant that ventures into the leasing marketplace only occasionally must rely on its broker and attorney to supply the missing expertise.

For the retail tenant, on the other hand, the leased space is an integral part of its business. The location and functionality of the space are far more critical to the success of the business venture for these tenants than for the office tenant. Thus, even a small retail operator tends to have greater sophistication, if not bargaining power, than a comparable office tenant. More to the point, retailing has become dominated by large chain operations and franchise systems that possess substantial bargaining power and whose real estate personnel are every bit as sophisticated as those of the largest REITs and developers. In fact, when a national retailer deals with a small developer, the landlord is almost always the underdog.

§ 2.2 MARKETING COMMERCIAL LEASEHOLDS—THE BROKERAGE AGREEMENT

A commercial landlord seeking to lease space needs to put the space on the market so that potential tenants become aware of its availability. A commercial tenant needs to identify the space it desires to lease among the various spaces available on the market. Unless the principal has substantial in-house real estate expertise, it will hire a commercial real estate broker to assist in these activities. The landlord will hire a broker to market the landlord's space by preparing and distributing marketing materials, contacting prospective tenants, showing them the space, and negotiating the business terms of the lease. The tenant will hire a broker to identify the most suitable space among that available on the market

and to negotiate the business terms of the lease. A specimen form of brokerage agreement for use by a landlord in listing space for rent is included as **Exhibit 2A**, Exclusive Leasing Agreement.

A listing agreement between a landlord and its broker should address at least the following elements:

- term of agreement,
- commission/cobrokerage,
- responsibilities of broker and landlord,
- reimbursement of expenses,
- posttermination commissionable leases,
- exclusivity/excluded prospects, and
- limitation on authority.

The following sections outline issues the leasing attorney should consider in negotiating the basic elements of a listing agreement.

§ 2.2.1 Term of the Agreement

The term of the agreement is the period during which the broker will have the right to represent the landlord in listing the property for lease. From the landlord's perspective, this period should be relatively short so that the landlord may terminate the arrangement if the broker is not producing results. From the broker's perspective, the term of the agreement must be at least long enough for the broker to develop and implement a marketing plan and to follow through with the prospects produced by that plan. The responsibility for paying for marketing materials comes into play here. If the landlord pays for the production and distribution of marketing materials, the broker may accept a relatively short-term agreement. If the broker invests its own money in the marketing materials, it will insist on a longer term in order to have an opportunity to reap the benefit of that investment. Listing agreements frequently provide that they will continue in effect after the expiration of the term until either party elects to terminate the agreement by advance notice to the other party. Alternatively, the agreement may provide for a longer term with either or both parties having the right to elect an early termination by notice to the other party. In any event, the broker will insist that it be paid a commission if a prospect properly introduced to the property during the term of the listing agreement signs a lease within an agreed period after the expiration or termination of the term. This concept is discussed below.

§ 2.2.2 Commission

The agreement should specify the commission that will be paid to the broker for leasing the property. Usually, the commission will be calculated in accordance with a formula based on the rent payable under the lease or the rentable area covered by the lease. From the landlord's perspective, a formula based on the rent is more desirable, since it gives the broker an incentive to negotiate the highest obtainable rent in order to maximize its commission. The commission schedule attached to the specimen listing agreement set forth in **Exhibit 2A** shows a typical commission formula based on the rent. The landlord should make sure that commission is payable only on base rent, and not on reimbursements of the landlord's expenses in operating the property or increases in such expenses (known as "pass-throughs") or percentage rent. Pass-throughs commonly include operating costs and real estate tax escalations. They should be excluded because the landlord wants to pay a commission only on the net income received. This argument applies also to incremental increases to "base" rent intended to reimburse the landlord for construction expenses above those included in a quoted rent rate. Often, a landlord will "finance" the tenant's leasehold improvements by increasing the base rent over that payable if the tenant took the premises "as is" and paid directly for its leasehold improvements. The landlord will not want to pay a commission on this reimbursement.

Percentage rent, on the other hand, certainly constitutes net income to the landlord, but it is not a good basis for commission because it is contingent on the result of the tenant's operations in the premises and could not be paid in advance at commencement of the lease term as commissions typically are. Moreover, payment of commission on percentage rent would necessarily make the broker privy to the tenant's gross sales information, which the tenant will want the landlord to keep confidential.

A well-drafted listing agreement will address the issue of whether a commission is payable for extensions of the lease term or expansions of the premises under leases executed during the term of the agreement, particularly those effected

after termination of the listing agreement. There is no "standard" or "correct" treatment of this issue, but the leasing attorney should make sure that the client understands the issue and the potential for future disputes created by leaving it unaddressed in the leasing agreement. Landlords sometimes agree to pay commission on extensions or renewals made pursuant to tenant options contained in the lease, but should refuse to commit to pay for subsequently negotiated deals. The broker can legitimately claim to have participated in structuring the deal for the contractual option, thereby earning a commission on the term covered by such option.

The listing agreement should specify when the commission will be payable. The broker, of course, wants the commission payable as soon as possible and can be expected to request the commission to be paid in full upon lease execution. The broker's argument for this position is that it has been hired simply to get the tenant to enter into the lease and not to ensure the tenant's performance of its obligations under the lease. If a tenant executes a lease and subsequently fails to perform, the broker will argue, the landlord has its legal remedies for breach of contract. The landlord may reply that it has hired the broker not simply to produce a contract but to produce a rent-paying tenant. Accordingly, the landlord will not want to pay a commission until the tenant has taken occupancy of the premises and commenced to pay rent. A common compromise calls for 50 percent of the commission to be payable upon lease execution and 50 percent upon the tenant taking occupancy and commencing to pay rent. Where the lease gives the tenant a "free-rent" period, the parties need to negotiate whether the second half of the commission is payable upon the tenant taking occupancy (the broker's preference) or the first rental payment (the landlord's preference). Where the tenant's obligations under the lease are subject to a condition precedent, such as board approval for a corporate tenant or the termination of an existing lease, the landlord should insist that the commission is not earned or payable until all such conditions precedent are satisfied or waived.

Since most tenants are represented by separate brokers, who will expect to be paid a commission, the brokerage agreement should specify how such "outside" commissions will be handled. One option is for the landlord to pay separately any outside commission, in which event a lower commission should be paid to the listing broker. The other approach is to make the listing broker responsible for any outside commissions and to provide for a higher commission wherever outside brokers are involved. The landlord should insist upon the latter approach. In the first place, the landlord will have little negotiating leverage to get a good deal from the outside broker, since they will have no contractual relationship (other than an implied contract to the extent the broker is considered the agent of the landlord at common law) nor any likelihood of future business dealings to induce the broker to cut a favorable deal. The listing broker, in contrast, usually has negotiating leverage with the outside broker, particularly if both brokers are members of large commercial brokerage houses. In such a case, the landlord's listing broker is often the outside broker on another deal where the outside broker is the listing broker for the other landlord. Both brokers have a strong incentive to cut the "usual" deal rather than engage in a dispute over the commission, which will have repercussions for other deals. To make sure that the landlord obtains the benefit of this approach, the brokerage agreement must provide that the listing broker will indemnify the landlord against all claims from outside brokers. The broker wants this indemnity limited to the total amount of commission paid to the broker on the transaction that is the subject of the indemnity, arguing that it is unfair to expect the broker to lose money on a commissionable transaction. This limitation puts a burden on the landlord to police the brokerage situation before entering into the lease. Any such limitation should not apply to other brokers with whom the listing broker has dealt. In this regard, the lease should contain a warranty by the tenant as to what brokers, if any, it has dealt with in connection with the lease transaction. See the sample lease included as **Exhibit 2B**.

§ 2.2.3 Responsibilities of Broker and Landlord

The agreement should specify who will be responsible for the preparation, distribution, and costs of marketing materials. In most cases, the broker, as the real estate professional, will take on responsibility for the preparation and distribution of the marketing materials, such as brochures, direct mailings, print media advertising, posting signs on the premises, and the like. Who pays for these activities is a matter to be negotiated between the parties. Landlords paying such costs should insist that the broker first prepare and obtain the landlord's approval of a budget for such expenditures and that expenses not exceed the budget without the landlord's prior written consent. The landlord should agree to reimburse only out-of-pocket expenses, i.e., the landlord should not compensate the broker for in-house personnel time spent on the marketing effort, since this is paid through the commission. It is not uncommon for agreements to be vague or even silent as to the specifics of the marketing program. One of the broker's major functions is to give the landlord access to the broker's knowledge of market conditions and to its contacts in the general brokerage community. Since the broker does not earn a commission unless the property is leased, the landlord can somewhat safely assume that the broker will effectively market the space without the necessity of spelling out the game plan.

One detail of the broker's performance that the landlord should insist be covered in the brokerage agreement is the broker's responsibility to periodically report on the results of its marketing activities. In particular, the landlord should

require the broker to submit a written report at least monthly that lists the prospects who have responded to marketing materials or visited the property. These lists will be important in determining whether the broker is entitled to a commission after termination of the listing agreement, as described below.

§ 2.2.4 Reimbursement of Expenses

The listing agreement should specify the marketing expenses that will be paid by the landlord and those that will be paid by the broker. Because the broker usually controls the expenditure of marketing dollars, the landlord should agree to reimburse only listed categories of expenses (as opposed to all expenses except listed exclusions) and, as indicated above, only to the extent the expenditures are consistent with the approved budget. Customarily, only property-specific, out-of-pocket expenses are reimbursed by the landlord. These include preparation and distribution of brochures or other promotional materials, media expenses, and signage. The broker's corporate overhead expenses should not be reimbursed.

§ 2.2.5 Posttermination Commissionable Leases

The broker will insist on receiving a commission for leases executed within an agreed time after the expiration or termination of the brokerage agreement with tenants introduced to the property during the term of the agreement. This requirement protects the right to a commission where the broker brought the parties together during the term of the agreement but the agreement has expired or has been terminated by the landlord prior to consummation of a lease. The key elements to be addressed here are the identity of the prospects that qualify for commission protection and the length of the protection period. As to the first point, the landlord should insist that any protected prospect must have been shown the property or initiated contact with the landlord or broker during the term of the agreement. A communication from the broker to the prospect, by itself, should not qualify that prospect for protection, since a mass mailing by the broker could thus qualify virtually the entire universe of prospects. The landlord should require that the communication or site visit be reflected in the monthly reports produced by the broker and documented in a final list delivered by the broker to the landlord on the termination of the brokerage agreement. The landlord needs a definitive list of protected prospects in order to make appropriate arrangements with the new listing broker for the property so as to avoid paying a double commission, i.e., a commission to the new broker because the lease was consummated during the term of its agreement and a commission to the old broker because the lease was consummated during the protection period.

Determining the length of the protection period involves balancing the interests of the broker, who wants to ensure that the landlord cannot simply "wait out" the protection period to finalize a deal previously agreed on in principle, against the interests of the landlord, who wants to get on with life with a new listing broker and have that broker vigorously pursue all potential prospects. The length of the protection period varies with the bargaining power of the parties and market conditions, but typically averages sixty to 120 days after the expiration or termination of the listing agreement.

§ 2.2.6 Exclusivity and Excluded Prospects

The broker will require that the listing agreement confer exclusive brokerage rights on the broker. That is, the landlord will not be permitted to contract with other brokers for listing the property during the term of the agreement. Further, the broker will want to be paid a commission for leases with tenants who contact the landlord directly (i.e., not through the broker and including contacts made through other brokers) during the term of the agreement, whether or not such contact results from the broker's efforts. To implement this, the broker will want the listing agreement to require the landlord to refer all independent contacts directly to broker and to conduct all negotiations with any contacts exclusively through the broker. This is a reasonable requirement, which the landlord should accept.

A landlord entering into an exclusive listing agreement should consider whether to exclude any prospective tenants from the agreement's terms, that is, to provide that no commission (or a reduced commission) would be payable if the landlord enters into a lease with the "excluded" prospects. Generally, it is appropriate to exclude only those prospects (1) with whom the landlord is engaged in ongoing negotiations, (2) who have within the recent past negotiated with the landlord for a lease, or (3) who are listed as protected prospects under an agreement with a previous broker. A landlord insisting on an extensive list of excluded prospects may find that few brokers are willing to undertake the listing or that the broker who does list the property does not put much effort into it. No one likes to work for free.

§ 2.2.7 Limitation on Broker's Authority

The listing agreement essentially makes the broker the landlord's agent in seeking tenants and negotiating the business terms of leases. The landlord—and the landlord's attorney—must be careful to understand and to place appropriate limits

on the scope of the broker's authority as agent. From the landlord's perspective, the best approach is to have the agreement provide explicitly that the broker has no authority whatsoever to offer the property for lease or to accept offers to enter into leases; the broker merely has the authority to solicit offers from others to enter into leases, which offers the landlord may accept or reject in its sole discretion. This is probably the most important point for the landlord's attorney to cover in a listing agreement. See **Exhibit 2A**. Failure to limit the broker's authority can result in a prospect claiming that the broker has bound the landlord to enter into a lease, the broker claiming that the landlord is bound to pay the brokerage commission with respect to such "lease," or both. In addition to specifying that the broker has no authority to enter into leases on the landlord's behalf, the listing agreement should require the broker to disclose this limitation to all prospective tenants and to indemnify the landlord against any liability that may result if the broker exceeds its authority.

§ 2.3 TERM SHEET OR LETTER OF INTENT

Before commencing negotiation of the lease document itself, landlords and tenants typically enter into a letter of intent, or term sheet, that sets forth the fundamental business terms of the lease. The obvious reason for this is that the parties want to make sure they have reached agreement on these fundamental terms before they spend time and money negotiating the lease document. Often, an attorney first learns about a client's prospective lease deal by receiving an executed letter of intent. Clients often feel that negotiating the letter of intent is the broker's job and that the attorney's involvement should commence with the negotiation of the lease document. This view is ill-informed and frequently causes the client grief later in the course of the deal.

The primary danger is that the executed letter of intent may, contrary to the client's expectation, form a binding contract to enter into a lease. In *McCarthy v. Tobin*, 429 Mass. 84 (1999), the Supreme Judicial Court held that an offer to purchase bound the seller to sell the subject property, notwithstanding the parties' failure to enter into a purchase and sale agreement as contemplated by the offer. *See also Battle v. Howard*, 489 Mass. 480, 492 n.12 (2022) (emphasizing that the holding in *McCarthy v. Tobin* was limited to transactions in which "all material terms are agreed to and contained in the offer to purchase"). In *Kristi's Restaurant Group, Inc. v. Zussman*, No. 96-3746, 1999 Mass. Super. Lexis 232 (Middlesex Super. Ct. Apr. 28, 1999), the Middlesex Superior Court held that a letter of intent between the parties to an existing lease with respect to a new lease to be entered into between those parties constituted a binding agreement between the parties. For this reason, attorneys should counsel their clients to seek attorney review of the term sheet prior to execution to ensure that the parties are not bound until the mutual execution and delivery of a lease. *See Goren v. Royal Invs., Inc.*, 25 Mass. App. Ct. 137, 142–43 (1987); *Guilfoile v. Shields Pharmacy, LLC*, No. 16-cv-10652 (D. Mass. Sept. 29, 2021).

The better practice is for the attorney to review the letter of intent with the client. Although the attorney will have little of value to add to negotiations concerning rental rates or the size and location of the premises, care should be taken to coordinate extension, expansion, and early termination options with the tenant's overall business plan; make sure the client has properly considered and allocated construction cost risks associated with the construction of leasehold improvements; and ensure that use restrictions, limitations on alterations, and limitations on assignment do not interfere with the client's exit strategy.

Even where the client is a landlord regularly engaged in the business of leasing commercial property, the attorney should assist in establishing the general form of the letter of intent, particularly the "nonbinding" provisions (i.e., the statement that no legal undertaking is created by the execution of the letter of intent). From the landlord's perspective, the letter of intent should certainly state clearly that the letter of intent creates no legal obligation whatsoever, except perhaps confidentiality agreements or an agreement not to market the property actively for some designated period, and that the parties will be bound only by a mutually executed and delivered lease. Consider that a suit based on a contractual lease obligation created by a letter of intent can cast a cloud on a substantial real property asset of a landlord and the landlord's right to market the same while similarly encumbering no asset of the tenant, save its litigation expense. Thereafter, professional landlords rarely need consult counsel in negotiating term sheets on their own standard form or in evaluating prospective tenants, since these functions typically are performed by the listing broker or the landlord's leasing personnel. In any event, both the landlord and the tenant should consider establishing a "drop-dead date" after which, if the parties have not executed a lease, they will be relieved of all obligations under the letter of intent.

§ 2.4 THE LEASE DOCUMENT

This section will discuss the basic terms of a commercial lease. The vast majority of commercial lease transactions involve office leases or retail leases. Other types include ground leases, industrial facility leases, and leases of special purpose properties, such as sports facilities, cellular antennae locations, and the like, which often involve considerations

unique to the particular transaction or type of transaction and fall into the domain of the leasing specialist. For this reason, the following discussion is limited to office and retail leases. These two types of commercial lease share many features in common and many lease provisions can be used interchangeably between the two types. For the sake of simplicity and brevity the following is an analysis of the structure of an office lease, with occasional detours to explore the differing requirements of retail leases. **Exhibit 2B** sets forth a fairly typical form of lease promulgated by a landlord. It does not incorporate the protenant modifications recommended below.

§ 2.4.1 Parties to the Lease

Identification of the proper parties to a lease seems a straightforward matter, but the attorney or client must be sure to perform some simple due diligence. The tenant must make sure that the landlord named in the lease owns or controls the leased premises and any other common areas and facilities required to be provided by this landlord, such as parking facilities, access drives, and the like. Where the landlord holds only a leasehold interest in the property, the tenant's attorney must consider and address the possibility of a termination of the landlord's leasehold estate, whether by the default of the landlord under the prime lease or otherwise. Absent an agreement between the tenant and the lessor under the prime lease, the tenant's leasehold interest under the lease will terminate on the termination of the landlord's leasehold interest as lessee under the prime lease. In this circumstance, the tenant should require a nondisturbance agreement from the prime lessor. This type of agreement is discussed below. The prime lessor's relationship to the tenant in this circumstance is analogous to that of a foreclosing mortgagee. The nondisturbance and attornment agreement between the tenant and the prime lessor should reflect these matters.

Sometimes a landlord holds title to the property in one legal entity but inadvertently enters into the lease through another entity. For instance, a limited partnership may own and operate a shopping center but hold title to the real property in the name of a nominee trust or through a limited liability company. If a tenant leases space in the shopping center with the limited partnership as landlord, this could create several problems for the tenant and even for the landlord. A notice of lease identifying the limited partnership as landlord would not fall in the chain of title to the shopping center property and thus would not constitute constructive notice of the lease. Misidentification of the proper landlord to a lease could result in procedural missteps for the tenant in a legal action against the landlord or a failure to maintain valid insurance protecting the landlord or tenant against liability for third-party claims.

To guard against this problem, the tenant's attorney should ask to see the landlord's most recent title insurance policy or, if none exists, the landlord's deed to the property. A review of the landlord's title insurance policy may help ascertain that the landlord is the owner of the premises; identify the landlord's mortgagee for the purpose of obtaining a nondisturbance agreement; and alert the tenant to any easements, restrictions, or other leases that may affect the tenant's rights under the lease. For instance, a recorded notice of lease may disclose that another tenant in the building has a prior right to expand into space as to which the client has an expansion option or, for that matter, the premises itself. Where a tenant plans to invest substantial sums in leasehold improvements or specialized equipment for leased space, it should consider obtaining title insurance on its leasehold interest. Simply reviewing the landlord's title policy will not identify any mortgages, liens, restrictions, options to purchase, or other encumbrances that arose after the effective date of the policy. Moreover, the tenant has no direct right to claim under the landlord's policy even for matters covered by the policy. For a straightforward office lease, particularly in a large development or with an institutional landlord, reviewing the landlord's title policy will suffice.

Just as the tenant needs to be dealing with the entity that owns the premises, the landlord needs to be dealing with an entity that has the money to pay the rent. The diligent landlord will require the tenant to provide financial statements and will review them carefully. This review should precede the investment of time and money in the negotiation of the lease document. While reviewing financial statements is not the lawyer's function, the landlord's attorney should check with the client to confirm that this review has occurred. Be careful about names! XYZ Corp. may be a multinational conglomerate with a net worth in the billions, but XYZ, Inc., the client's tenant, may be its thinly capitalized shell corporation. The glossy annual report of the parent company means nothing unless the parent has guaranteed the tenant's obligations under the lease.

Ethics Commentary

A lawyer representing a business enterprise contemplating a commercial lease transaction should correctly identify the client, preferably in a carefully drawn written fee agreement. Correct identification ordinarily limits the lawyer's fiduciary and ethical duty of diligent representation so that that duty does not inadvertently extend to related entities, such as subsidiary corporations or affiliate corporations with overlapping officers or directors. *See Cacciola v. Nellhaus*, 49 Mass. App. Ct. 746 (2000). Correct identification of the legal entity being

represented is also necessary for a proper conflicts check. *See McCourt Co. v. FPC Props., Inc.*, 386 Mass. 145 (1982).

§ 2.4.2 Premises

(a) *Description of Premises*

The lease must accurately describe the leased premises. Depending on the type of property, this can be done in a variety of ways. In a downtown building with substantial partitioning walls that cannot be readily relocated, a simple room number or suite number may be sufficient. Most office buildings constructed in the last fifty years have steel frame construction that permits the ready relocation of interior partition walls. With such buildings it is best to describe the leased premises by reference to a floor plan, since demising walls can be easily relocated. A "demising wall" is a wall that separates one tenant's space from another's or from common area, as opposed to an interior partition wall separating rooms within one tenant's space. Of course, if the premises comprise the entirety of one or more floors of the building, it will be sufficient simply to identify the floors. In any event, where a floor plan is available, the better practice is to attach it as an exhibit to the lease and to describe the premises by reference to the plan. Particularly where the premises are to be newly delineated by the construction of new demising walls, the plan should clearly show the boundaries of the premises. If the tenant employs a design professional to prepare or review leasehold improvement plans, that professional should prepare or review the floor plan designating the premises.

Frequently, the parties negotiate the rent on a rate per square foot of floor area. Where rent is calculated as a function of the floor area of the premises, the leasing attorney should consider and address the possibility that the actual floor area of the premises may be other than the amount assumed by the parties. This is usually the tenant's concern, since the landlord typically designates the area of the premises, i.e., holds out to the tenant that the premises contain the stated amount of floor area. The prudent tenant's attorney is gnawed by the doubt that this designation may not be grounded in reality. This doubt can be laid to rest by measuring the premises and recalculating rent (and other lease terms that derive from the area of the premises, such as the amount of a tenant improvement allowance, the number of allotted parking spaces, and the tenant's proportionate share of real estate taxes and operating expenses) based on such measurement.

A remeasurement provision is a two-edged sword—the landlord likely will require a mutual right to remeasure and will specify that rent can move up, as well as down, based on the measurement. In response to the potential for upward rent adjustment, the tenant may argue that it has bargained for only a specified amount of space and that, while it wants to ensure that it only pays for the space it actually gets, it is unwilling to accept (or at least to pay for) more space than it has bargained for. Accordingly, a strong tenant may impose a cap on any upward adjustment of the rent based on a measurement. The basis for this position is that the landlord knows or has at hand the means for determining the precise area of the premises and should take the risk of overstatement or understatement.

A measurement provision should state (1) the formula for determining usable area and for converting usable area to rentable area, (2) a deadline for completing the measurement, (3) who may measure, and (4) any caps on upward or downward adjustments based on the measurement. As to item (1), the lease may either specify a formula or refer to a standard measurement method, such as that promulgated by the Building and Office Management Association, or the "New York" measurement method. In any event, the leasing attorney should make sure that the client understands the method to be applied.

Independently of determining floor area for purposes of establishing rent amounts, the lease should specify the boundaries of the "box" of space encompassed by the premises for purposes of allocating responsibility for and control of the elements of the building. In most leases of space in multitenant office buildings, the landlord wants to cede control of, and the tenant wants to accept responsibility for, only the interior finished surfaces of the perimeter boundaries of the premises—walls, floors, and ceilings—and the plenum of space encompassed thereby, excluding utility chases, elevator shafts, and other spaces serving the building generally. The common areas and facilities of the building are the landlord's concern and responsibility and should be excluded from the premises specifications. See **Exhibit 2B**.

(b) *Usable Area Versus Rentable Area*

One of the most important concepts for the leasing attorney to master is the distinction between usable area and rentable area (also called leasable area). Usable area is the actual floor area of the space encompassed within the premises. Rentable area, or leasable area, is the usable area plus that area's allocable share of the common areas of the building. By way of example, Building A may contain 100,000 square feet of floor area, of which 85,000 square feet is usable area (i.e., space available for occupancy by tenants) and the remaining 15,000 square feet is common area (i.e., lobbies, elevators,

stairways, loading docks, utility rooms, closets, janitors' closets, and the like). The landlord wants to collect rent on the entire 100,000 square feet, so it allocates the common area to the usable area. The increase to the usable area effected by this allocation is sometimes referred to as the "add-on factor" and the size of the add-on factor is often referred to as the "efficiency" of a building. In our hypothetical, the 15,000 square feet of common area is spread ratably over the 85,000 square feet of usable area so that each usable square foot of floor area becomes 1.18 square feet of rentable floor area (i.e., 100,000/85,000). Rent is calculated on rentable floor area, not usable area.

(c) *Appurtenant Rights*

In addition to the right to use and occupy the premises, the tenant will want the lease to specify its rights with respect to the property in which the premises are located. At a minimum, the tenant will need a right of access over the common areas of the building and lot. Leases of space in suburban office parks should address the tenant's parking rights. Typically, tenants are given the right to use a specified number of parking spaces, which number is calculated on a formula based on the rentable area of the premises. In the Boston suburban market, parking ratios range from three to five spaces per 1,000 square feet of rentable floor area in the premises. Most landlords will not designate particular parking spaces for particular tenants, but will want the lease simply to provide that the tenant has the right to use the parking facility, up to that tenant's designated number of spaces, in common with other tenants of the building on a first come, first-served basis. The tenant wants to be sure that it will always have access to its full allotment of spaces. As a compromise, leases often provide that the tenant has the "exclusive" right to its share of parking spaces, but that those spaces are "unassigned." This approach leaves unstated the tenant's rights and remedies if it routinely finds that its allocated number of spaces are unavailable. Landlords understandably do not wish to become entangled in the expensive and thankless task of policing the use of an open parking lot. Sophisticated (i.e., hardened by experience) landlords may simply covenant to maintain an overall number of spaces serving the office building or complex, subject to applicable legal requirements, and not to grant parking rights to nontenants. Where access to the parking facility is controlled, the landlord can control usage through limiting the issuance of passes, access cards, or the like. Under these circumstances, a landlord can more safely undertake to guarantee the availability of the tenant's allotted spaces.

Where the premises do not include lavatory facilities, the lease should give the tenant the appurtenant right to use the common lavatories on the floor or floors of the building containing the premises. Generally, the tenant should have the right to use all common areas and facilities of the building, such as elevators, lobbies, loading docks, and the like. Many office buildings now feature health clubs, cafeterias, and conference facilities. The tenant's attorney should make sure that the lease specifically provides that the tenant and its employees will have the right to use these facilities on the same basis as other tenants of the building or office park. In the current labor market, it is advisable to provide that the tenant's employees *and contractors* have the right to enjoy tenant's appurtenant rights under the lease, since many people who formerly would have been employees now legally constitute contractors.

The landlord's form of lease usually reserves the landlord's right to add to, subtract from, or change the common areas of the building and land. The tenant should insist that this right be subject to the restriction that the common areas always be at least functionally equivalent to the common areas existing as of the date of the lease. A tenant that leased space in a given building based on the spacious atrium would be upset if that space were walled off and converted to offices.

§ 2.4.3 Condition of the Premises

Unless the premises are in move-in (often referred to as "turnkey") condition as of the lease execution, the lease should provide for the construction of such leasehold improvements as the tenant requires in order to use the space for its business operations. In particular, the lease should

- describe the leasehold improvement work or a process whereby the plans and specifications for such work will be developed and approved by the parties;
- state who will perform the work or a process for selecting a contractor;
- indicate who will pay for the work and allocate responsibility for cost overruns; and
- provide a schedule for completion of the work and allocate responsibility for delays.

A brief consideration of each of these four elements follows.

The best method for describing the leasehold improvement work is to have approved construction documents (that is, plans and specifications describing the work in detail sufficient for a construction contract) attached to the lease as an exhibit. This means that the landlord and the tenant—and their architects or space planners and contractors—must

complete the design process before lease execution. Because the parties often want to know that they can reach agreement on lease terms before committing time and money to the preparation of construction documents, the leasing attorney may need to negotiate and document a procedure for the production and approval of plans and specifications after lease execution. If the tenant hires its own design professional to prepare the plans, the lease can simply specify the deadline for plan submission and make the tenant responsible for delays. Things get tricky when the tenant uses the landlord's architect for plan preparation, which is often the case as the landlord's architect has a working familiarity with the design and construction of the building. Because the design process is interactive, the leasing lawyer needs to understand the details of this process in order to identify the source of—and allocate responsibility for—delays and cost increases.

The lease should specify who will construct the leasehold improvements, either by designating the contractor or describing the process for selecting the contractor. There are many good reasons for using the landlord's contractor (such as familiarity with the building and the local permitting process), and a landlord paying for the work—as opposed to simply providing an allowance—should insist on using its own contractor. Tenants responsible for construction costs may want to select the contractor through a bidding process. Landlords usually will insist on the right to approve the contractor.

The lease should clearly address who will pay for the construction of the leasehold improvements. A great deal of money can hinge on this issue, and the leasing attorney must make certain that the client has considered the point carefully and that the lease accurately reflects the client's understanding. The lease should allocate both anticipated and unanticipated construction costs. The simplest approach is for one party to bear all construction costs, both anticipated and unanticipated. Retail store leases frequently provide that the landlord will deliver the premises in its "as is" condition and that the tenant will then design and construct all of its leasehold improvements at its sole expense. The landlord may agree to contribute a specified amount, an "allowance," toward such cost. This approach is not common in the office-leasing context, where tenants tend to have less construction expertise and landlords, for a variety of reasons, require greater control over the design and construction process.

From the landlord's perspective, the amount expended on leasehold improvements relates directly to the base rental rate. The landlord expects to receive a net rental rate for the use of the space and any money expended on the construction of leasehold improvements must be recaptured over the lease term through an increase to the base rent. Where the plans and specifications for the leasehold improvements have been approved prior to lease execution, and a firm bid for the work obtained from a general contractor, the lease can simply allocate the construction costs—based on the fixed-price construction contract—among the parties and provide that the tenant will be responsible for the net amount of any increased costs resulting from changes to the work requested by the tenant. The tenant's attorney should be careful to insist that the tenant be responsible only for the "net" increase in cost, because some changes may reduce construction costs and the tenant should be entitled to offset the reductions against the increases. Where the construction cost has not been fixed as of lease execution, the lease typically provides that the landlord will provide a construction allowance, either in a stated amount or in an amount per square foot of floor area in the premises. Thus, a broker frequently quotes the cost for space in a formulation that includes the allowance, e.g., $36 per square foot, with a $12 allowance. This means that the base rent will be $36 per square foot for the space and that the landlord will provide a construction allowance of $12 per square foot. If the tenant requires a larger construction allowance or is willing to live with a smaller allowance, the base rent can be adjusted accordingly. The allowance approach allocates the risk of cost overruns completely to the tenant, and the tenant, particularly where the landlord's contractor will be performing the work, should try to get an accurate estimate of total construction costs before committing to the deal.

The allowance provisions should address the mechanics and timing of paying the allowance. The landlord would like to pay the entire amount in a lump sum after the tenant has completed the work, documented its construction costs, commenced occupancy of the premises, and started paying rent. This wish is sometimes gratified, but most tenants with the financial wherewithal to meet this demand also have the bargaining power to refuse it. Thus, the parties more often than not agree to disburse the allowance on an installment basis. Frequently, they agree to disburse on a "construction loan" basis, meaning periodic, usually monthly, payments proportionate to the degree of completion of the work (often with an agreed retainage) based on the tenant's requisitions accompanied by specified supporting certifications and documentation. The timing of allowance payments often reflects the tenant's credit.

The lease should set forth the deadline for completing the leasehold improvements and the consequences for failure to meet the deadline. As a general rule, the risk of a missed deadline should fall to the party responsible for performing the work. Where the tenant is performing the work, as is the case in most retail leases, the lease often provides that the commencement date—and the obligation to start paying rent—will occur when the tenant actually completes the work or the agreed construction period expires, whichever is earlier. Where the landlord is performing the work, the lease should provide that the commencement date will not occur until the work is actually completed. Where the tenant retains the right to request or require changes to the work, the landlord will want the commencement date to occur on the date the

work would have been completed but for delays occasioned by the tenant's changes, the tenant's failure timely to submit or approve plans or change orders or to take any other required action, and the time required to produce or deliver "long lead time" items required by the tenant, such as specialty millwork or lighting fixtures. The lease should address the possibility of substantial delays in the completion of construction. Office leases frequently provide for a "drop-dead date" whereby one party or both may elect to terminate the lease if the commencement date has not occurred by some agreed outside date. Where the landlord is performing the work, the tenant should insist on a drop-dead date so that the tenant will not be bound indefinitely to the lease when the work is not progressing. In most cases, the tenant attempts to synchronize the commencement of its new lease with the expiration of its old lease, so delays in completion of the new space can result in a serious problem when the tenant is required to vacate the old space. The landlord's attorney will want the lease to provide that the tenant's right to terminate under a drop-dead date clause will constitute the tenant's sole and exclusive remedy for the landlord's failure to complete construction as provided in the lease. Tenants should push for more. The landlord can safely pass through to the tenant whatever remedies the landlord has against its contractor for late completion. The landlord will want any assignment of these rights to be made without recourse to or warranty by the landlord. Where the landlord is responsible for construction, the tenant's attorney should not permit the landlord the right to terminate the lease by reason of a delay in completion of the space and thus avoid the possibility of the landlord getting out of a bad deal by simply delaying the construction process.

The tenant will want the right to examine the work after the commencement date and to give the landlord a "punchlist" of incomplete or incorrectly performed items of work. The landlord will require the punchlist to be delivered promptly after the commencement date, usually within thirty days. In addition to punchlist items, the tenant should require the landlord to correct latent defects identified within one year of term commencement. Since the landlord has almost certainly obtained a one-year or longer warranty from its general contractor with respect to the work, the landlord can safely agree to the tenant's request.

§ 2.4.4 Term

(a) *Term for Years Versus Tenancy-at-Will*

The vast majority of commercial leases call for a fixed term, typically stated as a designated number of years or months after a commencement date. The commencement date may be a fixed date or a date contingent on completion of the leasehold improvements. After expiration of the fixed term, the tenant may hold over as a tenant-at-will and this may continue for a long period. It is not common to structure a commercial lease as a tenancy-at-will from inception. Such deals usually arise because the landlord simply wants to fill the space during an interregnum between other leases. For instance, space may be subject to another tenant's upcoming expansion option and the landlord simply wants to earn some rent until the option is exercised. Neither party will want to make a significant investment in leasehold improvements for space subject to a tenancy-at-will. License agreements are even rarer, and tend to be limited to telecommunications equipment facilities and specialty retail arrangements, such as kiosk or pushcart operations conducted in the common areas of a shopping center.

Ethics Commentary
A lawyer representing a commercial tenant contemplating a long-term lease should take into consideration the statute of frauds, which generally provides that a lease for a term of more than seven years is not valid against nonparties without actual knowledge unless recorded in the appropriate registry of deeds. *See* G.L. c. 183, § 4; G.L. c. 185, § 71.

(b) *Extension Options; Termination Options*

Commercial leases frequently contain extension options in favor of the tenant and, far less frequently, termination options. Option rights are among the fundamental business terms of a lease that should be negotiated at the letter of intent stage. The leasing attorney should make sure that the lease clearly sets forth the terms of the option and the mechanics for exercising it. An extension option clause should specify the following:

- the number of option terms,
- the length of each option term,
- the rent payable for each option term and any other changes to the economic or other terms of the lease applicable to the option periods,
- the time period or periods within which the tenant can exercise the option or options, and

- the mechanics for exercising the option.

The first two items are straightforward. The rent payable during an option term can be a fixed amount stated in the lease, an amount to be determined by formula using the Consumer Price Index or some other cost inflation index or an amount equal to the "fair market rent," or some fraction thereof, for the premises as of the option term, usually determined by appraisal. If the rent will be a stated amount, it should be set forth in the term sheet. The leasing attorney should be careful in the use of defined terms here. If the lease calls for both "Base Rent" and "Additional Rent" (e.g., real estate tax and operating cost pass-throughs), the landlord's attorney must make sure that the option clause states that the "Base Rent," as opposed to "Rent," for the option terms will be the stated amount. Otherwise, the tenant could argue that the parties intended the stated amount to cover all rent for the option term, both base rent and additional rent. If the option period rent will be determined by formula, the same considerations that apply to formula increases to base rent during the term will apply here.

Probably the most common method for fixing option period rent, particularly for option terms that will commence several years after lease execution, is a fair market rent approach. Landlords favor this approach because it protects them against loss where increases in market rental rates outpace increases in general inflation, as reflected in the Consumer Price Index. The lease should *not* provide for the fair market rent to be an amount agreed upon by the parties without specifying some mechanism for determining fair market rent if the parties fail to agree. Such "agreements to agree" cannot be judicially enforced if the parties fail to agree, which can result in the extension option right being held unenforceable. *Compare Conos v. Sullivan*, 250 Mass. 376, 378 (1924) (tenant could not specifically enforce renewal option where lease failed to specify method for fixing rent for renewal period), *with Eliot v. Coulter*, 322 Mass. 86 (1947) (lease that provided for determination of market value for option period by three arbitrators was enforceable). The most common approach for determining fair market rent is the three-appraiser approach (such as that used in *Eliot v. Coulter*, 322 Mass. 86 (1947), above), whereby the landlord and the tenant each designate an appraiser to confer with the other party's appraiser to attempt to determine fair market rent. If the two appraisers cannot agree by a given deadline, they jointly appoint a third appraiser to determine the fair market rent. There are several methods for determining how the third appraiser's determination will affect the fair market rent determination. The lease can provide that the fair market rent will be the amount agreed upon by any two of the three appraisers. Alternatively, the lease could require each of the tenant's and the landlord's appraisers to specify a rental rate, with the third appraiser specifying a rental rate independently. The "fair market rate" would be whichever of the tenant's or the landlord's specified rates is closest to the third appraiser's specified rate. These are but a few of the approaches available. The important point for the leasing attorney is to make sure that the client clearly understands the mechanism and timetable for arriving at a final rate and that these are clearly set forth in the lease. The lease should specify the allocation of cost for the appraisal process. The most common, and probably fairest, approach is for the landlord and the tenant to each pay its own appraiser and for the two parties to split evenly the cost of the third appraiser. Where an appraisal method is used to determine extension period rent, the tenant should consider specifying in the lease the factors to be taken into consideration by the appraisers in determining fair market rent, such as the fact that no leasehold improvements will be performed in connection with the extension, whether or not a brokerage commission will be payable by reason of the extension, and the like. When the tenant extends the term pursuant to an option, the landlord often does not incur the transactional costs commonly taken into account as a part of fair market rent. The tenant would like the appraised rent to reflect this fact. Extension option provisions commonly establish a "floor" on the extension term rent, usually equal to the rental rate as of the expiration of the term. The tenant should resist this, since it deprives the tenant of the right to extend at fair market rates if those rates have dropped below the current rate. Most landlords do not give up this protection easily.

Tenants often want to know the rental rate for the extension term before committing to the extension. Thus, the tenant may ask for the right to cancel its election to extend the term if the fair market rent as determined by appraisal turns out to be higher than some agreed amount or an amount specified by the tenant at the outset of the arbitration process. The landlord can agree to this provided that the landlord is made whole, i.e., that the landlord still have a reasonable time to market the premises after the tenant elects out of its extension option and that the tenant pay all costs of the appraisal. The time factor can be covered in two ways. The deadline for determining the fair market rent through appraisal and for any subsequent cancellation election by the tenant can be set far enough in advance of the expiration of the term to give the landlord adequate time to market the premises before the term expiration. Alternatively, the term could be automatically extended for some agreed period after the tenant elects out of its extension option. The latter approach is less desirable to the landlord in a rising market, because, absent some agreement to a stepped-up rent during the extension period, the landlord will be stuck for a longer period with below-market rent for the premises.

The option clause should unambiguously specify the deadline for exercising the option and the manner it may be exercised. Disputes as to whether or not the tenant timely or properly exercised an extension option produce a great deal of commercial lease litigation. The lease should state the deadline for the tenant to give the option notice, which should

either be a date certain or a number of days before the expiration of the lease term or the then-current option term, as the case may be, and should state that time is of the essence in the giving of such notice. A tenant with a good deal of bargaining power may insist that the landlord give the tenant a "reminder notice" that the deadline for exercising the option is about to or has expired. In these cases, the tenant's right to exercise the option will continue for an agreed period (typically between five and thirty days) after the landlord gives the reminder notice, even if the otherwise specified deadline passed. The option notice should be given in writing in accordance with the generally applicable notice provisions of the lease. The parties may agree that an extension option will be elected automatically unless, by a given deadline, the tenant gives notice that it elects *not* to extend. The landlord will want the deadline for exercising an extension option to be far in advance of the expiration of the current term for the obvious reason that the landlord cannot effectively market the space until it knows whether the tenant will extend the term. The tenant, on the other hand, wants the flexibility to delay the decision as long as possible. In practice, the election deadline is set at three to twelve months before the expiration of the current term, with six to nine months being the most common deadline.

The other side of the extension option coin is the early termination option, whereby the tenant may elect to terminate the lease before the stated expiration date. All the above considerations regarding the timing and mechanics of exercising the option also apply here. In addition, the landlord usually requires an early termination fee. Besides the relative bargaining position of the landlord and the tenant, two factors come into play in determining the amount of any termination fee. The first factor is the landlord's need to receive the unamortized amount of any capital expenditure it made in creating the tenancy. This would include the landlord's investment in leasehold improvements, design and legal fees, the brokerage commission, and any inducement payments to the tenant. As will be noted in the next section, the landlord looks to the base rent not only to provide a return on its capital asset (i.e., the space in the landlord's building), but also to recover the expenditure required to consummate the lease deal and prepare the premises for the tenant's occupancy. If the rental stream is cut off before the expiration of the term, the landlord will not have recaptured its transactional investment. The second component of the termination fee is a liquidated amount to compensate the landlord for the risk of reletting the premises for the remainder of the term. This amount is frequently calculated as a multiple of the monthly rental payment under the lease. Termination options are much rarer than extension options. In practice, there is little distinction between a long-term lease with a termination option and a short-term lease with an extension option, as long as the parties address the transactional costs so that the landlord recovers those costs over the term.

§ 2.4.5 Base Rent

Base rent, also referred to as "minimum rent" or "net rent," is the amount the tenant pays the landlord for use of the premises. This is usually, but not always, calculated as a rate per square foot of rentable floor area. Where the rent is calculated on a square-foot basis, the lease may provide that either or both the parties may remeasure the floor area of the premises shortly after the commencement date and that the base rent (and all other terms that are a function of floor area, such as the tenant's proportionate share of operating costs and taxes and the number of parking spaces allocated to the tenant) will be readjusted to reflect the actual area of the premises per such remeasurement.

Base rent may be set as a fixed amount throughout the term or may escalate pursuant to a fixed schedule or an agreed formula or proportionately to increases in an agreed index, such as the Consumer Price Index. Where the parties agree to escalate base rent by a formula, the result of which can be ascertained as of lease execution (e.g., when base rent is to increase by a fixed percentage each year), the better practice is to work through the formula and set out the annual rent for each year directly in the lease. This avoids later disputes as to the proper application of the formula.

Although the rental rate is a fundamental business point rarely negotiated by the leasing attorney, the attorney should understand the considerations that go into the determination of the rate and properly counsel the client regarding other lease provisions that may affect these considerations. The most fundamental element in determination of rent is the market price for comparable space—a factor beyond the scope of the lease document or the transaction itself. Beside these market considerations, the biggest factor in determining the base rent is the amount of the landlord's investment in the lease transaction, including leasehold improvement costs and allowances, brokerage commissions, legal fees, and any other payments made to consummate the lease. Rental rates are often quoted in negotiations by stating the amount the landlord will pay for construction or allowances. The landlord will specify in the lease a reimbursement of expenditures above the stated threshold, which reimbursement may be in the form of an increase to base rent per an agreed formula. The prudent tenant will negotiate either a rent reduction or a payment in rent credit if the expenditures fall below the stated threshold. As between these remedies, most landlords prefer to give a payment in rent credit so as to preserve the value of the rental stream, which affects the market value of the building.

An alternative method for the landlord to finance the construction of leasehold improvements characterizes the landlord's payments of construction costs as a loan to the tenant. This approach makes the tenant's obligation to reimburse

the landlord its construction costs independent of the tenant's obligations under the lease. The leasing attorney should carefully consider the effect of such an arrangement or default remedies and termination payments. The landlord's attorney should also consider whether to require a promissory note, and should counsel the landlord regarding the advisability of obtaining security for repayment of the loan.

§ 2.4.6 Security Deposit

Commercial landlords are not subject to the limitations on security deposits imposed on residential leases under G.L. c. 186, § 15B. *See Shwachman v. Khoroshansky*, 15 Mass. App. Ct. 1002, 1002–03 (1983); *Sacco v. DeBon-Aire, Inc.*, 6 Mass. L. Rptr. 265 (Super. Ct. 1996). Whether the tenant must post a security deposit and, if so, the amount of the deposit are fundamental business terms of the lease, typically negotiated at the term sheet stage. Creditworthy corporate tenants rarely agree to pay a security deposit. Where a thinly capitalized entity is affiliated with a creditworthy parent company, the parent company may guarantee the tenant's obligations in lieu of a security deposit.

Judicial Commentary

In *Shwachman v. Khoroshansky*, 15 Mass. App. Ct. 1002 (1983), despite the fact that the Appeals Court agreed that the lease in question permitted residential use, because it was primarily commercial and only incidentally residential, the security deposit statute did not apply.

The leasing lawyer needs to understand that the security deposit does not serve the same function as a deposit under a purchase and sale agreement. The deposit under a purchase and sale agreement usually also constitutes the seller's liquidated damages in the event of the buyer's default, but in the commercial leasing context, the deposit simply serves as collateral for performance of the tenant's obligations under the lease. If the tenant defaults, the landlord cannot simply claim the security deposit but must prove actual damages. On the other hand, the landlord's actual damages are not limited to the amount of the security deposit.

Where a security deposit will be required, the lease should address the following points:

- the amount of the deposit;
- whether the deposit needs to be kept in a separate account;
- whether the deposit will accrue interest and, if so, at what rate; and
- the circumstances under which the landlord may draw upon the deposit.

The landlord will want the right to draw upon the deposit to cure any default of the tenant under the lease and will want to oblige the tenant to make an additional deposit in the amount so drawn so as to replenish the security deposit to its required amount. The tenant should insist that, except for emergency self-help performance by the landlord, the landlord may apply the security deposit to cure a default only after the tenant has received notice of such default and the applicable cure period has expired. Otherwise, the tenant loses the right to cure defaults with its own resources.

Tenants frequently ask for the right to provide a security deposit in the form of a letter of credit in lieu of a cash deposit. This approach offers the tenant greater protection in the event of the landlord's bankruptcy or mortgage default. The landlord's mortgagee usually insists on a provision in any nondisturbance agreement with the tenant that the foreclosing mortgagee will not be liable to account for the security deposit unless the mortgagee has actually received the deposit. Since lenders rarely insist on holding security deposits held by their borrowers in escrow, by the time the lender gets around to foreclosing the mortgage, the cash security deposit is often gone. While the tenant has no guarantee that the landlord will not improperly draw upon the letter of credit when in financial distress, a security deposit in the form of a letter of credit is far more likely to find its way into the hands of the foreclosing mortgagee. Similarly, while a cash security deposit will be included among the assets of a bankrupt landlord's estate and therefore subject to the claims of the landlord's creditors, a letter of credit will not and will thus remain intact to be turned over to the successor landlord. Likewise, from the landlord's perspective, a letter of credit will remain outside a bankrupt tenant's estate and thus remain intact in the landlord's hands, unencumbered by the claims of the tenant's trustee in bankruptcy.

The landlord will want the right to approve the form of the letter of credit and the issuing bank. Where the letter of credit will expire before the lease term expires, the lease should give the landlord the right to draw down the full amount of the letter of credit unless the tenant renews the letter of credit or provides a substitute letter not later than thirty days, or some other agreed period, before the expiration of the current letter of credit. In this situation, the landlord should insist on an "evergreen" letter of credit, i.e., one that automatically renews for one-year periods unless the issuing bank notifies

the holder that the letter will not be renewed. This approach relieves the landlord of the burden of administering the renewal of the letter of credit, other than keeping an eye on the mail.

Of particular concern in this regard are start-up companies that can display a healthy balance sheet funded by equity investments but that generate no profit and perhaps little or no cash flow. Landlords are understandably reluctant to expend substantial sums on leasehold improvements and broker commissions to conclude a lease with this type of tenant, which may well be out of business in a year or two. Landlords frequently solve this problem by requiring tenants to post security deposits equal to some or all of the landlord's transactional costs, including brokers' commissions, the cost of performing leasehold improvements, and, perish the thought, legal fees. In these cases, the tenant usually requires the deposit to be reduced over the course of the lease term, on the theory that the landlord has recaptured its investment through the receipt of base rent over the term.

§ 2.4.7 Additional Rent

(a) *Cost Escalators, General*

There are two basic types of additional rent: pass-throughs, which require the tenant to compensate the landlord for costs, or increases in costs, of operating the premises; and percentage rent, which is found only in retail leases and enables the landlord to participate in the commercial success of the tenant's operations at the premises.

Commercial leases providing for additional rent to cover pass-throughs usually deal separately with real estate taxes and operating costs. When a lease is referred to as "triple net," it means that the base rent is net of real estate taxes, operating costs, and insurance. In practice, most leases treat insurance expenses as simply another element of operating costs. There are two fundamental types of pass-through arrangements, those that pass through *all* the applicable costs and those that pass through only the *increases* in such costs over a "base" amount. In retail leasing, the former method is the most common; in office leases, the latter approach is more common.

The following basic issues should be addressed when negotiating and drafting lease provisions regarding pass-through additional rent:

- Are total costs, or only the increases over the base amount, passed through?
- What items of cost are to be included in the pass-through?
- What is the tenant's share of the passed-through costs?
- How will the additional rent charges become payable, be accounted for, and be reconciled between the parties?

Where the total costs are passed through to the tenant, the tenant should review the landlord's most recent cost statements, i.e., the tax bills for real estate taxes and the annual statement for operating costs, in order to assess and plan for the additional rent burden undertaken and its effect on total space costs.

Where costs are passed through over a base amount, the base is usually established as either a specified number or the actual costs for a specified period, usually referred to as the "base year." If the base costs are a specified number, the tenant should ascertain whether this number approximates the actual current costs. For instance, if the lease specifies that the base amount of taxes is $6 per square foot and taxes for the current year are $6.50 per square foot, the tenant will pay $0.50 per square foot annually as additional rent for taxes, even if taxes do not increase during the term. This tenant is essentially paying an additional $0.50 per square foot in base rent.

Where the "base" amount of taxes or operating costs will be the actual costs over a specified period, the tenant should ascertain whether the building or office park was or will be fully occupied throughout the base period. If not, the tenant should insist that the actual costs for the base period be "grossed up." "Grossing up" costs means adjusting the actual costs by extrapolating such costs to equal the amount of costs that would have been incurred if the building were fully occupied throughout the base period. The tenant needs to make this adjustment to avoid paying for increases in costs resulting from increased occupancy of the building, as opposed to increases resulting from cost inflation. Consider the following illustration: On January 1, 2000, the tenant leases 20,000 square feet of space in a 100,000-square-foot building, under a lease calling for the tenant to pay its proportionate share of increases in operating costs over the actual costs for calendar year 1999. The building was 80 percent occupied during 1999 and, as a result of the instant lease, becomes 100 percent occupied in 2000. Premises cleaning services cost the landlord $1 per square foot of occupied space in 1999 and that rate does not increase in 2000. In 1999, the landlord paid $80,000 for cleaning services, which amount is included in base costs. In 2000, the landlord pays $100,000 for cleaning services, resulting in an excess cost of $20,000, which is

passed through to building tenants as additional rent. If this cost is not "grossed up," the tenant will pay one-fifth of such excess (i.e., 20,000/100,000 or $4,000.00), even though the unit cost of cleaning did not increase.

Calculating the gross up of operating costs can be complex, since some costs hold constant regardless of vacancy rate (such as snow removal), others vary proportionately with vacancy rates (such as premises cleaning), and yet others may vary disproportionately with vacancy (such as utilities and insurance). The grossing up of management fees can become a source of dispute between the parties, particularly where the management fees are determined as a percentage of gross rent so that the extrapolation involves an assumption as to the rent attributable to the vacant space. The tenant's attorney should make sure that the client understands the fundamental economics of the grossing up process and has evaluated the effect of future operating cost increases on the total occupancy costs for the premises.

Where base costs are grossed up, and, for that matter, in any event, the landlord should insist that annual costs will be grossed up for purposes of calculating additional rent. This is the flip side of the tenant's argument for grossing up base costs. In our hypothetical building, suppose that 20,000 square feet of space becomes vacant in the year 2001 and the cost of cleaning services rises to $1.25 per square foot that year. Cleaning services for that year would cost $100,000, which would equal the grossed up base amount. Unless the actual cleaning cost for the year 2001 are also grossed up, the tenant would not pay any additional rent for cleaning services, even though the cost to the landlord for cleaning the tenant's premises went up by $0.25 per square foot, or $5,000.

The tenant's share of the passed-through costs is usually determined by the percentage of floor area of the building or project occupied by the premises. Thus, if the premises contains 5,000 rentable square feet and the building contains 100,000 rentable square feet, the tenant's share of the passed-through costs, often referred to as the "Tenant's Proportionate Share," will be 5 percent. The lease may express this share as a formula or simply as a stated percentage. Where the lease simply states a percentage, the tenant should require the landlord to warrant that the building or project contains at least the amount of floor area necessary to justify that percentage.

Where the lease states a formula, it is usually expressed as a fraction, the numerator of which is the floor area of the premises and the denominator of which is the floor area of the building or project. The floor area figures for the numerator and denominator should be comparable, i.e., the floor *area* figure should be *usable area* in both cases or *rentable area* in both cases. Retail leases in regional malls sometimes make the denominator of the equation the "leased" floor area, rather than the "leasable" or "rentable" area. This puts the tenant at risk for vacancies in the mall. Consider a tenant who leases 10,000 square feet in a 300,000-square-foot mall. If the denominator in the formula is the "leased" floor area of the mall and only 250,000 square feet of the mall are leased in the applicable year, the tenant's proportionate share for that year will be 4 percent (or 10,000 ÷ 250,000). By contrast, if the denominator of this lease were the "leasable" floor area of the mall, the tenant's share would be only 3 percent (or 10,000 ÷ 300,000). Smaller tenants in regional malls may not have the bargaining power to require the landlord to shift to a leasable area denominator but usually can negotiate a "floor" on the leased area, expressed as a percentage of the leasable area. Under such an arrangement, the denominator would be the higher of the leased floor area or, for example, 80 percent of the leasable floor area.

In some cases, *different* share percentages apply to different elements of cost. In a multiple-building office park, for instance, certain costs, such as cleaning and utilities, might be passed through on a building-by-building basis whereas other costs, such as insurance, snow removal, or the costs of a health club or dining facility located in one building but available generally to tenants of the park, would be passed-through on a parkwide basis.

(b) *Administration of Additional Rent*

Office leases commonly provide that additional rent for real estate taxes and operating costs will be paid monthly on an estimated basis with an annual reconciliation statement and adjustment after the landlord closes its books for the applicable year. The parties frequently negotiate the basis for the estimated monthly payments. The landlord wants the estimated payments to be based on the landlord's budget for the current year. The tenant, fearing that this budget may be inflated, wants the monthly payments based on the actual costs for the preceding year. The tenant should insist on a deadline for the landlord to prepare and deliver the annual statement of costs. This deadline typically is ninety to 120 days after the close of the fiscal year. The lease should provide that if the monthly payments exceed the amount of additional rent due for the year, the tenant will receive a credit against rent (landlord's preference) or a refund (tenant's preference) concurrently with delivery of the annual statement. If the lease provides for a rent credit, it should specify that the tenant will receive a refund for adjustments made after the end of the term. If the actual liability exceeds the estimated monthly payments, the tenant will be required to make an adjusting payment within an agreed period (usually thirty days) after receipt of the annual statement.

The tenant should insist on the right to audit the landlord's books and records as to operating costs and real estate taxes. Because the amount of real estate taxes is a matter of public record, the parties seldom dispute audit rights in this context. However, many landlords resist giving tenants the right to audit operating cost records. Given that the tenant can discover all this information in the event of litigation between the parties, this reluctance is somewhat misplaced. Usually, what the landlord really wants is to avoid being subjected to audit by outside accountants working on a contingent-fee basis. The landlord should simply prohibit such arrangements and otherwise agree to give the tenant audit rights. In any event, landlords will want to limit the period during which they must maintain operating cost records for audit purposes, and the frequency and timing of audits. Landlords should require tenants to protect the confidentiality of any information obtained in the course of such an audit.

(c) *Real Estate Taxes*

The real estate tax provisions of the lease should address what types of taxes are subject to reimbursement, the formula and procedure for effecting that reimbursement, and who will have the right to seek tax abatements. The tenant wants to be responsible for only ad valorem real estate taxes and betterment assessments (i.e., those according to value). The landlord wants the right to pass through all taxes of any nature assessed against the building and land. While these two categories are, as of this writing, coextensive, an amazing amount of negotiating time and energy is spent wrangling over how to deal with potential changes in the system of real estate taxation. The parties usually wind up agreeing that "substitute" taxes shall be included and that "additional" taxes shall not, without going into great detail as to how to distinguish the two. In any event, the tenant should insist that the lease specifically exclude the following from the definition of "Taxes" for the purpose of determining additional rent: inheritance, estate, gift, transfer, franchise, and income taxes.

> **Judicial Commentary**
> Any lease drafted after February 13, 1978, that requires the tenant to pay taxes will be interpreted as requiring the tenant to pay the amount of taxes allocable to the period covered by the lease. The parties may agree that the tenant is required to pay the taxes on the property for the entire year, whether or not the lease covers that whole period. *See Erhard v. F.W. Woolworth Co.*, 374 Mass. 352, 357–58 (1978).

Betterment assessments (e.g., assessments for the installation of public "betterments" such as sewers, sidewalks, traffic signals, and the like) are included among reimbursable taxes. The tenant should insist that the additional rent payable with respect to assessments be calculated as if the landlord had elected to pay the assessment over the longest period allowed by law and that, in any given year, only the annual charge be included in taxes for that year. Otherwise, the tenant may find itself funding a sidewalk or sewer improvement, the economic benefit of which will accrue to its successors.

The lease should provide that the tenant will receive credit for any reduction or rebate of taxes achieved through a real estate tax abatement, net of the cost of obtaining the abatement. Where additional rent is payable only with respect to increases in taxes over a base amount, the landlord's attorney should be careful to specify that any credit or rebate to the tenant be limited to the amount of additional rent paid with respect to taxes in the year or years to which the abatement applies. The tenant would like to have the right to compel the landlord to seek an abatement or, alternatively, the right to seek an abatement directly. The landlord will resist giving the tenant either of these rights, and usually only those tenants leasing a substantial portion of a building or project or with strong bargaining power will get this right. The landlord's argument against giving this right is that the landlord has every bit as much an interest in keeping taxes low as does the tenant and that the landlord, as the property owner and taxpayer, should have the right to control negotiations and relations with the taxing authority. Where the landlord must concede on this point, it should insist that the tenant will have the right to prosecute an abatement directly only if the landlord declines to seek an abatement upon the request of the tenant. Under G.L. c. 59, § 59, a tenant responsible for 51 percent or more of the real estate taxes payable on a property has the right to seek an abatement in its own name. Where the lease calls for the tenant to pay a share of the excess of taxes over those incurred during a base period, the tenant should consider the ill effect of a tax abatement affecting the base period not accompanied by parallel abatements in subsequent periods.

(d) *Operating Costs*

Typically, landlords seek to recover from tenants a portion of the cost of operating the property. **Exhibit 2B** contains a fairly typical operating costs provision. See § 2.4.8, below, for further discussion.

(e) *Percentage Rent*

Percentage rent is found only in retail leases. It permits the landlord to participate in the success of the tenant's retail operations at the premises by requiring the tenant to pay as additional rent a percentage of the gross sales generated by the tenant's operations at the premises. The percentage rent provisions should address the following issues:

- the percentage of gross sales to be paid as percentage rent;
- the "breakpoint" or the amount of gross sales that must be generated before percentage rent begins to accrue;
- the definition of "gross sales" and the specification of items of gross revenues that are excluded from gross sales;
- the calculation and payment schedule for the payment of percentage rent, e.g., monthly, quarterly, or annually; and
- the administration of percentage rent, including the gross sales records to be maintained by the tenant, the period the tenant must retain such records, the landlord's right to audit such records, and the like.

Included are **Exhibit 2C**, Definition of Percentage Rent, which sets forth specimen percentage rent provisions from a landlord's form lease, and **Exhibit 2D**, Definition of Breakpoint and Gross Sales; Payment of Percentage Rent and Landlord's Audit Provisions, from a tenant's form lease.

The following sets forth a brief explanation of each of the basic elements of percentage rent lease provisions.

Percentage Rate

This is the percentage rate that is applied to gross sales over the breakpoint to determine the amount of percentage rent payable. The percentage rate is a fundamental business term that should be negotiated as part of the letter of intent. The retail industry has developed standard percentage rates or ranges of percentage rates for various types of retail activities. These rates usually reflect the gross margin on the merchandise sold. Thus, supermarkets, which operate at low margins, usually pay only 1 or 2 percent of gross sales, whereas restaurants or bars will pay 10 percent or more.

Breakpoint

Rarely will a tenant pay percentage rent on the total amount of gross sales generated at the premises; it will pay only to the extent that the gross sales exceed a specified threshold or "breakpoint." The breakpoint is a fundamental business term that should be addressed in the letter of intent. Often, the breakpoint is the amount of gross sales that would generate percentage rent equal to the minimum rent or base rent. This is referred to as a "natural" breakpoint. For example, if the base rent is $100,000 and the percentage rent is 4 percent, the natural breakpoint for this lease would be $100,000 ÷ 0.04, or $2,500,000. The tenant would pay percentage rent only to the extent that gross sales exceed $2,500,000. If the tenant achieved $2,700,000 in gross sales in a given year, it would pay as percentage rent for that year 4 percent of the $200,000 excess over the breakpoint, or $8,000. There is no requirement that the breakpoint be a natural breakpoint and the leasing lawyer will rarely be involved in the negotiation of the breakpoint. The tenant's lawyer, however, should be alert to the potential effect of increases in base rent on the breakpoint. Where the breakpoint is a stated amount, and the lease calls for periodic increases in the base rent, the tenant's attorney should make sure that the client negotiates a proportionate increase to the breakpoint.

In the same vein, the landlord's attorney should require reductions to the breakpoint corresponding to reductions in minimum rent effected by the operation of other provisions in the lease. Say, for instance, that our tenant paying $100,000 base rent and 4 percent over a natural breakpoint suffers a casualty that closes the premises and abates rent for two months during a lease year. Suppose also that this tenant generates $2,400,000 in gross sales during the ten months it did operate during that lease year. Without an adjustment to the breakpoint, the tenant would pay no percentage rent for that lease year even though gross sales would exceed the breakpoint on both an annualized basis (in our example, multiply actual gross sales by 12/10) and a proportional basis (again in our example, multiply the breakpoint by 10/12). Thus the landlord should require that the breakpoint reduce proportionately with any reductions in minimum rent.

Definition of Gross Sales

This point is often the subject of vigorous negotiation between the parties, which usually occurs at the lease negotiation stage rather than at the letter of intent stage. The landlord wants the definition of gross sales to be as inclusive as possible. The tenant wants to exclude as many transactional costs, other than the cost of goods, as possible from the "gross

sales" amount on which the tenant must pay percentage rent. **Exhibit 2D** sets forth an extensive list of exclusions from gross sales.

Computation of Percentage Rent

Percentage rent is calculated on an annual basis, with each year separately determined. Thus, if in Year 1 the amount of gross sales was below the breakpoint and in Year 2 the amount of gross sales was above the breakpoint, the tenant could not offset the shortfall in Year 1 against the excess in Year 2. The annual period may be a calendar year, the landlord's fiscal year, or the tenant's fiscal year. Where the tenant is a large chain retailer, it usually insists on calculating and paying percentage rent on the basis of its fiscal year. The lease should address the schedule for reporting gross sales and paying percentage rent. Typically, the tenant would like to report gross sales and pay percentage rent annually, that is, submit one statement per year setting forth the gross sales for that year accompanied by any required payment of percentage rent. Landlords usually require more frequent reporting and payment obligations, i.e., monthly or quarterly reports. Where the tenant reports gross sales monthly, most landlords would like the tenant to make monthly payments to the extent that gross sales for the month exceed one-twelfth of the breakpoint. Tenants often object to this on the ground that monthly gross sales vary throughout the year and the tenant does not want to pay the excess on a good month without the right to offset this against the shortfall on a poor month. The usual compromise calls for the tenant to report gross sales monthly and to commence paying percentage rent once gross sales for the year exceed the annual breakpoint.

Record-Keeping Requirements and Audit Rights

To be able to confirm that the tenant has paid the correct amount of percentage rent, the landlord needs the lease to address record-keeping requirements and audit rights.

§ 2.4.8 Operating Costs: Tenant's Obligation to Pay Operating Costs Under a Commercial Lease

The requirement imposed on the tenant to contribute toward operating expenses (or common area costs in retail leases) incurred by the landlord is one of the most basic provisions of a commercial lease. This component of the commercial lease evolved primarily as a device to protect the landlord's rent stream against the eroding effect of seemingly ever-increasing costs to operate and maintain the property, much as CPI-based and other base rent escalators evolved to protect that stream against the ravages of inflation. The role of the landlord's counsel is to develop a form of lease that, within the constraints of the deal structured by the client, enables the landlord to recover from the tenant, on a rational and justifiable basis, as great a portion of the cost of operating the property as possible. It falls to tenant's counsel (1) to attempt to limit the tenant's obligations, (2) to provide the tenant with the tools it can use to eliminate landlord abuses, and (3) to advise the tenant of its exposure.

It must be understood that, as is the case with fixed rent, the tenant's obligation to pay operating costs is subject to the marketplace. There are no right or wrong answers. For example, check those old legal stationery forms. Forms from the 1930s describe "gross leases," i.e., deals where the tenant paid fixed rent and nothing else. Thus, the landlord took the risk of increases in operating costs. Today, this approach seems incredible, unless the term of the lease is quite short. However, in an era where there was minimal inflation, or even deflation, it is understandable that landlords were willing to accept this approach.

The concept of the ground lease, where the tenant assumes all obligations with respect to the land, including the obligation to pay for all costs associated with the operation of the buildings on the property, is rooted deeply in medieval English history. "Net" leases have survived to this day and are commonly used in financing transactions (e.g., sale-lease back deals, synthetic leases), as well as in leases where the tenant will occupy the entire property.

The concept of a "net" lease is actually ambiguous. A lease is "net" of a cost if the tenant is required to pay that cost. Brokers often use the term "triple net" to indicate that the tenant has assumed all costs of operating and owning the property. However, even in the most extreme situations, it is unlikely that the tenant will have assumed costs such as the payment of debt service, ground rent, and the fees payable to landlord's asset manager. Therefore, it is critical that the lease specifically identify the costs that the tenant has assumed.

This section seeks to illuminate issues commonly contended between tenants and landlords of office and retail properties. It is important to recognize, however, that if the tenant occupies only a small portion of the landlord's property, it is unlikely that the landlord will be willing to make material changes in its accounting and management procedures to accommodate the tenant's demands.

(a) *Definition of Operating Cost or Common Area Costs*

The first draft of a lease, particularly for premises located in a multitenant property, is generally prepared by the landlord or its counsel. Therefore, the landlord has the chance to set the stage on which the negotiations will take place. The landlord commonly proposes a broad definition of operating costs. In addition to the broad definition, the landlord explicitly lists various included categories. Except where the business deal contemplates that only specified items will be included in operating costs, the landlord should insist that "operating costs" be defined conceptually (as opposed to by reference to a list of included items), with specific cost items listed merely by way of illustration and amplification of the general definition. Usually, any listed categories are not intended to limit the operating cost definition. The problem with a restrictive list, from the landlord's perspective, is that items or categories of cost may be inadvertently omitted and new types of costs, which would otherwise legitimately constitute operating costs, cannot be added. Most categories of operating cost are fairly self-evident and probably unnecessary to list specifically in order to pass muster (e.g., costs of providing supplies, cleaning, and providing utility service to common areas, insurance premiums, etc.). However, the specific inclusion of a questionable category of expenditures may be the only way to assure that such costs will pass the scrutiny of an auditor or judge. See the sample definition of operating costs found in office leases included as **Exhibit 2E**.

From the tenant's viewpoint, a broad definition is problematic because it places the onus on the tenant to develop an extensive list of exceptions. In some circumstances, however, it may be possible to limit the definition to specific categories. The starting point for this discussion should be a detailed breakdown of the landlord's actual costs for the prior year. Given that the landlord is always required to submit a year-end reconciliation statement, such a breakdown should be readily available. In fact, it is always a good idea for the tenant's counsel to ask for the year-end statements for several of the prior years. At a minimum, this information will enable the tenant to estimate likely exposure for the immediate future. It may be possible to spot troublesome trends. The cost breakdown could form the basis of a limited operating cost definition. Finally, if the billings for the initial years of the lease term are significantly in excess of the information submitted to the tenant, and if there is no defensible justification for the cost increases, the year-end statements could assist the tenant in making a claim that the landlord has made a misrepresentation to the tenant. The tenant typically must overcome an integration clause to establish such a claim.

Although all-inclusive operating cost definitions are found in both office and retail leases, certain differences stand out in the specifically listed categories of expense. For example, the management fee paid by the landlord to its building management company is commonly charged to the tenants of an office building. This fee is usually based on a percentage of the building's gross income during the year in question. Retail leases, on the other hand, may charge the tenants an administrative fee (e.g., as a percentage of the costs incurred) either in lieu of, or in addition to, a management fee. See the sample Common Area Cost definition used in retail leases included as **Exhibit 2F**.

(b) *Exclusions from, and Limitations of, Operating Costs*

The typical definition of operating costs found in a landlord form lease could serve as an open checkbook on the tenant's bank account, with the landlord having unlimited signing authority. In actuality, the vast majority of landlords do not abuse their position. Several factors constrain the landlord. For one thing, if the operating costs of a property are high relative to other properties, the landlord will find it difficult to market the premises to new tenants. In egregious situations, the landlord conceivably could be exposed to a claim that it has committed an unfair and deceptive practice under G.L. c. 93A. Tenants often are successful in negotiating restrictions on the landlord's ability to incur operating costs at the their expense. The following sections examine certain exclusions and limitations found with some frequency in negotiated commercial leases. See the sample list of operating cost exclusions included as **Exhibit 2G**.

Competitive, Reasonable, and Necessary Costs

The simplest tack a tenant can take is to attempt to require the landlord to limit operating costs to "competitive," "necessary," or "reasonable" costs. Each of these words has a different connotation. "Competitive" speaks only to the magnitude of the cost; "necessary" may exclude costs on the basis of need. "Reasonable" can be construed as limiting cost on the basis of both magnitude and need. It can be argued that if other landlords would not have incurred the cost, the cost is not reasonable. Most landlords of first-class properties refuse to accept this type of limitation because they are unwilling to be second guessed after the money has been spent.

GAAP, Consistently Applied

The tenant may request that costs be determined in accordance with generally accepted accounting principles (GAAP) that are consistently applied. GAAP is a set of procedures, rules, and conventions that define accounting practice. The

primary sources of GAAP are the statements of the Financial Accounting Standards Board and its predecessors. GAAP deals with whether an expenditure can be reported in a single accounting period, or if the expenditure must be reported over time, and the manner in which the expenditure is reported. The tests of whether an expenditure may be expensed in one year or spread over time turn on materiality (i.e., the size of the expenditure relative to the budget) and the useful life of the expenditure.

Regardless of whether GAAP is imposed, the concept of consistent application is critical where the tenant is paying costs over a base. If the landlord is not required to determine operating costs in a consistent manner between years, the landlord conceivably could exclude a category of cost from the base year and yet include that category in subsequent years.

Capital Expenditures

One of the most highly contested areas in operating cost provisions is capital expenditures. Capital expenditures by their nature are different from other operating costs. Unlike other costs, the owner of a property is not permitted, under the Internal Revenue Code, to deduct the full amount of a capital expenditure in the year the owner incurs the expense; the owner is required to amortize the expense over a longer period based on the presumed useful life of the capital item. *See* 26 U.S.C. §§ 167–168.

Capital expenditures should be included in operating costs, if at all, only on an amortized basis, together with the interest cost the landlord is required to incur to finance the expenditure (or the imputed return if the landlord self-finances the expenditure). Stated differently, the amount that should be included in operating costs for any year on account of a capital expenditure is the annual amount of principal and interest that would be payable in a year in order to repay a loan on a direct reduction basis with equal monthly installments of principal and interest based on an original principal amount equal to the cost of the capital expenditure. See **Exhibit 2E**.

Tenants often argue that the landlord recovers capital outlays through the base rent, so that any further recovery would constitute “double dipping.” They also assert that the cost of making capital expenditures is an ownership risk that should not be passed on to the tenant, and that by paying for capital expenditures the tenant is essentially building or rebuilding the landlord’s property. The landlord, however, typically takes the position that the agreed-upon fixed rent has no reserve built into it to pay for necessary capital costs. Therefore, the tenants of the building must bear the risk of capital expenditures by passing them through, at least on an amortized basis. This argument is based on the following analysis in the office-building context. The landlord is required to pay, from the fixed rental:

- a known amount for real estate taxes (the base taxes);
- a known amount for operating costs (the base operating costs);
- the cost of leasehold improvements and other inducements paid to the tenant, amortized over the initial lease term;
- the cost of the brokerage commission, amortized over the initial lease term;
- debt service; and
- a return to the owner.

Unless there is a reserve built into the fixed rent or paid separately by the tenant, the landlord has no money to cover the cost of making the capital expenditure.

This debate turns on just how “net” the lease is. The ultimate resolution is a function of the current marketplace and the relative negotiating leverage of the parties.

Traditionally, office leases have been more restrictive regarding inclusion in reimbursable expenses of capital items than have retail leases. Formerly, only the cost of energy-saving devices or other capital expenditures that resulted in a reduction of operating costs would be included, and, often, the inclusion was limited to the lesser of the reduction in costs or the annual depreciation of the capital expenditure amortized over its useful life. Today, most office leases include not only cost-reducing capital expenditures but also capital expenditures required by changes in legal requirements, such as ADA-mandated costs or the cost of life-safety systems. Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. In any event, the tenant should insist that any included capital expenditures be amortized over the useful life of the applicable items and that only the annual depreciation be included in operating costs in any given year.

In the office market, a common resolution is to distinguish between new items and replacement items. New items are included only if the capital expenditure is made based on a reasonable projection that there will be a savings achieved in operating costs as the result of the expenditure or if the expenditure is required by law.

- **Savings.** It is difficult to argue against the concept that capital expenditures made for the purpose of achieving savings in operating costs should be included in operating costs, at least on an amortized basis. However, sometimes the tenant is successful in capping the amount to the actual amount of savings achieved. A landlord may be unwilling to agree to a cap based on actual savings as it puts the landlord in the position of guaranteeing a result it may not be able to control (e.g., because of inflation in energy costs). If the savings from the capital expenditure are significant, the landlord may attempt to accelerate its recovery of the capital item to the extent of the savings achieved. See paragraph B.3 of **Exhibit 2E**.
- **Compliance with law.** Landlords typically argue that the tenant must accept the risk of expenditures required by law because the tenant would be subject to this exposure wherever its business was located. The tenant may counter by attempting to exclude costs necessary to bring the property into compliance with laws, ordinances, or regulations that are in effect as of the execution date of the lease. Landlords that are unwilling to agree to this limitation should be willing to disclose their present plans with respect to compliance costs so that the tenant can budget for that exposure. Two categories of laws often specifically addressed are remediation and removal of hazardous substances and compliance with the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.
- **Replacement items.** Tenants may try to exclude replacement items altogether on the theory that including them results in the tenant being required to rebuild the landlord's property. The landlord may counter by proposing to limit the cost of replacement items to the savings and compliance-with-law categories. Another approach is to include only the "inflation" factor incurred in connection with the replacement. For example, if the compressor of an air conditioning unit originally cost $10,000 and had a useful life of ten years, and the replacement compressor cost $11,000 and had a useful life of ten years, then the $1,000 price differential would be included in operating costs on an amortized basis. See paragraph B.2 of **Exhibit 2E** for language describing this concept.

Finally, it is important to note the difference between leases where the tenant is paying operating costs over a base year and leases where the tenant pays operating costs on a pass-through basis. In the former case, the inclusion of capital expenditures could conceivably work to the tenant's benefit. If, for example, a capital expenditure is incurred prior to the base year, and if the amortization period for the capital expenditure ends during the lease term, the tenant would receive the benefit of reduced operating costs during the remaining years of the term since the base year would include an amortization factor not included in the remaining years. If the capital expenditure is incurred in the base year, there will be no impact on the tenant, since the amortization of the capital expenditure will remain constant throughout the lease term. On the other hand, if the tenant is paying operating costs on a pass-through basis, the tenant might have to pay for a portion of expenditures made by landlord prior to the commencement of the lease term.

Disproportionate Consumption of Services

Most operating costs are allocated among the tenants based on their relative floor areas. A legitimate area of concern for the tenant is the disproportionate consumption of services and costs by other tenants of the property. A tenant may ask to exclude the cost of providing services to retail tenants (e.g., water to a restaurant or a laundromat), or increases in insurance premiums arising from another tenant's hazardous use or lavish leasehold improvements. The landlord should be willing to protect the tenant from disproportionate charges since the landlord should be able to pass these costs directly to consuming tenant either through physical measures (e.g., separate metering) or through lease provisions.

Management and Administrative Fees

Landlords frequently seek to recover the cost of fees paid to the manager of the property. As the management fee can be significant, the tenant may seek to limit the fee so that it does not exceed fees paid to managers of competitive properties. Another approach is to obtain the landlord's agreement to a fixed cap on fees (e.g., a percentage of the gross income of the building). The tenant's concern is greater when the landlord or an affiliate of the landlord is managing the property. However, some landlords are unwilling to agree to a cap on these fees. Their justification is based on their position in the marketplace and the quality of the services they believe they bring to their properties. If the tenant is paying operating costs over a base year rather than on a pass-through basis, the tenant's concern about the landlord's refusal to cap management fees is mitigated to some degree, since the management fee will be in the base year as well as in subsequent years.

Suspect Transactions

Whenever an affiliate or subsidiary of the landlord provides a service to the property, there is the potential for self-dealing and inflated charges. Therefore, tenants commonly require the landlord to limit the costs charged by an affiliate or subsidiary to the cost that would have been paid had the service been provided on a competitive basis.

Costs Associated with the Landlord's Income-Producing Ventures

The underlying rationale for charging tenants a share of operating costs is that the tenants should pay for services that benefit the tenants. Conversely, tenants feel that they should not be required to pay for services incurred for the purpose of enabling the landlord to generate income. Therefore, the following types of exclusions are typically requested by tenants and agreed to by landlords:

- leasing commissions;
- attorney fees, costs, and disbursements and other expenses incurred in connection with negotiations or disputes with tenants;
- costs of operating commercial concessions;
- costs of operating garages;
- costs of tenant improvement work; and
- advertising and promotional expenses.

Not all these exclusions will be agreed to with respect to all properties. For example, in the suburban Route 128 marketplace, there are instances where the operation of a cafeteria is considered to be for the benefit of the tenants of the property and the tenants are required to subsidize that operation. Retail leases commonly require tenants to contribute to marketing and advertising funds for the benefit of the entire shopping center. And, even if the landlord is willing to exclude the costs of operating an underground garage located beneath the structure of an office building (since the landlord may be receiving a separate rental charge for parking passes or spaces in the garage), the landlord may insist on including the cost of maintenance and repair of the structure in which the garage is located.

Costs Reimbursed by Third Parties

It would be unfair for the landlord to recover a cost from more than one party. Therefore, tenants often seek to exclude the cost of repairs covered by warranties, casualty insurance or taking proceeds, and the cost of nonbuilding standard services provided to other tenants. While the exclusions do not present any conceptual difficulties, there are some subtleties to consider.

- Should the warranty exclusion be written to exclude the cost of a repair regardless of whether the repair is performed by the original contractor, or should the landlord have the right to include the cost of the repair, and then deduct from operating costs the net (i.e., net of the costs of collection) amount collected by the landlord from the warranting contractor, to the extent that the cost of the warranty repair was previously included in operating costs?
- Is the cost of repairing any damage caused by fire or other casualty excluded from operating costs, or only the portion of the cost covered by the landlord's insurance (therefore exposing the tenants to the cost of the deductible and any underinsurance)?
- Is the cost of repairing any damage caused by a taking excluded from operating costs, or only the portion of the cost recovered from taking proceeds?

Ownership Costs

Costs incurred by the landlord to maintain its ownership of the property are not generally considered appropriate to pass through to the tenants. Thus, landlords willingly agree to exclude debt service, ground rent, and the costs of defending the landlord's title to the property from operating costs.

A more interesting question arises in connection with linkage payments. In the 1980s, the City of Boston began to impose linkage payments on the developers of downtown office buildings as a condition to granting the permits necessary for the construction of the project. Linkage payments generally are fixed payments (i.e., the payments do not increase) that are payable over a period of years. These payments could be approximately $1 per square foot, not an insignificant

cost. Some developers expressly included this cost in operating costs, which has a couple of interesting ramifications. First, because linkage payments do not increase over time, there was no benefit to the landlord unless the tenant was paying operating costs on a pass-through basis or the base year was a "plug number," as discussed in the next section. Unless the linkage charge was disclosed to the tenants in the business negotiations leading to execution of the lease, one wonders at the propriety of burying such a significant charge in the bowels of the operating cost clause. Second, when office leases are extended or renewed, the operating cost base typically is changed to a current base year. It is therefore possible that the operating cost base might include the linkage charge but that subsequent years during the extension or renewal term might not include the linkage charge.

(c) *Base Years*

Generally, in a retail lease, tenants are required to pay for their share of common area costs on a complete pass-through basis. Office tenants, on the other hand, typically are charged only for the amount by which operating costs during any year of the term of the lease exceed a base amount. Establishing the base amount will have a material impact on the obligations of an office tenant.

Plug Numbers

The base amount is set to equal the operating costs the landlord is incurring at the inception of the lease term. For an office building under construction, however, this number is impossible to determine. In these circumstances, the landlord may use a "plug" number based on a detailed, but estimated, budget developed by the landlord. Usually, after the landlord has convinced its permanent lender and the first major tenants of the reasonableness of the budget, the landlord is able to convince the rest of the marketplace to accept the base figure.

Current Year Versus Prior Year

With respect to an existing project that is near full occupancy, the issue is whether the base operating costs should be equal to the amount of operating costs for the latest year for which the landlord has actual figures or for the year in which the term commencement date occurs. The landlord prefers to use the known figure because it enables the landlord to determine its return on the transaction. If the base year figure is not known at the time of lease execution, it is possible that an increase in operating costs in the base year will reduce the landlord's return over the entire term. On the other hand, using the prior year exposes the tenant to an increase in rent commencing as of the first day of the lease term. Depending on market conditions, the landlord may insist on an increase in the fixed rent if the tenant insists on using the year in which the term commencement date occurs as the base year.

Grossing Up

If the building is not near full occupancy at the term commencement date, the tenant will be concerned that it will be charged increases in operating costs that reflect the rent-up of the building rather than increases in costs. Therefore, the tenant will request either that the base operating costs be determined as the first year at which full (e.g., 95 percent) occupancy is achieved or that the operating costs in the base year be "grossed up" to reflect full occupancy. Landlords are reluctant to accept the first solution, since it is conceivable that full occupancy may never be achieved during the lease term. On the other hand, the landlord probably will agree to gross up the base year so long as the same principle applies to all future years during the term of the lease.

The "gross up" concept calls for the extrapolation of costs that vary based upon vacancy. This principle is easy to apply to certain costs (e.g., cleaning and utilities), but not quite so clear when it comes to management fees. If the management fee is based on a percentage of the rentals in the building, then what rental rate is applicable to vacant space?

Base Year Taxes

If real estate taxes are treated as a separate escalation charge, the possibility that base year taxes will not be determined as if the property were "fully assessed" or that there will be an abatement of real estate taxes in the base year presents concerns to the tenant that are similar to the effect of vacancy on other base year operating costs.

The full assessment issue arises in the context of a project that is under construction. *See, e.g.*, *Kimbrell v. Fischer*, 15 F.3d 175, 176 (Fed. Cir. 1994). In Massachusetts, the assessment date for each July 1–June 30 fiscal year is the immediately preceding January 1. If the building is not fully constructed as of the January 1 prior to the base year, future tax increases may reflect the value of the completed building, rather than increases in the tax rate or general inflation in

property values. If the landlord agrees that the base tax year will be the year the property is first fully assessed, however, it may never be clear when "full assessment" has been reached. Possible compromises on this issue include agreeing on a floor for the tax base, deferring the base year until an agreed upon year when it is most likely that the full assessment will have occurred and creating a base by multiplying the tax rate for an earlier fiscal year by the assessed value of a later year.

If the landlord obtains an abatement in real estate taxes for the base year and the landlord either does not apply for, or is unsuccessful in obtaining, an abatement in subsequent years, the tenant may feel that it is effectively paying for that tax abatement throughout the balance of the lease term. Note that in Massachusetts if the lease does not specifically address the issue, the tax base will be the abated number. *See George H. Dean Co. v. Pappas*, 13 Mass. App. Ct. 55, 58–59 (1982). In the current market, however, it is unlikely that the landlord will agree to use the unabated number.

(d) *Taxes*

Definition of Taxes

The definition of "taxes" in a commercial lease always includes real estate taxes assessed by the local municipality. The definition often includes taxes assessed by governmental authorities in lieu of and in addition to real estate taxes. Landlords adopted these clauses so as to pass as much as possible of the risk of change in the taxation system on to the tenants.

Tenants usually are willing to agree to pay taxes that are in lieu of real estate taxes, as it is considered that such taxes are intended to serve or supplement the same functions as real estate taxes. Tenants are generally unwilling to agree to pay additional taxes unless certain limitations are provided. Thus, taxes based on the nature of the owner entity will be excluded from the definition. For example, net income, gift, estate, inheritance, and corporate excise taxes are not the proper subject of a tax escalation provision. In addition, tenants often try to exclude interest and penalties arising from the landlord's late payment of taxes. Tenants may try to exclude taxes based on improvements that do not benefit the tenant. However, many landlords are reluctant to agree to this type of exclusion, since it may not be clear whether an improvement to a common portion of the property that is remote from the tenant's premises "benefits" the tenant.

The definition of taxes may include special assessments and betterments. Since these charges typically reflect the cost of capital improvements made by the municipality for the benefit of a limited number of property owners, the property owners may have the right to spread their payment obligations over a period of time. If such a deferral is permitted, the property owner will be required to pay interest on the unamortized balance of the initial betterment cost. Tenants usually require that betterments and special assessments be treated in a manner similar to capital expenditures made by the landlord, i.e., betterments are included in taxes only to the extent, and is if, they were payable over the longest period of time permitted by law. See the sample definition of taxes included as **Exhibit 2H**.

Multiple Escalator Versus Single Escalator

Although taxes are simply another operating cost, many leases treat taxes as a separate charge. Where the tenant is paying its share of costs on a pass-through basis, separating real estate taxes from other operating costs has no effect on the tenant's obligations. However, if the tenant is paying operating costs over a base amount, then separating real estate taxes from other operating costs could cost the tenant. When taxes are lumped in with other operating costs, a decrease in taxes may offset an increase in other operating costs. If taxes are treated as a separate escalator, however, the possible offset is lost.

Change in Tax Period

If the tenant is paying increases in taxes over a base year, the lease should consider the effect of a change, during the term of the lease, in the time period to which the tax bills relate. For example, in the District of Columbia prior to July 1993, a property owner was required to pay one-half of its annual real estate taxes on October 1, relating to the period from July 1–December 31. A second payment was due on April 1 and covered the second half of the fiscal year (i.e., January 1–June 30). To address well-chronicled financial difficulties without appearing to increase taxes, the District of Columbia passed an ordinance by which the October 1, 1993, payment would cover only the three-month "Stub Period" from July 1, 1993, through September 30, 1993. There-after, the fiscal years ran from October to September. There was no change in the due date of the tax payments.

By this sleight-of-accounting magic, the District of Columbia effectively increased taxes by 25 percent for the calendar year 1993. Most taxpayers did not notice the change until they sold their property, at which point the taxpayer was short-changed three months' worth of taxes in the closing adjustment with the purchaser of the property. Some commercial

landlords were able to recover this loss from their tenants because their leases provided that, in the event the municipality adopted a shorter tax period, the tax period would be treated as a separate measuring period, with the tax increase to be determined by reference to a prorated base amount. See the sample audit provision included as **Exhibit 2I**.

Tax Abatements

The lease should provide that if the landlord is successful in obtaining a tax abatement, the tenant will receive its share of the net (i.e., net of the landlord's costs) amount of such abatement. If the tenant pays escalation over a base year, the landlord will be unwilling to pay the tenant more than the tenant paid in tax escalation payments for the year in question. Commonly, reimbursement to the tenant is in the form of a credit against the tenant's rental obligations, although at the end of the term, the tenant should receive a payment, to the extent that the payment exceeds amounts then due from the tenant to the landlord. If the tenant occupies a large enough portion of the property, it may be able to require the landlord to apply for tax abatements or be allowed to apply for abatements in its own, or in the landlord's, name. G.L. c. 59, § 59.

(e) *Tenant's Proportionate Share*

Where the tenant does not occupy the entire property, it will be required to pay its proportionate share of operating costs or real estate taxes. It is important to examine how the tenant's share is determined. From the tenant's perspective, the proper ratio is the floor area of the tenant's premises to the floor area of the entire property. This fraction may be modified in a number of ways.

- The denominator of the fraction may be based on the leased area, rather than the leasable area, thereby placing the risk of vacancies on the tenant. If a landlord insists on this formula, it generally is willing to cap the exposure (e.g., the denominator of the fraction will not be less than 80 percent of the total leasable area).
- In a shopping center, the landlord may exclude office area or mezzanine space on the theory that such space is not used for sales.
- Another issue that arises in the shopping-center context is the effect of deals reached between the landlord and anchor tenants. These tenants may have deals calling for tax contributions that are not based on relative square footage. In these cases, at the minimum, the tenant should have the landlord agree that if the floor area of the premises of the anchor tenants is excluded from the denominator of the fraction, then the amount of taxes should be reduced by the tax contribution payments due from anchor tenants. The tenant should try to obtain some understanding of the basis of the tax contribution of the anchor tenants.

If the tenant's share is stated as a fixed fraction or percentage, rather than as a formula, then provision should be made for adjustment of the fraction in the event of a change in the floor area of the property. In any event, the tenant should ask the landlord for a representation as to the total floor area of the property as of the lease execution date.

(f) *Tenant's Audit Rights*

Tenants often ask for the right to audit or examine the landlord's books and records relating to operating costs. An express audit right gives the tenant some comfort that it will be able to prevent abuses by the landlord. Note, however, that if the landlord is forced to bring suit against a tenant to recover additional rent, the landlord will be forced to prove the costs it alleges are owed by the tenant. Consequently, all relevant books and records of the landlord would be open to discovery in the ensuing litigation. One major problem with waiting for a suit to be brought by the landlord is that the tenant risks losing its lease if it does not pay the entirety of the amount billed by the landlord.

If the landlord is willing to grant audit rights, it should consider imposing the following limitations on the tenant:

- the time period within which the tenant has the right to perform an audit after receiving a year-end statement;
- the location of the audit;
- notice to the landlord;
- approval of the auditor, and particularly its mode of compensation (many landlords are reluctant to consent to auditors who work on a contingent-fee basis); and
- confidentiality, so that other tenants of the property do not piggyback on the tenant's examination.

See the sample audit provision included as **Exhibit 2I**.

(g) *Caps and Other Limitations*

In light of the many and complicated issues that can arise in negotiating and administering operating cost provisions, the parties sometimes try to simplify their lives while protecting the landlord, to some degree, with respect to increases in costs. Several approaches that can be used for this purpose are as follows:

- Increase the fixed rent annually by a fixed percentage in lieu of charging operating costs.
- Increase the fixed rent, or a portion of the fixed rent, in proportion to the Consumer Price Index.
- Agree to an operating cost escalation provision, but cap the escalation on an annual basis. This cap may be a fixed percentage over the prior year's costs or a cumulative cap (i.e., where the landlord could carry over any savings under the cap from one year to the next).
- Agree to an operating cost escalation, but cap "controllable" expenses. This approach calls for the parties to agree about which expenses are controllable. While it is clear that some expenses are out of the landlord's control (e.g., snow removal costs and the price of utilities), the rest of the definition can be the subject of extensive negotiation.

(h) *Manner of Payment*

Most operating cost and tax provisions require the tenant to make estimated (i.e., estimated by the landlord) monthly payments on account of the tenant's annual obligations. The landlord's estimates should be reasonable. Some leases allow the landlord to make adjustments to the estimate throughout the year, although some tenants are successful in limiting the number of adjustments that may be made in estimated payments during any year.

With respect to real estate taxes, a tenant who occupies the entire property, or a tenant with negotiating leverage, may be able to limit the timing of its payments to the times when the landlord is required to make payments to the tax collector. Landlords willing to agree to this procedure may wish to reserve the right to require the tenant to make estimated monthly payments if the landlord's mortgagee requires monthly tax escrow payments.

The lease should provide that after the end of each year, the landlord will provide a reconciliation statement for the year, at which time the tenant is required to pay any underpayment of additional rent or the landlord is required to refund any overpayment of additional rent. As with tax abatements, overpayments commonly are refunded through a credit against rent, and at the end of the term, overpayments should be refunded in cash to the extent they exceed amounts then due from the tenant.

§ 2.4.9 Operational Covenants

A lease will contain various operational covenants by the tenant—some affirmative, some negative. These covenants address both the physical operation of the premises and the building and the nature of the activities the tenant will be permitted to conduct in the space. Article V of the sample lease included as **Exhibit 2B** sets forth fairly standard operating covenants. The following sections summarize the more significant types of covenants.

(a) *Covenant to Stay Open*

In retail leases, this constitutes one of the more important lease provisions. A retail landlord, particularly in a shopping center, as opposed to a single store location, will insist that the tenant not only pay the rent but also actively conduct business with the public at the premises. For one thing, the tenant must generate sales in order to produce percentage rent, but even where a lease does not call for percentage rent, the landlord wants each retail tenant to open for business in order to help generate customer traffic in the shopping center for the benefit of all other tenants. For these reasons, a retail landlord should require the tenant to agree to open for business with the public at least during specified minimum hours. A well-drafted operating covenant will require the tenant not only to open, but also to keep the store fully stocked and staffed in a manner consistent with commercially reasonable retail practices.

The underlying commercial dynamic that provides the rationale for operating covenants in retail leases is not present in the office lease context. No percentage rent is payable under an office lease and office tenants, for the most part, do not particularly care if other space in the building is actually occupied. In fact, vacancies might prove desirable by providing potential expansion space and lessening competition for limited parking facilities. Therefore, the office tenant should refuse to agree to any requirement that it stay open for business in the premises. An office landlord may argue that it needs the operating covenant to avoid the negative appearance of a vacant building. The tenant can address this concern by agreeing to light exterior offices during customary business hours. Another compromise would be to allow the landlord

to recapture the premises (i.e., terminate the lease) as its sole remedy for the tenant's failure to conduct business in the premises, but in this event the tenant will want to recapture the unamortized portion of its investment in leasehold improvements. Even in the retail context, strong tenants will negotiate this limitation on the landlord's remedies for a failure to operate.

The tenant's attorney must be alert to the possibility of a stay open requirement "hidden" or implied in the permitted use clause. If the permitted use clause states, "The Tenant shall use the Premises for general business offices," the landlord could argue that the tenant has agreed to use the premises for office purposes (i.e., to actively conduct business in the premises) throughout the lease term. The tenant's attorney should revise the clause to read as follows: "The Tenant shall use the Premises for no purpose other than general business offices." This formulation states a restriction and does not imply a covenant to open or operate in the premises.

In retail leases, the tenant's obligation to remain open for business—or indeed to remain obligated under the lease at all—often is subject to the satisfaction of cotenancy requirements.

(b) *Compliance with Law*

Both office and retail leases routinely require the tenant to comply with all applicable legal requirements, including making any alterations or repairs required to keep the premises in compliance with such requirements. The tenant should limit the application of this requirement to make clear that the tenant is not responsible for performing work to bring the premises into compliance with generally applicable legal requirements. The tenant should agree to perform only that work made necessary by reason of some particular manner of use of the premises, as distinguished from office use or retail use generally, or by improvements or installations installed by the tenant. Some examples will illustrate the point. If the local building code is amended to require new emergency exit lighting for all office buildings, the tenant should insist that this work be performed at the landlord's expense since the work would be required whether or not that particular tenant occupied the premises. The landlord might argue that the cost of such compliance work should be amortized over the useful life of the applicable items of work and that the tenant shall pay the annual depreciation accruing during the lease term. On the other hand, if the tenant installed specialized electrical equipment in the premises, which equipment required a special fire suppression system under the building code, the installation of such system should be the responsibility of the tenant since it would not be required but for the presence of the tenant's specialized equipment.

(c) *Maintenance and Operational Covenants*

Most standard forms of leases contain covenants, some affirmative, some negative, dealing with the maintenance and use of the premises and common areas of the building and lot. Section 5.5 of the lease included as **Exhibit 2B** sets forth fairly typical covenants for an office lease. A retail lease, particularly for space in a regional mall or specialty leasing location, such as an airport, usually contains additional operational covenants. For instance, leases for in-line stores in an enclosed mall will require the tenant to adequately heat and air-condition the premises so as not to "bleed" HVAC from the interior common areas. Airport or other public facility retail leases will require the tenant's store personnel to wear identification badges or comply with other security requirements. The leasing lawyer must deal with such special operating covenants on a case-by-case basis. The landlord's attorney should focus on ensuring an efficient and profitable operation of the overall retail facility; the tenant's attorney will seek to ensure compatibility of the operational requirements of the lease with the tenant's operational methods and requirements and to preserve the tenant's flexibility to respond to changes in the retail marketing environment.

(d) *Signage*

The significance of signage provisions differs greatly between office and retail leases. Although the office tenant would like the freedom to select the signage of its choice, identification of the tenant's presence in the building through signage only rarely has an effect on the success of the business enterprise. Exterior signage in an office park is a matter of prestige, reflecting the amount of space leased by the tenant, the tenant's bargaining power, or both. However, for the retail tenant, adequate exterior signage directing the public to the tenant's store can be a matter of economic life or death.

Accordingly, the "run of the mill" office tenant only has the right to be listed in the lobby directory and to place identifying signage at the entrances to the premises. The tenant should insist on getting a proportionate share, by floor area, of directory listings. The landlord often requires signage to be "building standard," i.e., of uniform dimensions and design standards, so as to preserve the appearance of the common areas. Large or powerful tenants may get the right to place a sign on the building exterior or a monument sign on the lot. A tenant who secures exterior signage rights should insist on

the right to alter such signage, in connection with any permitted or approved transfer of the tenant's interest under the lease, subject only to the landlord's reasonable design criteria.

Retail tenants in street locations or strip centers (i.e., as opposed to enclosed malls) will require the right to place exterior signs. The size and location of signs, as well as the right to place sign panels on a pylon sign, are negotiated on a deal-by-deal basis. The tenant typically wants the maximum exposure of its signs to vehicular and pedestrian traffic. The landlord, while it wants to promote the tenant's business, must balance this interest against competing claims of other tenants for limited signage rights under local code and against the need to maintain a visually harmonious appearance for the shopping center as a whole. Permissible size, style, and colors of signs may also be governed by applicable local ordinance; the landlord will want to reference such restrictions in the lease, making the tenant liable for failure to comply.

(e) *Hazardous Materials*

Virtually all leases now contain provisions governing the handling of hazardous materials and the parties' liability for the presence or release of hazardous materials in the premises or the property comprising the premises. The landlord's form of lease usually prohibits the tenant from bringing any hazardous materials onto the property. The tenant should insist on an exception for customary office and cleaning supplies, which exception the landlord should accept on the condition that all such materials are used, stored, handled, and disposed of in accordance with legal requirements. Tenants leasing space in older buildings should require the landlord to warrant that no asbestos is present in the premises, or to agree to remove any such asbestos at the landlord's sole expense, and to warrant that any asbestos in the common areas has been encapsulated in accordance with legal requirements. Both the landlord and tenant will seek an indemnity from the other party against liability for releases of hazardous material caused by the other. Landlords usually resist giving an indemnity, but the landlord should at least covenant to remediate any hazardous materials violations to the extent required by law. A tenant with negotiating leverage will be able to require the landlord to give the tenant a rent abatement to the extent that the tenant's operations are interrupted by the violation or the remediation process.

(f) *No Build Area*

These covenants appear only in retail leases. Because storefront visibility and access are critical to the tenant's business success, prudent tenants will require the landlord to covenant not to construct new improvements within a designated area. For tenants in an enclosed mall, this area typically covers that portion of the enclosed mall immediately in front of tenant's storefront. For tenants in a strip center, the "no build" area protects the tenant's primary parking field, i.e., that portion of the shopping center parking lot most likely to be used by the tenant's customers, in addition to the visibility of and access to the premises.

(g) *Exclusive Rights*

These provisions are found primarily, but not exclusively, in retail leases. A retail tenant with significant bargaining power will require the landlord to agree to refrain from or limit the leasing of space to other retailers engaged in direct competition with the tenant. The nature and scope of these restrictions varies with the size, nature, and bargaining power of the retail tenant. For instance, a supermarket operator will not only prohibit the landlord from leasing other space in a shopping center to another supermarket, but will also restrict the landlord's ability to lease to take-out food operations, pet stores selling pet food, drugstores, bakeries, and the like, all of which compete in one way or another with the supermarket. These provisions require careful negotiation and drafting. The landlord, for instance, should insist that the exclusive rights will be enforceable only so long as the tenant is actively engaged in the protected retail operation. The tenant, on the other hand, will want an exception for temporary interruptions in operations, and so on. The landlord wants to make sure that its compliance with the tenant's exclusive rights do not run afoul of antitrust laws and accordingly should insist that its obligations under the exclusive clause be limited to such actions as do not violate antitrust laws.

In office leases, only strong tenants can extract exclusive rights and usually only those national or regional enterprises with a public market identity bother trying to do so. Thus, Xerox may prohibit its landlord from leasing to Canon, or AT&T may bar Verizon, and so on. Banking and brokerage tenants, relying to some degree on foot traffic, may try to ban competitors from a building. These types of arrangements hinge largely on the negotiating muscle of the tenant, since exclusive rights of office tenants are anathema to landlords.

(h) *Radius Restrictions*

These provisions are the flip side of exclusive rights provisions. Where a retail lease calls for percentage rent, the landlord will want the tenant to agree not to open a competing operation so close to the shopping center that it might draw off sales from the tenant's store in the shopping center. Accordingly, the landlord will require the tenant to covenant not to open other stores within an agreed "radius" of the shopping center. The negotiation and drafting of these provisions can get tricky. The tenant will want an exception for any existing stores, as well as for violations that may occur by reason of the tenant's acquisition of an existing chain of operations or a competitor's acquisition of the tenant. Remedies for violation of radius restrictions vary, but commonly call for the inclusion of gross sales from the violating location in gross sales at the premises for purposes of computing percentage rent.

(i) *Cotenancy*

This is another provision found only in retail leases. Because a tenant in a strip center or enclosed mall relies on the other stores in the shopping center to draw potential customers, tenants will try to condition their obligations under the lease on the landlord keeping open for business some agreed threshold of other stores in the shopping center. These provisions are negotiated on a case-by-case basis, with the covenant often tied to specific stores in the shopping center. The remedies for violation can include rent reduction; the right to pay percentage rent only (in lieu of minimum rent and percentage rent); the right to close the store; and the right to terminate the lease. The landlord should insist on a grace period so that a cotenancy violation is not triggered by a casualty or closure for remodeling and to provide for some period of time to relet a closed store and get a new tenant up and running.

§ 2.4.10 Alterations and Additions

Commercial leases regulate the tenant's right to make alterations and additions to the premises. The landlord, as the owner of the building, needs to control work performed in the building for safety reasons, to preserve the value of the property, and to ensure the efficient operation of the building.

The vast majority of leases, both office and retail, either prohibit structural and exterior alterations or provide that they may be made only with the landlord's consent, which may be withheld at the landlord's sole discretion. A tenant with strong bargaining power should insist that the landlord subject itself to a standard of reasonability, even with respect to structural alterations. Most leases provide that nonstructural, interior alterations may be made with the landlord's consent, which will not be unreasonably withheld. The landlord should require the tenant to submit plans showing the proposed work in reasonable detail for anything other than purely cosmetic work such as recarpeting and repainting. Frequently, the landlord will require the tenant to remove any alterations or additions at the termination of the lease. The tenant should insist that landlord make this election at the time the landlord approves the work, since the tenant may elect not to perform the work if it will be required to incur demolition costs at the end of the lease. Lately, the bone of contention is the tenant's obligation to remove communications and data wiring at the end of the term. Landlords seek to avoid these now seemingly inevitable costs and tenants resist, as they always have and always will, paying any costs to get the premises ready for the next tenant.

The landlord should require the tenant to obtain all permits and approvals for any such work. In addition, the landlord should require the tenant to perform the work at the tenant's sole expense and in accordance with the landlord's reasonable requirements regarding issues such as the use of elevators and timing of noisy work to avoid disturbing other tenants. Finally, the tenant should be required to discharge any liens on the property that may result from such work.

The tenant's attorney needs to be aware that the alterations clause has an effect on the tenant's ability to sublease and assign the premises, since most new users of the space will require work to adapt the space to their requirements. Accordingly, the tenant should not accept an outright prohibition on alterations and improvements.

§ 2.4.11 Repairs and Maintenance

The lease should clearly specify who will be responsible for repair and maintenance of the premises and other physical components of the property of which the premises are a part. The customary allocation of responsibility differs between office and retail leases. Whereas in retail leases, the tenant frequently bears responsibility for maintaining the utility and building service systems serving the premises, this is rarely the case in multitenant office buildings. In both cases, the tenant maintains the interior of the premises and the landlord maintains the roof and the structural and exterior elements of the building. Where a tenant leases the entire building, whether for office or retail space, the parties may agree to make the tenant responsible for overall building maintenance.

The leasing attorney should consider the distinction between responsibility for performing the work and responsibility for paying for the work. In most cases, the landlord will want to retain control of the physical aspects of maintenance and repair obligations, even where the tenant must pay the cost of the work. This arrangement is usually preferable to the tenant as well, since the tenant does not have ongoing relationships with the contractors who will perform the work. In most cases, the costs of maintenance and repair are a part of operating costs that are passed-through to the tenant as additional rent. Where the lease requires the tenant to reimburse the landlord for repair or maintenance costs separately from passed-through operating costs, the tenant should make certain that operating costs exclude the costs of similar repair or maintenance work performed on behalf of other tenants.

Both the landlord and the tenant will want to exclude from their maintenance obligations ordinary wear and tear and casualty damage. The prudent tenant resists giving the landlord this exclusion. The landlord should undertake to maintain the property to an agreed standard and should have no right to plead the obsolescence of its capital asset as an excuse to performance. Similarly, the retail landlord requires the tenant to perform such periodic remodeling and upgrades as may be necessary to keep the premises in first-class condition.

§ 2.4.12 Utilities and Building Services

These provisions are of necessity deal-specific, although the landlord will try to achieve uniformity in all its leases in a given building or project. A well-drafted lease, whether for office or retail space, will allocate responsibility for the following:

- electric service—lights and plugs;
- premises heating and air conditioning;
- water;
- hot water;
- sewer;
- gas (if applicable);
- premises cleaning;
- common area cleaning;
- snow removal;
- common area lighting and HVAC;
- landscaping; and
- telephone, cable, Internet, and other communications.

To the extent that the tenant is responsible for utilities or services, the lease need not be very specific, since the tenant will service its own needs.

Judicial Commentary

A commercial landlord's unreasonable construction of the lease provisions, which required the lessee to pay, in addition to the base rent, an additional rent for use of electricity, subjected that landlord to liability under G.L. c. 93A, § 11. *See Diamond Crystal Brands, Inc. v. Backleaf, LLC*, 60 Mass. App. Ct. 502, 508 (2004). Rather than an ambiguity in the terms of the lease, there was a missing term in an otherwise unambiguous provision, and the court found that it was the task of the trial judge to fill in the missing term in accordance with the intent of the parties. *Diamond Crystal Brands, Inc. v. Backleaf, LLC*, 60 Mass. App. Ct. at 505–06.

Where the landlord is responsible, the tenant's attorney should consider what degree of specificity is appropriate. This varies with the utility or service being provided. For common utility service for standard office use, without special equipment, it is sufficient simply to specify who provides and pays for the utilities. For heating and air conditioning, the tenant will want some standard of performance. From the tenant's perspective, this standard can be fairly nontechnical; the tenant will be happy if the lease simply requires the landlord to provide HVAC services sufficient to maintain the premises at a comfortable temperature. The landlord will want to state the conditions to this obligation, such as normal occupancy levels and the absence of heat-producing special equipment. Sophisticated landlords often match their HVAC covenants to the performance standards of the building's HVAC equipment.

§ 2.4.13 Assignment and Subletting

Assignment and subletting restrictions number among the most significant and hotly contested provisions of a commercial lease because they directly affect vital interests of both the landlord and the tenant. The landlord needs to control the tenant's right to transfer its leasehold interest not only to maximize the landlord's economic benefit deriving from the premises itself, but also to protect the reputation and marketability—and hence the profitability—of the larger asset of which the premises is a part, be it a building, an office park, or a shopping center. The tenant, on the other hand, needs latitude to dispose of its leasehold interest, i.e., freedom from the landlord's control of such disposition, to accommodate the growth or contraction of its business and other changing economic conditions.

At issue is the control of the asset and the liability that together constitute the tenant's interest under the lease. The asset is the right to use the premises under the lease, which has an ascertainable market value; the liability is, of course, the contractual obligation to pay the rent and perform the tenants' other monetary and nonmonetary obligations under the lease. When the tenant, for whatever reason, can no longer use the premises profitably for its own business purposes, it naturally desires to use the value of the asset to offset the cost of the liability by "selling" the asset to another. The landlord, on its part, wants to stake its claim to any excess value of the asset over the cost of the liability, i.e., the extent to which the current fair market rental of the premises exceeds the contract rent under the lease.

A tenant may transfer its interest under the lease by, among other methods, an assignment, which is a transfer of all the tenant's rights and obligations under the lease; a sublease, which transfers the tenant's rights for less than the entire remainder of the term, or less than the entire premises, or both; a license or concession, which transfers less than complete possession of the applicable space; or an operating agreement, which purports to transfer only contractual rights and obligations with respect to the use and operation of the premises but effectively acts as an assignment or sublease. The lease should, from the landlord's perspective, restrict or prohibit transfers of the tenant's interest, of any nature. As with other contracts, restrictions on alienability of property in leases will be construed to limit the restriction, so ambiguity disfavors the landlord who seeks to limit assignments and subleases.

The most common restrictions on assignment and subletting are outright prohibition (or its equivalent, the requirement of the landlord's consent, which may be withheld at the landlord's discretion); a requiring the landlord's consent, not to be unreasonably withheld; recapture rights; and profit sharing (i.e., the landlord's participation in the "upside").

No office tenant should accept an outright prohibition on transfers. Generally, this prohibition will be obtained only by aggressive landlords under favorable market conditions. Since office leaseholds are fungible assets in an open market, the tenant should insist on the right to transfer its leasehold interest, subject to some or all of the other controls available to the landlord. Retail leases present a different situation. Landlords in regional malls or other large shopping centers often impose an outright prohibition on transfers by small, in-line tenants. This reflects not only the relative bargaining power of the parties, but also the landlord's legitimate need for tight control over the retailing "mix" of the shopping center.

The most common restriction on transfers is the requirement that the tenant obtain the prior consent of the landlord to the transfer, which consent the landlord agrees it will not unreasonably withhold. This right gives the landlord some control over the financial condition and operational quality of the proposed transferee. Landlords often want to specify factors that may be taken into consideration in determining whether the landlord has acted "reasonably" in granting or withholding its consent. Thus, a lease may provide that the landlord may withhold consent to transfers to existing tenants while other space in the building remains vacant. Many landlords prohibit leases to high-traffic uses, such as governmental or claims settlement offices. Similarly, a tenant with strong bargaining power might specify in the lease certain categories of transferees that must be accepted or factors that would make "unreasonable" the landlord's withholding of consent. For instance, a well-capitalized tenant that remains liable under the lease after assignment might insist that the assignee's lack of net worth cannot constitute grounds for withholding consent.

> **Judicial Commentary**
> Commercial landlords can arbitrarily reject a tenant's bid to assign a lease. Unless specifically inserted into the lease, the courts will not imply a reasonableness requirement in the assignment clause. *See 21 Merchants Row Corp. v. Merchants Row, Inc.*, 412 Mass. 204, 205–07 (1992).

The landlord frequently reserves the right to terminate the lease upon a proposed assignment or sublease, that is, the right to "recapture" the premises. Under such a provision, if the landlord so elects, the lease will terminate as of some agreed date—usually the proposed effective date of the proposed transfer—as if such date were the natural expiration of the lease term. In office leases, all but the strongest tenants must accede to this demand. In most cases, tenants do so willingly,

for although they forfeit any profit that may be had on the transfer, they no longer carry the burden of the lease obligations. Most tenants, happy to take the rental obligation off their books, gladly make this trade.

Landlords often attempt to capture a portion of the appreciation in rental value of the premises by requiring the tenant to pay as additional rent a portion of the tenant's profit from the proposed assignment or sublease. Some landlords seek all the profit, thereby ensuring that there will be none. A prudent landlord splits the "upside" with the tenant to motivate the tenant to maximize price, bearing in mind that this affects not only annual revenue but also the capitalization of the asset. The tenant should insist that out-of-pocket transactional costs be netted out of any profit in which the landlord may participate. These costs would include brokerage and legal fees, construction costs, and allowances for leasehold improvements installed for the transferee and vacant period rent. Stronger tenants will also include the unamortized amount of costs related to the original lease transaction, such as leasehold improvement costs and brokerage fees. Blue chip tenants, whose credit guarantees the value of the contract rent, naturally refuse to agree to allow the landlord to participate in the "upside" of their leases.

§ 2.4.14 Indemnity and Assumption of Risk

The function of indemnity provisions in a commercial lease is properly to allocate responsibility for defending and paying third-party claims for bodily injury or property damage arising from occurrences in the premises or on the property of which the premises are a part. This is about insurance, not fault and blame or right and wrong. An invitee of the tenant who is injured while visiting the premises will likely sue both the landlord and the tenant, alleging that the negligence of one or both caused the injury. It does not make economic sense for the landlord and the tenant each separately to defend their interests, nor does it serve either party to have their insurers wrangling over who must defend the claim. The indemnity provisions in the lease express the parties' effort to allocate between themselves—and their insurers—responsibility for defending and satisfying third-party (including employees, agents, etc. of the landlord and the tenant) bodily injury and property damage claims resulting from the use and occupancy of the premises. The goal of each party should be to provide effective insurance protection for the benefit of both, with no gaps and minimal overlaps in coverage, at the lowest overall cost.

Many, indeed most, indemnity clauses are drafted entirely too broadly, requiring the indemnifying party (usually the tenant) to indemnify and hold harmless the other against and from any and all costs, claims, expenses, and so forth of any nature whatsoever that may arise not only from occurrences in or about the premises, but also from any failure of the tenant to perform its obligations under the lease, to comply with legal requirements, and so on. Taken literally, such a broad indemnity would supplant the default provisions of the lease, eliminating the tenant's notice and cure rights in the process. Therefore, the tenant should insist that the indemnity be limited to indemnity against third-party personal or bodily injury or property damage claims, i.e., the types of claims covered by the tenant's liability insurance. The same limitation should apply to any indemnity given by the landlord.

Landlords usually resist giving indemnities to tenants. They will attempt to justify this position by arguing that the landlord, as the property owner, already has direct liability for the third-party claims that would be covered by the indemnity or that the landlord is not conducting active business operations at the property that could result in third-party claims. These arguments miss the point. Any rational property owner will maintain liability insurance, which may include a self-insurance component. In most cases the landlord will pass the cost of this insurance through to tenants of the property, either as additional rent or as a component of base rent. Therefore, the tenant should insist that the lease pass through to the tenant the benefits of this coverage, either by providing a landlord indemnity (which would be funded by the insurance) or providing that the tenant will be listed as an additional insured on the landlord's liability insurance. However, the above rationale does not apply where the landlord has no repair or maintenance obligations with respect to the property and requires the tenant to maintain all necessary liability insurance. In this case, which usually only occurs with ground leases or single-occupant building leases, the landlord will justifiably refuse to give the tenant an indemnity.

In a multitenant property, whether office or retail, the fairest and most sensible allocation of indemnity responsibility tracks the degree of control the parties exercise over the components of the property and their activities thereon. Thus the tenant should indemnify the landlord against claims resulting from occurrences in the premises, however caused, other than those resulting from the landlord's negligence, and from occurrences anywhere else on the property that result from the tenant's negligence. Conversely, the landlord should indemnify the tenant against claims resulting from occurrences in the common areas of the building and lot, however caused, other than those resulting from the tenant's negligence, and from occurrences elsewhere on the property that result from the landlord's negligence. Note that G.L. c. 186, § 15 provides that any provision of a lease indemnifying the landlord against liability arising from its own negligence is void. Further, G.L. c. 186, § 19 provides that if a landlord (other than an owner-occupant of a two- or three-family dwelling) fails to correct an unsafe condition within a reasonable period after being notified of same, the tenant or any other person

rightfully on the premises injured by reason of such condition has a right of action in tort against the landlord, and that any waiver of such right contained in the lease is unenforceable.

Another clause usually found among the indemnity provisions of a commercial lease is the "Tenant's Risk" or "Tenant's Waiver" clause. This clause has the tenant waive any claims against the landlord for damage to the property of the tenant and of anyone claiming through the tenant, such as the tenant's agents, employees, contractors, or subtenants. This provision, like the indemnities, relates to the allocation of insurance responsibilities between the parties. The landlord wants the tenant to insure all its fixtures, equipment, and personal property against the risk of damage or destruction and to bear the risk of loss if it fails adequately to insure such property. This waiver also helps the landlord avoid a subrogation claim by the tenant's insurer.

As with indemnity provisions, the tenant's waiver clause in the landlord's form of lease is often drafted too broadly, calling for the tenant to waive all claims against the landlord or all claims resulting from occurrences in or the condition of the premises, and not merely claims for damage to property. The tenant's attorney should insist that the waiver be limited to property damage claims.

A tenant's attorney frequently asks to except from the waiver claims for damage resulting from the negligence or other fault of the landlord. This misses the point; the tenant has no claim against the landlord that could be waived except to the extent of the landlord's negligence or failure to fulfill its obligations. Therefore, the exception would swallow the general provision. Accordingly, the landlord's attorney should refuse to agree to this request, fair though it may seem on the surface. This is about insurance, not morality. The landlord can, however, agree to an exception for claims resulting from its willful misconduct or gross negligence.

§ 2.4.15 Insurance

The lease should specify the types and minimum coverage amounts of insurance to be maintained by each party. A well-drafted lease will state the minimum qualifications for the insurance companies providing the required coverage. The insurer should be qualified to do business in the state where the premises are located and either meet a specified minimum rating standard or be reasonably satisfactory to the other party.

Except for ground leases and single-occupant building leases where the tenant maintains all insurance, the lease should require both the landlord and the tenant to maintain commercial general liability insurance and "all risk" property insurance covering all the insuring party's real and personal property. Ideally, each party will be named as an additional insured on the other's policies. Most landlord forms of lease require the tenant to name the landlord as an additional insured on the tenant's policies. Landlords routinely require the tenant's insurer to agree not to cancel or amend the policy without at least thirty days' advance notice to the landlord. Strong tenants will be able to extract these same concessions from the landlord.

The lease should contain a waiver-of-subrogation provision, whereby each party waives any claim against the other for property damage covered by insurance maintained by the waiving party and covenants to cause its insurer to waive any rights of subrogation against the other party. This clause is more important to the tenant than to the landlord. The landlord usually has protected itself against this exposure through the tenant's waiver clause and by being named as an additional insured on the tenant's property insurance policy. The latter measure cuts off any subrogation rights of the tenant's property insurer against the landlord, since an insurer cannot assert a subrogation claim against its insured. The former measure, by cutting off the right of the tenant to claim against the landlord for property damage, also cuts off the subrogation claim, which derives solely from the tenant's direct claim against the landlord. Unless the tenant has convinced the landlord to agree to a waiver similar to the tenant's risk clause, or to name the tenant as an additional insured on the landlord's property insurance policy, the tenant should insist on the following:

- a waiver-of-subrogation clause;
- the landlord's covenant to maintain property insurance for the full replacement value of the property containing the premises; and
- the landlord's agreement that the landlord's waiver in the nonsubrogation clause will apply both to damage actually covered by the landlord's insurance and to damage that would have been covered if the landlord had maintained the required insurance.

Only with these protections does the tenant relieve itself, indirectly, from liability for damage to the landlord's property. The tenant should require that this waiver also apply to any permitted subtenant.

§ 2.4.16 Casualty

Casualty provisions produce some of the most protracted and least productive negotiations between attorneys, probably because business people tend to leave these matters to their attorneys and because the provisions address a hypothetical situation of scope and nature necessarily unknown to the parties at the time of the lease negotiations. The analysis and resolution of issues relating to casualty damage to the premises or building differ greatly between office and retail leases. As noted in other contexts, for the office tenant the premises is simply a place to conduct a business that could be conducted elsewhere. For the retail tenant, the location of the premises is essential to the success of the business. This difference will manifest itself most prominently in the lease provisions relating to termination rights after a casualty.

The casualty provisions should address the following points: (1) which party is responsible for restoring what damage after a casualty; (2) under what circumstances may either or both the parties terminate the lease after a casualty; and (3) abatement of rent while the tenant's occupancy is interrupted by reason of casualty damage.

(a) *Obligations to Repair or Restore*

Generally, the obligation to repair casualty damage should fall on the party responsible for insuring the damaged property against the casualty. In office leases, the landlord usually insures the real property, i.e., the building, including leasehold improvements to the premises, and the fixtures and building service equipment incorporated therein, the landlord's furniture, fixtures, and equipment (FF&E) and other personal property used in the operation of the project. The tenant insures all its personal property, including FF&E owned by the tenant. In this scenario, the lease should make the landlord responsible for restoring the building and premises, other than the tenant's personal property. In a ground lease or single-tenant building lease where the landlord may agree to provide, at the tenant's expense, insurance on the real property (usually because the landlord can do so at a lower rate than that available to the tenant), the landlord might pass the restoration obligation to the tenant, merely agreeing to enforce its rights under the insurance policy and to make the proceeds available to the tenant.

The landlord will want to condition its restoration obligation on its ability to perform the required work consistently with applicable legal requirements. If changed building or zoning codes do not permit the replacement of the improvements destroyed by the casualty, the landlord does not want to be contractually obligated to perform the prohibited work. Landlords also try to condition their restoration obligations on the sufficiency of insurance proceeds to fund the work or on the agreement of the landlord's mortgagee to release the proceeds. As to the former condition, the tenant should insist that the landlord agree to supply from its own funds the "deductible" under the insurance policy and that the tenant have the option, but not the obligation, to supply any further shortfall. As to the latter, the tenant should try to eliminate this condition entirely and should, at the least, insist that the landlord use best efforts to cause the mortgagee to release the proceeds and to diligently enforce any rights the landlord may have to compel the release of the proceeds.

(b) *Termination of the Lease*

The lease should clearly delineate between the casualty damage that must be restored and that which will entitle one or both parties to terminate the lease. Wherever this line may fall, the lease should require a party that has not exercised its termination right to perform its restoration obligations if the other party does not terminate. The delineation is based on the degree of damage, which can be measured by various standards. The most common standards are the time required to repair the damage; the cost to repair the damage, often expressed as a percentage of some valuation of the premises; and the physical extent of the damage, usually expressed as the percentage of floor area of the premises or the project subject to the damage. Both the landlord and the tenant are best served by using time to restore as the standard. Where, as in virtually all cases, the casualty is covered by insurance, the restoring party should not have the option simply to keep the insurance proceeds in lieu of restoring. Therefore, the cost to restore approach should not be used. The percentage of floor area approach does not work because it does not take into account the economic significance of the damage. For instance, a small fire may cause smoke damage to the entire premises, which can quickly be remediated at a relatively low cost. This should not entitle either party to terminate the lease.

Each party tries to limit the right of the other to terminate the lease by reason of casualty damage to the premises or the building because it does not want the other to use the casualty as an opportunity to renegotiate the rent. Suppose, for example, that a lease calls for base rent at the rate of $20 per square foot and the premises are damaged by fire at a time when the current market rate is $25 per square foot. If the landlord has the right to terminate the lease by reason of the casualty, it could use this right to force the tenant to agree to a rent increase to avoid the termination. Of course, if the contract rent exceeds the market rent, a tenant termination right could be used in like fashion to extract a rent reduction. The right to terminate is inextricably linked to the obligation to repair the casualty damage. It does the tenant no good to

negotiate out the landlord's termination right if the landlord has no obligation to restore the premises so that the tenant can recommence its use of the space.

The lease included as **Exhibit 2B** uses the time to restore approach to differentiate between "partial damage," which the landlord must restore, and "substantial damage," which lets the landlord terminate the lease. The landlord's form of lease frequently permits the landlord, but not the tenant, to terminate for substantial damage. The need for a termination right differs greatly between office and retail tenants. The office tenant conducts operations in the premises that can—and, if necessary, must—be carried on elsewhere. This tenant has a much lower tolerance for a prolonged absence from the premises. The office tenant wants to get back into the premises immediately or to move on with life by relocating to other space. The retail tenant faces a very different business dynamic. In most cases other than central business district locations, a retail tenant cannot "relocate" its business—if it closes the premises, it withdraws from the market area. Thus, the office tenant typically fights for a termination right to avoid lengthy interruptions of use, whereas the retail tenant tries to avoid termination by the landlord. Where the landlord forgoes the right to terminate, it faces an irresistible pressure to restore, since it will have agreed to a rent abatement pending restoration and must put its asset back into economic service.

(c) *Rent Abatement*

The lease should address the abatement of rent during the period that the premises are not usable by reason of the casualty. The tenant's lawyer should bear in mind that the premises may be rendered unusable by a casualty that does not directly damage the premises, such as when the damage eliminates access to the premises. Rent should abate in these circumstances as well.

In the typical office lease, where the landlord insures all the leasehold improvements, rent should abate until restoration is complete or the tenant recommences use of the premises, whichever occurs first. Office leases sometimes simply call for "an equitable abatement of rent taking into account the nature and extent of the damage" or words to similar effect. In many retail leases, where the tenant has the responsibility to insure and therefore to restore its leasehold improvements, rent should abate until the earlier of an agreed period after the landlord has completed base building restoration, i.e., to allow the tenant to restore its leasehold improvements during such period, or the resumption of the tenant's business operations in the premises.

The tenant should insist that not only base rent, but also additional rent and other lease charges, abate. The retail landlord should specify that percentage rent will *not* abate, since this type of rent is generated not on a per diem basis but as a function of gross sales. In fact, the percentage rent breakpoint should reduce when the base rent abates by reason of casualty.

§ 2.4.17 Eminent Domain

The lease should address the rights of the parties if all or a portion of the premises or the property of which the premises are a part are taken by eminent domain, including any transfer in lieu thereof. These provisions will, in large part, track the casualty provisions of the lease, but should reflect one important difference: in the case of a casualty, the property can, subject to changes in code, be restored more or less exactly to its previous condition; in the case of a condemnation, because the landlord has been deprived of ownership and possession of a portion of the property, the property cannot be restored exactly to its previous condition.

Termination right issues differ between casualty and condemnation clauses based primarily on this inability to restore after a taking. Whereas most lease forms provide that the tenant may terminate if more than a certain percentage of the premises are taken, but not otherwise, the tenant should not accept this. For one thing, if any portion of the actual premises are taken, the tenant will need to assess the impact of this taking on its business operations and should have the right to terminate the lease if it reasonably determines that it cannot continue such operations. For instance, if a computer room essential to tenant's operations was taken, the tenant would want the right to terminate regardless of whether the taking exceeds any given percentage of the tenant's floor area. However, it is absurd to spend much negotiating time or money determining the rights of the parties if a portion but not all of the building were to be taken by eminent domain, given the extreme unlikelihood of such an occurrence. A more significant issue is the tenant's right to terminate if vehicular access or parking spaces are taken. Since the vast majority of eminent domain takings are made in connection with utility installations or the layout or widening of roadways, which typically affect site improvements but not existing buildings (because of the cost to the taking authority), the tenant should require the lease to address this type of taking.

Most disputes between landlords and tenants regarding eminent domain provisions center on the allocation of the award for the taking of the property. Landlords want to receive all the award, excepting only whatever may be specifically

awarded to the tenant for the loss of its FF&E and other personal property, relocation costs, and the unamortized value of leasehold improvements paid for by the tenant. Specifically, the landlord does not want the tenant to have the right to receive any award for the value of the tenant's leasehold estate, i.e., the excess, if any, of the fair market rental value of the premises for the remainder of the term over the value of the rent required to be paid under the lease. This position is founded more on bargaining power than on intrinsic merit and landlords usually prevail on this point unless the tenant has strong bargaining power. A different case prevails in ground leases, where the tenant has taken all the risks and rewards of the property ownership for the term of the lease. Here, the tenant will insist on obtaining the portion of the award attributable to the value of the leasehold interest and that the tenant's award take priority over the landlord's.

§ 2.4.18 Default

Default provisions should address the following: the events that will constitute defaults of either party; notice and cure rights and the other enforcement mechanisms; and the nature and scope of damages. Many a landlord's lease form deals with the tenant's default in exquisite detail while maintaining a delicate silence regarding the landlord's default. This disparity of remedies and enforcement rights has a foundation not only in bargaining power and tradition but also in economic logic. The tenant has an obligation to pay money, the performance of which may be suspended at whim. The landlord has an obligation to provide space, the performance of which may be suspended only by dispossessing the tenant. After the lease is terminated, the landlord can mitigate damages, as required under Massachusetts law, only by evicting a defaulted tenant and reletting the premises.

The tenant's defaults fall into three categories: monetary defaults, nonmonetary defaults, and automatic defaults. The lease should define monetary defaults and automatic defaults, with nonmonetary defaults as the residual category. A monetary default is the failure to pay any rent, additional rent, or other charge when due. An automatic default is the failure to perform obligations within the knowledge and control of the defaulting party. Violations would include making a prohibited transfer, closing the premises in violation of an operating covenant, and the like. A nonmonetary default is the failure to perform any obligation under the lease that is not a monetary or automatic default.

The lease should provide the right of the tenant to notice of, and the opportunity to cure, all monetary and nonmonetary defaults. Since automatic defaults involve deliberate violations of the lease, the tenant cannot legitimately insist on notice and cure rights with respect to these defaults. The tenant should have a relatively short period (typically five to fifteen days) within which to cure a monetary default. Tenants usually get thirty days to cure nonmonetary defaults, which period is often extended for force majeure (i.e., problems beyond the reasonable control of the tenant), provided that the tenant commences the cure within the thirty-day period and diligently pursues the cure to completion. Some landlords specify a short cure period for those nonmonetary defaults that create a hazard or otherwise immediately jeopardize the landlord's interest, such as the failure to maintain required insurance.

Landlords do not want the tenant's notice and cure rights to permit chronic late payment or other nonperformance, so they frequently provide in the lease that after one or two notices of default in a given year, any subsequent failure to perform will constitute a default without the necessity of notice and the expiration of a cure period. The tenant usually has difficulty arguing against this approach as it pertains to monetary defaults, but should be careful in agreeing to its application to nonmonetary defaults. The purpose of this type of provision is to prevent chronic nonperformance, but the nonmonetary duties of a tenant under a lease encompass a wide array of obligations of differing natures. The tenant would not want the fact that it has received a notice of default with respect to, say, a maintenance obligation to permit the landlord to terminate the lease without notice if later that year the tenant fails timely to submit a replacement certificate of insurance. Thus, if the tenant must live with this clause as applied to nonmonetary defaults, it should insist that only subsequent material defaults substantially identical in nature to the previously noticed default will entitle the landlord to exercise its rights under the clause.

The lease should set forth the landlord's remedies after the tenant has defaulted. These should include the right to terminate the lease, the right to recover possession of the premises, and the right to collect money damages from the tenant. Although most landlord's forms of lease give the landlord the right to terminate the lease and recover possession of the premises without recourse to legal process and by force if necessary, self-help evictions are not permitted under Massachusetts law and a landlord may legally recover possession of premises from a tenant in occupancy thereof only through a summary process action pursuant to G.L. c. 239, §§ 1–13.

The landlord's form of lease sometimes gives the landlord the right to collect damages from a defaulted tenant in an amount equal to the total amount of rent and additional rent payable under the lease for what would have been the balance of the term but for the termination by reason of the tenant's default. The tenant should resist this remedy for several reasons. First, a lump sum payment of the aggregate amount of rent payments payable over the balance of the term

exceeds in value the stream of those rent payments if paid when due. More significantly, this approach ignores the rental value of the premises over the balance of the term. As discussed below, the tenant should receive the benefit of rent payments received by the landlord through a reletting of the premises after termination for a tenant default. A fair compromise that addresses both of these concerns sets the landlord's damages at an amount equal to the excess, if any, of the net present value (discounted to present value at some agreed discount rate) of the rent, additional rent, and other charges that would have been payable during the balance of the term had no default occurred over the net present value of the fair market rental value of the premises during that same period. Where additional rent is contingent (such as percentage rent or operating cost pass-throughs), the parties may agree on assumptions as to such additional rent for the purposes of making such calculation.

Particularly strong tenants can refuse any acceleration of rent after a default, even on the basis described above. These tenants—investment credit corporate office tenants, anchor retail tenants, and the like—can insist that rent, less any reletting proceeds, will be payable only on the due dates therefor throughout what would have been the balance of the term. This puts the landlord in the awkward position of potentially needing to take one or more additional legal actions to collect these subsequent payments. Landlords forced to accept this position should insist not only on the right to recover all out of pocket collection costs, but also reasonable compensation for administration and overhead costs incurred in dealing, if necessary, with repeated payment defaults.

The tenant should insist that the landlord be contractually obligated to use reasonable efforts to relet the premises after a termination due to tenant default. The prudent landlord will want to set limitations on this obligation, such as the condition that the landlord need not give priority to reletting the premises over leasing other vacant space in the building or shopping center. Retail landlords should also insist on their right to control the merchandising mix in the shopping center when reletting the premises.

A significant case, in its effect on case law if not necessarily on common practice, was decided in 2013. In *275 Washington Street Corp. v. Hudson River International, LLC*, 465 Mass. 16 (2013), the Supreme Judicial Court ruled that a landlord claiming posttermination damages under an indemnification clause in a lease may not do so until what would have been the end of the term, when such damages may be ascertained with certainty, and that, absent a contrary provision in the lease, no common law remedy exists for posttermination damages. This decision might devastate the imprudent or the unadvised but means little to experienced practitioners, who universally include in their default clauses sometimes nauseatingly detailed descriptions of the remedies available to their landlord clients in the event of a tenant default.

Landlords' forms of leases usually have little, if anything, to say about the landlord's default. This represents one of the several vestiges of the lease as conveyance, rather than contract. In days of yore, all of the landlord's obligations under the lease were performed by conveying the premises to the tenant with the benefit of the covenant of quiet enjoyment. Most forms provide that the landlord will not be in default unless it fails to perform its obligations for thirty days after notice from the tenant, plus whatever additional time may be required to complete the cure. Some leases state that the lease cannot be terminated by reason of a landlord default. Others impose further limitations on the tenant's remedies in the event of a landlord default, such as limiting the tenant to specific enforcement or injunctive relief. Still others, perhaps most, will simply be silent as to the tenant's remedies for a default by the landlord. A tenant with moderately strong bargaining power should insist on some protection against constructive eviction, i.e., the failure of the landlord to perform an obligation under the lease that results in some or all of the premises becoming unfit for occupancy. A stronger tenant will get a self-help right to perform the landlord's unfulfilled obligations, while the strongest tenants get the right to fund the self-help effort by offsetting the cost thereof against rent. A landlord facing a tenant with this bargaining power should at least establish a percentage cap on the amount of any monthly offset in order to salvage some cash flow to operate the property and pay debt service. In any event, the landlord should insist that the tenant's self-help rights be limited to matters that directly affect the tenant's operations. In a multitenant building, the landlord should not permit the tenant to exercise self-help to perform functions that affect the other tenants of the building. For instance, the landlord will not want the tenant to have the right to repair the central HVAC power plant. For its part, the prudent tenant will not want to undertake such work, with the attendant risk of liability to other tenants.

§ 2.4.19 Retail Lease Provisions

As mentioned above, this chapter focuses on office leasing while attempting to point out ways in which accommodations between parties of comparable sophistication and bargaining power differ in the retail context. Because of the significance of the operational characteristics of the property to the success of the business venture conducted in the premises, retail leases contain provisions not found in office leases. While a detailed analysis of these provisions is beyond the scope of this chapter, it may be helpful to touch on a few basic concepts: exclusives, cotenancy rights, and kickouts.

(a) *Exclusives*

Retail tenants do not like direct competition within the shopping center, whether it be a community shopping center or a regional mall. The sophisticated landlord also wants to restrict competition so as to foster the economic performance of its tenants. To the extent that percentage rent deals offer prospects of collecting, the landlord wants to maximize the gross sales feeding into such arrangements. Even where few or no leases require percentage rental, landlords usually find it prudent to maintain a complementary mix of uses within a shopping center or mall. Exclusive rights provisions restrict or prohibit leases of space in a shopping center or mall, or a designated portion thereof, to businesses that compete with the tenant.

The landlord should insist that the exclusive rights only pertain so long as the tenant actively conducts the protected use in the premises. In general, the tenant would like the restriction to apply as broadly as possible, while the landlord seeks to constrict its application to the narrowest channel. Thus the tenant would like the restriction to apply to the sale of any goods or services sold in the premises, while the landlord will try to limit the stricture to operations primarily conducted in competition with the tenant's core business, exempting incidental activities that may compete. The landlord must exempt existing leases to the extent they do not give the landlord the right to prohibit the protected uses.

A breach of an exclusive right typically triggers specified rights of the tenant. These include paying straight percentage rent (i.e., no base or minimum rent, but only percentage rent over a zero breakpoint for the applicable period), the right to "go dark" (i.e., cease to operate in the premises), and the right to terminate the lease (perhaps with reimbursement of the unamortized portion of the tenant's capital investment in the premises). The landlord should require a cure right where the exclusive violation results from another tenant violating its lease.

(b) *Cotenancy Rights*

Retail tenants lease space in a shopping center or mall on the assumption that the center or mall will reach or maintain projected or historic occupancy levels. Cotenancy provisions protect these expectations by giving the tenant rights or remedies if occupancy falls below an agreed threshold. These provisions should set forth the triggering event and the tenant's rights upon the occurrence of such event. Frequently, these provisions distinguish between anchor tenants and general occupancy, establishing complementary or supplementary requirements.

The tenant's cotenancy rights are triggered by designated retail operations (whether one or more specified stores, a specified percentage of the floor area of the shopping center, or both) ceasing to conduct business for a designated period. Thus for a three-anchor-store shopping center, a cotenancy clause might provide that the tenant's remedies accrue if two or more anchor stores or one anchor plus 50 percent of the remaining GLA (i.e., the gross leasable floor area of the shopping center) remains "dark" for more than six months. The landlord should insist that force-majeure closings—e.g., by reason of casualty—will not count, at least for a specified grace period.

Cotenancy violations usually evoke the same types of remedies available upon a breach of an exclusive right. This makes sense, for both clauses seek to protect the tenant from the consequences of the landlord's actions (or inactions) that negatively affect the tenant's retail business. The landlord should insist that the tenant be entitled to this remedy only if the tenant is actively conducting its own retail operations in compliance with the lease throughout the designated period. Otherwise, the tenant's "going dark" could itself set in motion the closings of the other stores that result in the cotenancy violation.

(c) *Kickouts*

Sometimes things just do not work out. "Kickout" clauses allow the tenant, the landlord, or both to terminate the lease if the tenant's gross sales fail to meet a designated threshold during a designated period. The clause should clearly specify the gross sales threshold and the measurement period. The landlord should require satisfactory documentation of applicable gross sales, such as the certified annual report of gross sales or its equivalent. The tenant's rights should not accrue unless it has continuously operated throughout the period, strictly in compliance with the lease requirements. The landlord should insist on this, lest a tenant close down and then open and operate in a desultory fashion through the measurement period in order to acquire the termination right.

The kickout remedy is simply the early termination of the lease. The clause should specify whether the parties have the right to recover their capital investment in the lease (e.g., the cost of the leasehold improvements and allowances, brokerage commissions, and legal fees), depending on who terminates. Tenants often object to giving the landlord a termination right, arguing that the landlord is only "entitled" to the base rent, which remains payable in full if the tenant does

not terminate. In many cases, the landlord truly expects to receive percentage rent and wants the right to dismiss any tenant who cannot produce it. More often, the landlord insists on a mutual termination right to keep the tenant honest. With a unilateral termination right, the tenant has every reason to establish a low gross sales threshold to its kickout rights, since this amounts to a termination option. By placing the tenant in jeopardy of losing its store via the landlord's exercise of the kickout right, the landlord gains some assurance that the tenant will not set an artificially low gross sales trigger to its own kickout right.

§ 2.4.20 Mortgagee Protective Provisions

To facilitate its ability to obtain mortgage financing on the property containing the premises, the landlord will want to provide in the lease certain protections in favor of not only its present mortgagee but, as importantly, future mortgagees of the property. The landlord need not worry too much about the rights of its present mortgagee, because its mortgage will be prior in right to the lease absent its agreement to the contrary. Where a mortgage is prior to a lease, absent any further agreement between the parties, upon a foreclosure of that mortgage the foreclosing mortgagee and the tenant may both elect to terminate the lease. For this reason, mortgagees want to have the right to require the tenant to attorn to the mortgagee, i.e., to agree to remain bound to perform the tenant's obligations under the lease in favor of the foreclosing mortgagee, and the tenant wants the mortgagee to agree not to disturb the tenant, i.e., to agree to perform the landlord's obligations under the lease from and after the foreclosure. These undertakings are usually encompassed within an agreement known as a subordination, nondisturbance, and attornment agreement, or SNDA agreement. A mortgagee's form of an SNDA agreement is included as **Exhibit 2J**.

The SNDA agreement provides for the subordination of the lease to the mortgage, the mortgagee's agreement to honor the lease if it should succeed to the landlord's interest in the property, and the tenant's agreement to honor the lease in such event. It will often set forth rights of the mortgagee that will control over contrary provisions of the lease in the event of foreclosure, provisions that form the bone of contention between tenants and lenders in SNDA negotiations. The attornment and nondisturbance portions of the SNDA agreement tend to be relatively straightforward. The tenant's attorney should take care to see that the mortgagee's obligation not to disturb the tenant applies whenever the mortgagee, or anyone claiming through the mortgagee, succeeds to the landlord's position, whether by foreclosure or any transfer in lieu of foreclosure. (In that regard, subsequent references to a foreclosure should be read as also referring to any transfer in lieu of foreclosure.) The easiest way to accomplish this in the negotiations is to ask that the same events or conditions trigger the obligations of each party under the agreement, i.e., whatever event or occurrence that requires the tenant to attorn will also require the mortgagee or its derivative claimant to agree not to disturb the tenant.

Mortgagees seek not to be obliged, after a foreclosure of the mortgage, by various undertakings of the landlord. While the scope of the exemptions sought is limited only by limits to the imagination and audacity of lender's counsel, mortgagees usually obtain substantial relief on three landlord obligations:

(1) the obligation to construct leasehold improvements;

(2) the obligation to account for a security deposit, except to the extent actually received by the mortgagee; and

(3) the obligation to pay any money to the tenant or credit any accrued offset rights.

The last category provokes the most disputes. The mortgagee will undertake to perform ongoing obligations but does not want to account for debts accrued before foreclosure, since this could turn a foreclosure into a greater loss than simply writing off the mortgage debt. The tenant does not want the mortgagee to have the option to "sweat out" a tenant into performing self-help capital improvements only to have the mortgagee renege on the reimbursement obligation through a foreclosure. This tenant may point out that the nonrecourse provisions of the SNDA agreement and the lease itself prevent the foreclosure from becoming an occasion of loss. That said, the most common resolution calls for the tenant to forsake any claims against the foreclosing mortgagee for accrued payment liabilities of the landlord, including offsets, but for the mortgagee to assume all liability for nonperformance from and after the time the mortgagee assumes possession of the property. Where a mortgagee forecloses before the landlord has completed the construction of the initial leasehold improvements, the tenant cannot simply release the lender from the landlord's construction obligations and otherwise leave unaffected the other rights and obligations of the parties under the lease. At the least, the tenant should insist upon the right to terminate the lease and receive a refund of any contribution it made to the cost of leasehold improvements, as well as any other deposits or other sums paid to the landlord. Stronger tenants may get a self-help right to complete construction.

As to ground leases, a ground lessor of the landlord finds itself for most practical purposes in the same position as the landlord's mortgagee vis-à-vis the tenant, and all of the considerations discussed above, and below, apply to relations between these parties.

The lease often gives the mortgagee the right to cure the landlord's defaults under the lease, usually providing for an additional cure period before any tenant remedies will become enforceable against the mortgagee. The enlightened tenant does not object to this right as a general principal, recognizing that notice to the mortgagee effectively prompts the landlord's response to a legitimate complaint. When the mortgagee seeks an indefinite or prolonged cure period and the cure requires foreclosure of the mortgage, however, the tenant faces the anguish of either enduring a lengthy interruption of essential services or, if the tenant has vacated the premises, of having to reoccupy the premises whenever the mortgagee completes foreclosure, perhaps paying some or all of the rent in the meantime. In any event, the tenant should make clear that the mortgagee's cure rights do not apply to negotiated termination rights, such as the right to terminate after a casualty or, for the retail tenant, the right to terminate for a violation of the tenant's exclusives, cotenancy, or kickout rights.

Landlord's leases often provide that a mortgagee does not, simply by taking a collateral assignment of the lease, assume any of the landlord's duties under the lease until the lender forecloses under such assignment. So long as this type of provision does not cede other rights, the tenant has no objection to this. The tenant should, however, request that the mortgagee assume the landlord's obligations once the mortgagee exercises its right to collect rent under the assignment, since the interruption of the landlord's income stream will likely leave the landlord powerless to perform such obligations.

§ 2.4.21 Miscellaneous Provisions

Every decent lease contains miscellaneous provisions, if only from a healthy respect for tradition. This part of the lease often provides a handy spot to dump deal-specific provisions and should be reviewed carefully by the leasing attorney, if only for that reason. There are often several other fascinating provisions among these seemingly dry clauses. Would that time allowed more than a fleeting glance at these gems.

(a) *Covenant of Quiet Enjoyment*

The covenant of quiet enjoyment constitutes one of the fundamental undertakings of the landlord in the lease—the landlord's covenant that the tenant will have the right to occupy the premises throughout the lease term, free from interruption by others claiming to have title superior to that of the tenant. This covenant, similar in nature to the grantor's covenants in a deed of fee title, is implied by the lease itself. General Laws Chapter 186, § 14 codifies the covenant of quiet enjoyment. Landlords frequently offer a more restricted covenant than that implied by common law or set forth in the statute, and their lease forms often provide that the contractual covenant supersedes any implied covenant. The tenant should resist this where the landlord's covenant protects the tenant only against those "claiming by, through, or under the landlord," since it leaves the tenant exposed to the predations of those claiming superior title to that of the landlord. In addition, and more importantly from the tenant's perspective, the tenant should insist that the landlord's obligation not to disturb the tenant be relieved *only* upon the occurrence of an "Event of Default" (i.e., importing the notice and cure rights of the tenant) as opposed to the common landlord formulation along the lines of "subject to performance of Tenant's obligations hereunder" or the like. See **Exhibit 2B**, Section 17.18, which contains the landlord's favored formulation.

(b) *Force Majeure*

More often than not, landlords' lease forms excuse the landlord's nonperformance of its obligations under the lease when such nonperformance results from causes beyond the landlord's control. The tenant should push for equal treatment as to obligations not involving the payment of money. (Neither party should ever agree to extend force majeure to payment obligations.) In addition, financial inability should not constitute force majeure for either party. Again, tenants should insist that this concept not apply (or have only a limited application) to nondefault termination and abatement rights, such as those accruing in the event of casualty.

(c) *Waiver*

Landlords' lease forms provide that no action or inaction by the landlord—other than a written instrument—will act to waive any of the landlord's rights under the lease. This concept is not itself objectionable to the tenant inasmuch as it encourages discussion of, and attempts informally to resolve, lease disputes before resort to formal legal procedures. The tenant, however, should insist that these provisions apply also to the tenant, lest they create the implication that the tenant can waive its rights by failing to enforce them vigilantly. See **Exhibit 2B**, Section 17.3.

(d) *Prevailing Parties*

Frequently, the default provisions of a lease permit the landlord to collect all of its enforcement costs from the tenant. See **Exhibit 2B**, Section 17.16. Except where one party or the other holds all of the bargaining power, the lease should provide that the prevailing party may collect from the other party all reasonable enforcement costs. Since lease disputes often involve multiple claims and counterclaims between the parties, the question of which party is the "prevailing" party can become a delicate one, and leases sometimes try to provide guidelines for determining the prevailing party.

(e) *Estoppels*

Properly included with the mortgagee rights provisions, this clause requires the tenant and, at the tenant's insistence, the landlord to certify to the other party, other interested parties, or both

- that the lease is in effect and has not been amended;
- that the parties have not defaulted in their obligations under the lease; and
- the status of various matters pertaining to the lease, such as the state of completion of the leasehold improvements, the payment of allowances, the current amount of rent payable, and the like.

Neither party should object to this obligation, so long as any objection to the certified facts may be noted on the estoppel. Landlords' lease forms often purport to give to the landlord a power of attorney to make the certification on behalf of a recalcitrant tenant. Seldom will a mortgagee give any credit to an estoppel executed by a landlord under such a power, so the prudent tenant should refuse to accept this arrangement on the ground that it creates liability for the tenant without any corresponding benefit for the landlord. See **Exhibit 2B**, Section 17.8.

(f) *Nonrecourse*

The prudent landlord insists that his liability under the lease be limited to his interest in the property containing the premises. The nonrecourse provision stipulates that should the tenant ever perfect a claim for money damages against the landlord, that claim may be satisfied only through recourse against the landlord's equity in the property. Only the most formidable tenant will have the power to resist this limitation. Where the property is owned by a single-asset entity, as is frequently the case, the point is moot, since the landlord's interest in the property comprises its entire net worth. Every tenant, however, should insist that it also will have recourse against the "issues, proceeds, and profits" of the landlord's equity interest in the property. See **Exhibit 2B**, Section 17.19.

(g) *Interest*

If not specified elsewhere, provision should be made for the payment of interest on overdue payments. It is hard to argue against reciprocity to the extent that the landlord may have any payment obligations to the tenant. The tenant will want notice or at least a grace period before interest starts to accrue. The landlord should insist on limiting the number of notices it must give before interest will begin to accrue automatically. The landlord will want to collect a late payment fee for long overdue payments or for chronic late payment.

(h) *Notice*

Notice provisions should specify

- that notices must be given in writing,
- the required or sufficient methods of delivery,
- the effective date of notices, and
- the initial notice address of the parties.

Many leases incorporate the "mailbox rule," whereby a notice becomes effective when deposited in the mail (or within a specified period thereafter). Prudent leasing attorneys prefer that notice become effective only on delivery or attempted delivery. See **Exhibit 2B**, Section 17.20.

(i) *Brokers*

Each party should warrant to the other that they have dealt only with those brokers identified in the lease and should indemnify the other against any commissions payable to any other brokers claiming through the indemnifying party. The lease should allocate responsibility for paying identified brokers. See **Exhibit 2B**, Section 17.9.

The author wishes to thank Raymond M. Kwasnick, Esq., of Goulston & Storrs, PC, for his contribution to this chapter on the topic of operating expenses.

EXHIBIT 2A—Exclusive Leasing Agreement

As of _____

THIS EXCLUSIVE LEASING AGREEMENT is made by and between _____, a _____ (“Owner”), and _____, a _____ (“Leasing Agent”).

RECITALS

Owner is in the process of leasing the Building (“Building”) located in _____, _____ (with a property address of _____), which contains approximately _____ square feet of office space (the Building and the land on which it is situated is hereinafter called a “Property)”.

Owner desires to engage the services of Leasing Agent, and Leasing Agent is willing to serve as exclusive agent, for leasing of the office space in the Building upon the terms and conditions hereinafter set forth.

NOW THEREFORE, in consideration of the mutual agreements hereinafter set forth, Owner and Leasing Agent hereby agree as follows:

AGREEMENTS

1. *Exclusive Leasing Agent*. Owner hereby appoints Leasing Agent as the exclusive agent for leasing office space in the Building for the tenant occupancy thereof (hereinafter called “Leasing”) and agrees:

   (a) to refer all inquiries and offers for Leasing to Leasing Agent;

   (b) to cooperate with Leasing Agent in every reasonable way necessary to facilitate Leasing Agent’s performance of its duties hereunder; and

   (c) to pay the commission (which shall be the only payments due hereunder from Owner to Leasing Agent), as hereinafter provided, if, and only if, a lease for the tenant occupancy of the space in question is duly executed and delivered by Owner and the tenant and all conditions to the effectiveness of such lease have been satisfied or waived. No commission shall be due to Leasing Agent unless a lease is so executed and delivered, and all such conditions have been satisfied or waived. Owner reserves the right to reject any prospective tenant or to refuse to enter into a proposed lease for any reason without thereby incurring any liability to Leasing Agent for a commission hereunder or otherwise. If a lease is not signed for any reason (including, without limitation, the disapproval of such lease by Owner’s lender(s)), then in no event shall a commission or any other compensation be due and payable to Leasing Agent in respect of such proposed lease.

2. *Leasing Effort; Submission of Leases to Owner*. Leasing Agent covenants and agrees to use its best efforts to effect the Leasing in an expeditious manner and at the rental rates and other terms established by Owner. Leasing Agent shall quote the prevailing square foot rental rate and other terms established by Owner in writing for the specific space in question and promptly will submit to Owner all terms of all bona fide offers to lease space in the Building. In connection with the foregoing, Leasing Agent’s responsibilities shall include diligent performance of all of the following:

   (a) Professional consultation with Owner, the architect of the Building, Owner’s construction manager and contractors engaged by Owner to perform work in the Building with respect to all aspects of Building design, construction, tenant finishing and rental schedules as they relate to the Building’s marketability, proper office environment qualities and maintenance factors; and

   (b) Professional solicitation of prospective tenants for the Building. This will include, but not be limited to, a marketing campaign consisting of personal solicitation of prospective tenants who are now known or shall become known to Leasing Agent and a direct mail marketing campaign directed to suitable local, national and international organizations. Thereafter, Leasing Agent will pursue personal follow-up of, and will attempt to solicit a response from, those prospective tenants who Owner and Leasing Agent agree have expressed (or are likely to have) an interest in leasing space in the Building; and

   (c) Cooperation and consultation with other leasing brokers regarding the leasing of the Building. Leasing Agent shall actively pursue cooperation with other brokers and shall periodically update the brokerage community with rental terms, amenities, and space availability in the Building to assure full awareness of the Building. Leasing Agent will either visit active real estate leasing organizations and give a detailed, personal presentation

of the Building or invite representatives of such organizations to the Building. The compensation of cooperating brokers will be paid by Leasing Agent as provided in Section 5 below; and

(d) Consulting activities relating to the development of a marketing program and consultation with Owner with regard to the preparation and supervision of all advertising and promotional matters and events pertaining to the Leasing. This shall include, but not be limited to, consultation with Owner with regard to (i) the organization and coordination of promotional events, (ii) preparation and dissemination by Leasing Agent of a leasing brochure and other necessary or desirable materials with respect to the Leasing, and (iii) signage approved by Owner. Leasing Agent shall prepare for Owner's approval a marketing, advertising and promotional schedule and budget and any amendments to such schedule and budget as Owner may require; and

(e) Coordination and supervision of the preparation of preleasing space studies and plans for prospective tenants, which studies and plans shall be prepared by an interior space planner, architect, or contractor designated by Owner; and

(f) Leasing Agent shall attend such meetings regarding the Building with Owner and others as Owner shall request. On a weekly basis, Leasing Agent will orally keep Owner fully informed as to its leasing efforts, contacts with prospective tenants and any co-broker activities. Leasing Agent further will report orally (and, upon written request of Owner, Leasing Agent shall make such reports in writing) on tenant interest and market conditions that affect the leasing of the Building and will make recommendations as to any adjustments Leasing Agent feels are necessary to accommodate changing market conditions and to accomplish full leasing in the most expeditious and profitable manner. At the request of Owner, from time to time, Leasing Agent will meet with Owner in _____, _____ in order to review the progress and results of Leasing Agent's performance of this Agreement. Leasing Agent shall, at the request of Owner, and at Leasing Agent's cost, meet with Owner in Boston, Massachusetts one time per year in order to review the progress and results of Leasing Agent's performance of this Agreement; and

(g) Leasing Agent shall prepare and submit to Owner once every two (2) weeks, in a form acceptable to Owner, written summaries of proposals outstanding to prospective tenants and leases in process; and

(h) Leasing Agent shall prepare and submit to Owner once every two (2) weeks an updated list of prospective tenants in a form approved by Owner; and

(i) Leasing Agent shall, promptly after delivery or receipt by Leasing Agent, as the case may be, give Owner copies of any correspondence and other written materials submitted by Leasing Agent to any prospective tenant and to any tenant of the Building, as well as copies of any correspondence and other written materials received by Leasing Agent from any such prospective tenant or tenant; and

(j) Leasing Agent shall coordinate its services with the Owner's property manager and shall cooperate with the property manager, in such manner as the property manager shall require in order to effect the Leasing in the Owner's best interest; and

(k) Leasing Agent shall submit to the Owner, for the Owner's approval, an annual budget for the Leasing, and the Leasing Agent shall make such revisions to such budget as the Owner may require; and

(l) Leasing Agent shall, throughout the term of this Agreement, submit to the Owner written quarterly projections estimating the success of the Leasing program and its impact on the approved annual budget for the Leasing.

Owner reserves the right to approve all prospective tenants and all terms, conditions, covenants and provisions of any proposed lease. Owner agrees to respond promptly to submissions by Leasing Agent with respect to proposed leases so as not to impede Leasing Agent's ability to lease the Building in a timely fashion pursuant to the terms of this Agreement and so as not to adversely affect the Leasing of the Building in accordance with the terms of this Agreement.

The relationship of the Owner to the Leasing Agent created by this Agreement is, and shall at all times remain, that of principal and agent. This Agreement authorizes the Leasing Agent only to solicit offers to enter into leases of space in the Building and the Leasing Agent shall have no authority to offer to enter into or to enter into any lease, term sheet, letter of intent or other agreement of any nature on behalf of Owner. At all times the exercise of the Leasing Agent's power shall be upon and limited to the conditions and terms herein set forth. In all dealings with third parties the Leasing Agent shall disclose its agency role and the limitations thereon.

3. *Project Team*. Leasing Agent shall employ a project team (the "Project Team"), the leader of which shall be _____ ("_____"). The Project Team (including _____) shall be specifically assigned to the services to be performed by

Leasing Agent under this Agreement. Without limiting the foregoing, _____ shall devote at least _____ (_____) full working days of each week to the services to be performed by Leasing Agent hereunder, and shall be physically present at the Property on such working days. All members of the Project Team shall be subject to Owner's written approval. Leasing Agent shall not, without Owner's prior written approval, remove any member of the Project Team (it being understood and agreed that Owner's approval shall not be required if a member of the Project Team voluntarily resigns from Leasing Agent's employment or otherwise voluntarily terminates his or her business association with Leasing Agent (e.g., in the case of an independent contractor)). Leasing Agent shall not enter into any agreement (whether verbal or written) whereby any member of the Project Team will either perform additional duties for other owners or represent any other office building in the _____ and which is in competition with the Building. Without limiting any other remedy of Owner, if Owner determines, in its sole judgment, that the time spent by the then members of the Project Team is not sufficient or adequate to successfully perform the services to be performed by Leasing Agent hereunder, Leasing Agent, upon Owner's request, shall hire (at Leasing Agent's expense) a "full-time" person (subject to Owner's prior written approval) to join the Project Team, which person shall devote all of his or her working hours to the services to be performed by Leasing Agent hereunder.

4. *Commission and Payment of Expenses*.

   (a) Owner shall pay Leasing Agent an all-inclusive commission in accordance with Exhibit A attached hereto in respect of Leases, as hereinafter defined. Fifty (50%) percent of said commission ("Initial Payment") shall be payable upon execution and delivery of the Lease by Owner and satisfaction or waiver of all conditions to the effectiveness of the Lease, the remainder of said commission shall be payable upon the later to occur of the tenant's taking occupancy of the leased space and the receipt by the Owner of the first payment of rent from such tenant. Notwithstanding the foregoing, if a Lease is terminated before the date that the tenant takes occupancy pursuant to a termination right set forth in such Lease, Leasing Agent shall retain the Initial Payment as Leasing Agent's sole compensation in connection with such Lease.

   (b) For the purposes hereof, "Leases" shall be defined as leases of any portion of the Building entered into during the term of this Agreement or with respect to which Leasing Agent is entitled to a commission pursuant to Paragraph 6(c) hereof. Notwithstanding anything to the contrary herein contained, "Leases" shall not include, and no fee shall be pay-able to Leasing Agent in connection with, any leases ("Owner Leases") to Owner or any affiliates of Owner which aggregate up to ten (10%) percent of the rentable area of the Building. Whether or not the building manager is an affiliate of Owner, any lease of the building management office shall be considered as an Owner Lease.

   (c) Except for the commission provided for above, Leasing Agent shall receive no compensation or reimbursement of expenses from Owner.

5. *Cooperating Brokers*.

   (a) Leasing Agent hereby agrees to distribute listings for initial occupancy to reputable and active real estate brokers ("cooperating brokers") within a reasonably effective area of the Building pursuant to Section 2(c) of this Agreement, to supply the cooperating brokers with information sufficient to enable them to assist in the Leasing and to reasonably cooperate with them on any matter that will aid in the Leasing. Leasing Agent shall pay any and all commissions or other amounts that may become due to licensed cooperating brokers (except those dealing directly with Owner). Such payments shall be paid to a cooperating broker in connection with any Lease promptly after Leasing Agent receives payment from Owner on account of the commission due to Leasing Agent for such Lease. Leasing Agent shall cause each cooperating broker to agree in writing that such cooperating broker will not look to the Building or Owner but will look solely to Leasing Agent for the payment of any commission.

   (b) Owner shall have no obligation to any broker or brokers cooperating with Leasing Agent (except those dealing directly with Owner), and (except for claims made by a cooperating broker or brokers dealing directly with Owner) Leasing Agent shall indemnify and hold harmless Owner from and against any and all claims for commissions or fees for services rendered or reimbursements for expenses incurred by a cooperating broker or brokers. Notwithstanding anything to the contrary herein contained, (i) Leasing Agent's obligations under this Section 5(b) in respect of any Lease are conditioned upon Owner's paying to Leasing Agent the commission due to Leasing Agent in respect of such Lease, and (ii) in the event that Owner does not pay to Leasing Agent the Cooperating Commission, as such term is defined in Exhibit A hereto, due in connection with any Lease, Leasing Agent shall be relieved of its indemnity obligations under the immediately preceding sentence to the extent of such non-payment. If any cooperating broker institutes any claims, demands, suits or legal proceedings against Owner which is covered by the foregoing indemnity, Leasing Agent shall assume the defense thereof at its own

cost and expense; and Owner and Leasing Agent shall each have the right to participate in such defense with its own counsel. The provisions of this Section 5(b) shall survive termination of this Agreement.

6. *Term.*

(a) The term of this Agreement shall commence on _____ and, subject to earlier termination in accordance with the provisions of this Agreement, shall expire as of _____. Either party shall have the right (for any reason or no reason) to terminate the Agreement on thirty (30) days' prior written notice to the other party.

(b) In the event that either party is in material default of its obligations hereunder, the other party shall have the right to terminate this Agreement if such default is not cured within ten (10) days of receipt of written notice of such default from the non-defaulting party.

(c) Following termination of this Agreement, Leasing Agent shall continue to be entitled to receive, and Owner shall remain obligated to pay, the commission provided in Section 4 above in respect of (i) Leases executed and delivered prior to the effective termination date, and (ii) Leasing subsequently effected with any tenant ("Identified Prospect") (A) who was introduced to the Building during the term of this Agreement, and (B) whose name is on a list ("Identified Prospect List") to be furnished by Leasing Agent to Owner within ten (10) business days after the effective termination date, provided that such Identified Prospect executes and delivers a Lease within a period ("Post Expiration Period") of sixty (60) days following the termination of this Agreement. Notwithstanding the foregoing, with respect to an Identified Prospect with whom Owner commences negotiations within sixty (60) days after the effective termination date of this Agreement, if Owner does not execute and deliver a Lease with such Identified Prospect within said sixty (60) day period, the Post Expiration Period with respect to such Identified Prospect shall be extended until the earlier of: (x) one hundred twenty (120) days after the effective termination date of this Agreement, or (y) the date that negotiations between Owner and such Identified Prospect are discontinued. The only names permitted to be on the Identified Prospect List shall be names which have appeared on the most recent (i.e., the last list submitted by Leasing Agent to Owner prior to the effective termination date) updated list of prospective tenants which Leasing Agent is required to provide to Owner pursuant to Paragraph 2(h) hereof plus up to ten (10) additional prospective tenants who are introduced to the Building through the efforts of Leasing Agent between the date Owner receives such most recent updated list of prospective tenants and the effective termination date; provided, however, with respect to any such additional prospective tenants, no commission shall be payable to Leasing Agent if Leasing Agent did not actually show such additional prospective tenant premises in the Building. Subject to the provisions of Section 5 above, Leasing Agent shall pay any commissions payable to cooperating brokers (if any) in respect of any such leasing.

7. *Notices*. Except as otherwise expressly provided in this Agreement, all notices and other communications under this Agreement shall be in writing and shall be personally delivered, sent by reputable overnight courier or deposited in the U.S. mail, first class registered or certified, return receipt requested, postage prepaid,

(a) if addressed to Leasing Agent as follows:

with a copy addressed to:

(b) if addressed to Owner as follows:

with a copy addressed to:

Service of any notice shall be deemed effective on the day of actual delivery as shown by the addressee's registry or certification or other receipt. The rejection or refusal of delivery of any notice properly sent hereunder shall not render such notice ineffective, but such notice shall be deemed effective on the date of such rejection or refusal. Either party may, from time to time by like notice, change the address to which notices are to be sent to it.

8. *Limited Liability*. No member, manager or partner of Owner (nor any general or limited partner, stockholder, employee, director, trustee, manager or officer of such member or partner in Owner) shall be liable for the payment or performance of any of Owner's obligations under this Agreement and Leasing Agent shall look exclusively to the Property and to the uncollected rents, issues and profits therefrom for satisfaction of any such liability.

9. *Assignment; Captions; Entire Agreement*. This Agreement is personal to Leasing Agent and shall not be assignable by Leasing Agent, but the foregoing prohibition on assignment shall not prevent or prohibit Leasing Agent from utilizing cooperating brokers upon and subject to the terms and conditions contained in Section 5 above. The captions of this Agreement are for convenience and reference only and shall in no way define, limit or describe the scope or intent of this Agreement. This instrument constitutes the entire agreement of the parties and (subject to the prohibition on assignment hereinabove set forth) shall be binding upon their respective successors and assigns. In connection

with any (proposed) sale or disposition by Owner of its interest in the Property, Leasing Agent agrees to execute and deliver, within seven (7) days of Owner's request therefor, a certificate stating whether either party is in default under this Agreement (and, if so, the nature of such default) and setting forth any amounts then due and owing, and any amounts which Leasing Agent in good faith believes may thereafter become due and owing, to Leasing Agent hereunder. In the event that the successor to Owner's interest in the Property executes and delivers to Leasing Agent an agreement ("Assumption Agreement") whereby such successor agrees to assume Owner's obligations hereunder and to pay for the commissions provided for in this Agreement with respect to the Property, Leasing Agent agrees to become a signatory to such Assumption Agreement and, in connection therewith, to execute and deliver such Assumption Agreement within seven (7) days of its receipt thereof. Upon the execution of such Assumption Agreement by such successor and the sale or other disposition of Owner's interest in the Property to such successor, Owner shall be released from any further obligations hereunder with respect to such Property. There shall be no modification of this Agreement unless in writing. This Agreement shall be construed in accordance with the law of the State of _____.

10. *Indemnification*. Owner agrees to hold Leasing Agent harmless from all costs, claims, disputes, litigation or judgments against or incurred by Leasing Agent arising from any incorrect information intentionally supplied by Owner to Leasing Agent concerning the Property. Leasing Agent agrees to hold Owner and its agents harmless from all costs, claims, disputes, litigation or judgments against or incurred by Owner or its agents arising from any incorrect information (except that intentionally supplied by Owner) or representations supplied or made by Leasing Agent, including without limitation, any claim that the Owner is bound by any act or omission of Broker.

11. *Attorney's Fees*. In the event of any litigation between the parties where a judgment is rendered (final and beyond appeal) based upon a default of one of the parties hereto in its obligations hereunder, the losing party shall reimburse the prevailing party for its reasonable costs and attorney's fees incurred in connection with such litigation.

12. *Non-Discrimination*. It is understood that it is illegal for either Owner or Leasing Agent to refuse to display or lease the Property to any person because of race, creed, color, religion, national origin, sex, sexual orientation, marital status or physical disability.

EXECUTED as a sealed instrument as of the date first written above.

LEASING AGENT:

By: ______________________________

Name:
Title:
Hereunto Duly Authorized

OWNER:

By: ______________________________

Name:
Title:
Hereunto Duly Authorized

EXHIBIT A

COMMISSIONS PAYABLE TO LEASING AGENT

EXHIBIT 2B—Lease

This instrument is an indenture of lease by and between _____ a _____ ("Landlord") and _____, a _____ ("Tenant").

The parties to this instrument hereby agree with each other as follows:

ARTICLE I
SUMMARY OF BASIC LEASE PROVISIONS

1.1 INTRODUCTION

As further supplemented in the balance of this instrument and its Exhibits, the following sets forth the basic terms of this Lease, and, where appropriate, constitutes definitions of certain terms used in this Lease.

1.2 BASIC DATA

Date:	____________________
Landlord:	____________________
Present Mailing Address of Landlord	____________________ ____________________ ____________________ ____________________
Payment Address:	____________________ ____________________ ____________________ ____________________
Managing Agent:	____________________ ____________________ ____________________
Tenant:	____________________
Mailing Address of Tenant	____________________ ____________________ ____________________ ____________________
Premises:	____________________ ____________________ ____________________
Lease Term:	_____ (plus the partial calendar month immediately following the Term Commencement Date if the Term Commencement Date does not fall on the first day of a month) subject to extension as provided in Section 3.3 hereof.
Term Commencement Date:	____________________
Base Rent:	For the first period beginning on _____ and ending on _____, at the rate of $_____ per annum ($____ per month); For the first period beginning on _____ and ending on _____, at the rate of $_____ per annum ($_____ per month); and For the first period beginning on _____ and ending on _____, at the rate of $_____ per annum ($_____ per month);

Rent Commencement Date:	________________
Security Deposit:	$ ________________
Guarantor of Tenant's Obligations	________________
Permitted Use:	________________ and for no other purpose or purposes.
Tenant's Proportionate Share:	_____ (__%). Tenant's Proportionate Share shall be adjusted in the event of any increase or decrease in the total square footage of rentable floor area contained within the Premises and/or the Building, based upon the square footage of rentable floor area contained within the Premises as compared to the square footage of rentable floor area contained within the Building, as increased or decreased.

1.3 ENUMERATION OF EXHIBITS

Exhibit A:	Plan showing the Premises.
[If Applicable: Exhibit B:	Term Commencement Date Agreement]

ARTICLE II
DESCRIPTION OF PREMISES AND APPURTENANT RIGHTS

2.1 LOCATION OF PREMISES

The Landlord hereby leases to Tenant, and Tenant hereby accepts from Landlord, the premises (the "Premises") identified on Exhibit A in Landlord's building (the "Building") located at _____. Nothing in Exhibit A shall be treated as a representation that the Premises or the Building shall be precisely of the area, dimensions, or shapes as shown, it being the intention of the parties only to show diagrammatically, rather than precisely, on Exhibit A the layout of the Premises and the Building.

2.2 APPURTENANT RIGHTS AND RESERVATIONS

Tenant shall have, as appurtenant to the Premises, rights to use in common with others entitled thereto the common facilities included in the Building or the land on which the Building is located (the "Lot"), including common walkways, driveways, lobbies, hallways, ramps, and stairways. Such rights shall always be subject to reasonable rules and regulations from time to time established by Landlord by suitable notice, and to the right of Landlord to designate and to change from time to time the areas and facilities so to be used, provided that such changes do not unreasonably interfere with the use of the Premises for the Permitted Use.

Not included in the Premises are the roof or ceiling, the floor and all perimeter walls of the space identified in Exhibit A, except the inner surfaces thereof and the perimeter doors and windows. The Landlord reserves the right to install, use, maintain, repair and replace in the Premises (but in such manner as not unreasonably to interfere with Tenant's use of the Premises) utility lines, shafts, pipes, and the like, in, over and upon the Premises, provided that the same are located above the dropped ceiling (or, if there is no dropped ceiling, then within three (3) feet of the roof deck), below the floor surfaces or tight against demising walls or columns. Landlord agrees to repair any damage to the Premises caused by the installation of any such items. Such utility lines, shafts, pipes and the like shall not be deemed part of the Premises under this Lease. The Landlord also reserves the right to alter or relocate any common facility, provided that substitutions are at least equivalent in quality and functional utility to the common facilities as of the date of this Lease, and to change the lines of the Lot.

ARTICLE III
TERM OF LEASE: CONDITION OF PREMISES

3.1 TERM OF LEASE

The term of this Lease shall be the period specified in Section 1.2 hereof as the "Lease Term" commencing upon the Term Commencement Date specified in Section 1.2. [Add if applicable: Promptly upon the determination of the date constituting the Term Commencement Date, the parties hereto shall enter into a term commencement date agreement substantially in the form of Exhibit B attached hereto and made a part hereof.]

3.2 CONDITION OF PREMISES

Tenant acknowledges that it has inspected the Premises and agrees to accept same in its "as is" condition, and further Tenant agrees that Landlord has no obligation to perform any work whatsoever in order to prepare the Premises for Tenant's occupancy hereunder.

3.3 EXTENSION OPTION

Tenant may elect to extend the term of this Lease for _____ (__) _____ (__) year period (the "Extension Term"), by giving Landlord notice of such election (the "Election Note") not earlier than fifteen (15) months nor later than twelve (12) months before the expiration of the Lease Term, provided Tenant is not in default on the date such notice is given or on the commencement date of the Extension Term. Such extension shall be upon the same terms, covenants, and conditions contained in this Lease except that Tenant shall have no further right to extend the Lease Term and except that the Base Rent for the Extension Term shall be at a rate equal to the greater of $_____ per annum or ninety-five percent (95%) of the fair market rent for the Premises as of the commencement of the Extension Term. If Landlord and Tenant are unable to agree on the amount of such fair market rent by the date that is thirty (30) days after the date of the Election Notice, then Landlord shall promptly specify in writing by such thirtieth day the rent (the "Landlord's Rental Rate") at which Landlord is willing to lease the Premises for the Extension Term and Tenant shall promptly specify in writing by such thirtieth day the rent (the "Tenant's Rental Rate") which Tenant is willing to pay for the Premises for the Extension Term and the amount of the fair market rent shall be established by appraisal in the following manner. The Landlord and Tenant shall each appoint one appraiser by the fortieth (40th) day after the Election Notice, and the two appraisers so appointed shall determine the fair market rent within seventy-five (75) days of the Election Notice. If either Landlord or Tenant fails to appoint an appraiser within such 40-day period, then the other party shall have the power to appoint the appraiser for the defaulting party. If such appraisers are unable to agree on the amount of such fair market rent within such 75-day period, they shall appoint a third appraiser within ten (10) days of the expiration of such period. The fair market rent shall be the amount agreed upon in writing by any two of the three appraisers and the rent so determined shall be conclusive on Landlord and Tenant. Each party shall bear the cost of its appraiser, and the cost of the third appraisal shall be split equally between the parties; provided that if the rental rate as so determined is equal to or greater than Landlord's Rental Rate, then Tenant shall pay the entire cost of all appraisers and if such rate as so determined is equal to or less than Tenant's Rental Rate, then Landlord shall pay the entire cost of all appraisers. Until such time as the fair market rent is so determined, Tenant shall pay Base Rent at the rate of $_____ per annum with an appropriate adjustment once the fair market rent is determined.

ARTICLE IV
RENT

4.1 RENT PAYMENTS

The Base Rent (at the rates specified in Section 1.2 hereof) and the additional rent or other charges payable pursuant to this Lease (collectively the "Rent") shall be payable by Tenant to Landlord at the Payment Address or such other place as Landlord may from time to time designate by notice to Tenant without any demand whatsoever except as otherwise specifically provided in this Lease and without any counterclaim, offset or deduction whatsoever. Rent shall be made payable to the order of Managing Agent as agent for Landlord.

(a) Commencing on the Rent Commencement Date, Base Rent and the monthly installments of Tenant's Proportionate Share of the Taxes and Tenant's Proportionate Share of Operating Expenses shall be payable in advance on the first day of each and every calendar month during the term of this Lease. If the Rent Commencement Date falls on a day other than the first day of a calendar month, the first payment which Tenant shall make shall be made on the Rent Commencement Date and shall be equal to a proportionate part of such monthly Rent for the partial month from the Rent Commencement Date to the first day of the succeeding calendar month, and the

monthly Rent for such succeeding calendar month. As used in this Lease, the term "lease year" shall mean any calendar year or part thereof falling within the Lease Term.

(b) Base Rent and the monthly installments of Tenant's Proportionate Share of the Taxes and Tenant's Proportionate Share of Operating Expenses for any partial month shall be paid by Tenant to Landlord at such rate on a *pro rata* basis. Any other charges payable by Tenant on a monthly basis, as hereinafter provided, shall likewise be prorated.

(c) Rent not paid within five (5) days of the date due shall bear interest at a rate (the "Lease Interest Rate") equal to the lesser of (i) the so-called base rate of interest charged from time to time by BankBoston, N.A., *plus* three percent (3%) per annum or (ii) the maximum legally permissible rate, from the due date until paid.

4.2 REAL ESTATE TAX

(a) The term "Taxes" shall mean all taxes and assessments (including without limitation, assessments for public improvements or benefits and water and sewer use charges), and other charges or fees in the nature of taxes for municipal services which at any time during or in respect of the Lease Term may be assessed, levied, confirmed or imposed on or in respect of, or be a lien upon, the Building and the Lot, or any part thereof, or any rent therefrom or any estate, right, or interest therein, or any occupancy, use, or possession of such property or any part thereof, and ad valorem taxes for any personal property used in connection with the Building or Lot. Without limiting the foregoing, Taxes shall also include any payments made by Landlord in lieu of taxes. The Landlord agrees that Tenant's share of any special assessment shall be determined (whether or not Landlord avails itself of the privilege so to do) as if Landlord had elected to pay the same in installments over the longest period of time permitted by applicable law and Tenant shall be responsible only for those installments (including interest accruing and pay-able thereon) or parts of installment that are attributable to periods within the Lease Term.

Should the Commonwealth of Massachusetts, or any political subdivision thereof, or any other governmental authority having jurisdiction over the Building, (1) impose a tax, assessment, charge or fee, which Landlord shall be required to pay, by way of substitution for or as a supplement to such Taxes, or (2) impose an income or franchise tax or a tax on rents in substitution for or as a supplement to a tax levied against the Building or the Lot or any part thereof and/or the personal property used in connection with the Building or the Lot or any part thereof, all such taxes, assessments, fees or charges ("Substitute Taxes") shall be deemed to constitute Taxes hereunder. Taxes shall also include, in the year paid, all fees and costs incurred by Landlord in seeking to obtain a reduction of, or a limit on the increase in, any Taxes, regardless of whether any reduction or limitation is obtained. Except as hereinabove provided with regard to Substitute Taxes, Taxes shall not include any inheritance, estate, succession, transfer, gift, franchise, net income or capital stock tax.

(b) The Tenant shall pay to Landlord, as additional rent, Tenant's Proportionate Share of the Taxes assessed against the Building and Lot during any tax year (i.e., July 1 through June 30, as the same may change from time to time) or part thereof during the Lease Term. The Tenant shall pay to Landlord, together with monthly payments of Base Rent, *pro rata* monthly installments on account of the projected Taxes for each tax year reasonably calculated by Landlord from time to time by Landlord with an adjustment made after the close of the tax year, to account for actual Taxes for such tax year. The initial monthly payments on account of Taxes shall be $_____ per month. If the total of such monthly installments in any tax year is greater than Tenant's Proportionate Share of actual Taxes for such tax year, Tenant shall be entitled to a credit against Tenant's rental obligations hereunder in the amount of such difference or, if the Lease Term has expired and Tenant has no outstanding monetary obligations to Landlord, Landlord shall promptly pay such amount to Tenant. If the total of such monthly installments is less than such liability for such tax year, Tenant shall pay to Landlord the amount of such difference within thirty (30) days after Tenant receives Landlord's invoice therefor.

(c) If any Taxes, with respect to which Tenant shall have paid Tenant's Proportionate Share, shall be adjusted to take into account any abatement or refund, Tenant shall be entitled to a credit against rental obligations hereunder, in the amount of Tenant's Proportionate Share of such abatement or refund less Landlord's costs or expenses, including without limitation appraiser's and attorneys' fees, of securing such abatement or refund or, if the Lease Term has expired and Tenant has no outstanding monetary obligations to Landlord, Landlord shall promptly pay such amount to Tenant. The Tenant shall not apply for any real estate tax abatement without the prior written consent of Landlord.

(d) Tenant shall pay or cause to be paid, prior to delinquency, any and all taxes and assessments levied upon all trade fixtures, inventories and other personal property placed in and upon the Premises by Tenant.

4.3 TENANT'S SHARE OF OPERATING COSTS

The Tenant shall pay to Landlord, as additional rent, Tenant's Proportionate Share of Operating Costs (defined below). The Tenant shall pay to Landlord *pro rata* monthly installments on account of the projected Operating Costs for each lease year during the Lease Term in amounts reasonably calculated from time to time by Landlord with an adjustment made after the close of the lease year, to account for actual Operating Costs for such lease year. The initial monthly payments on account of Operating Costs shall be $_____ per month. If the total of such monthly installments in any lease year is greater than Tenant's Proportionate Share of actual Operating Costs for such lease year, Tenant shall be entitled to a credit against Tenant's monthly installments on account of projected Operating Costs hereunder in the amount of such difference or, if the Lease Term has expired and Tenant has no outstanding monetary obligations to Landlord, Landlord shall promptly pay such amount to Tenant. If the total of such monthly installments is less than such liability for such lease year, Tenant shall pay to Landlord the amount of such difference, as additional rent, within thirty (30) days after Tenant receives Landlord's invoice therefor.

As used in this Lease, the term "Operating Costs" shall mean all costs and expenses incurred by Landlord in connection with the operation, insuring, repair, equipping, maintenance, replacement, management, cleaning and protection (collectively, "the Operation") of the Building, the Building heating, ventilating, electrical, plumbing and other systems and the Lot (collectively, "the Property"), including, without limitation, the following:

(1) All expenses incurred by Landlord or its agents that shall be related to employment of day and night supervisors, janitors, handymen, carpenters, engineers, firemen, mechanics, electricians, plumbers, guards, cleaners and other personnel (including amounts incurred for wages, salaries and other compensation for services, payroll, social security, unemployment and similar taxes, worker's compensation insurance, disability benefits, pensions, hospitalization, retirement plans and group insurance, uniforms and working clothes and the cleaning thereof, and expenses imposed on Landlord or its agents pursuant to any collective bargaining agreement), for services in connection with the Operation of the Property, and personnel engaged in supervision of any of the persons mentioned above; provided, however, that the costs of employing personnel who work less than full-time in connection with the Operation of the Property shall be equitably adjusted;

(2) The cost of services, materials and supplies furnished or used in the Operation of the Property, including, without limitation, the cost to perform Landlord's obligations under Sections 8.2 and 9.1 of this Lease;

(3) The amounts paid to managing agents and for legal and other professional fees relating to the Operation of the Property, but excluding such fees paid in connection with (x) negotiations for or the enforcement of leases; and (y) seeking abatements of Taxes; provided, however, that management fees shall not exceed prevailing market rates;

(4) Insurance premiums and the positive difference, if any, between the amounts of what the insurance premiums would be if such insurance were maintained without deductibles over the actual premiums for such policies;

(5) Costs for electricity, steam and other utilities required in the Operation of the Property;

(6) Water and sewer use charges;

(7) The costs of snow-plowing and removal and landscaping;

(8) Amounts paid to independent contractors for services, materials and supplies furnished for the Operation of the Property; and

(9) All other expenses incurred in connection with the Operation of the Property.

Operating Costs may be incurred directly or by way of reimbursement, and shall include taxes applicable thereto. The following shall be excluded from Operating Costs:

(1) Salaries of officers and executives of Landlord not connected with the Operation of the Property (i.e., above the level of Building Manager) and other costs and expenses associated with the Operation of the Property, but allocable to other properties (e.g., where a service is provided at a single cost to both the Property and another property of Landlord, an equitable allocation shall be made to exclude the cost fairly attributable to such other property);

(2) Depreciation of the original construction costs of the Building;

(3) Expenses relating to tenants' alterations;

(4) Interest on indebtedness;

(5) Expenses for which Landlord, by the terms of this Lease or any other lease, makes a separate charge;

(6) Real estate taxes;

(7) The cost of any electric current or other utilities furnished to the Building tenants and separately metered or billed;

(8) Leasing fees or commissions; and

(9) Capital and other expenses incurred in the construction of additional leasable area on the Property.

ARTICLE V
USE OF PREMISES

5.1 PERMITTED USE

Tenant agrees that the Premises shall be used and occupied by Tenant only for the purposes specified as the Permitted Use thereof in Section 1.2 of this Lease, and for no other purpose or purposes.

The Tenant shall comply and shall cause its employees, agents, and invitees to comply with such reasonable rules and regulations as Landlord shall from time to time establish for the proper regulation of the Building and the Lot, provided that Landlord gives Tenant reasonable advance notice thereof and that such additional rules and regulations shall be of general application to all the tenants in the Building, except where different circumstances justify different treatment.

5.2 COMPLIANCE WITH LAWS

Tenant agrees that no trade or occupation shall be conducted in the Premises or use made thereof which will be unlawful, improper or contrary to any law, ordinance, by-law, code, rule, regulation or order applicable in the municipality in which the Premises are located or which will disturb the quiet enjoyment of the other tenants of the Building. Tenant shall obtain any and all approvals, permits, licenses, variances and the like from governmental or quasi-governmental authorities, including without limitation any Architectural Access Board and Board of Fire Underwriters (collectively, "Approvals") which are required for Tenant's use of the Premises, including, without limitation, any which may be required for any construction work and installations, alterations or additions made by Tenant to, in, on or about the Premises; provided, however, that Tenant shall not seek or apply for any Approvals without first having given Landlord a reasonable opportunity to review any applications for Approvals and all materials and plans to be submitted in connection therewith and obtaining Landlord's written consent, which consent shall not be unreasonably withheld. In any event, Tenant shall be responsible for all costs, expenses, and fees in connection with obtaining all Approvals. Without limiting the general application of the foregoing, Tenant shall be responsible for compliance of the Premises, including, without limitation, any alterations it may make to the Premises with the requirements of the Americans with Disabilities Act (42 U.S.C. Section 12101 et seq.) and the regulations and Accessibility Guidelines for Buildings and Facilities issued pursuant thereto, as the same may be amended from time to time (collectively, the "ADA"). The Landlord shall be responsible for the compliance with the requirements of the ADA of (x) the common areas of the Building and Lot and (y) the access to the Premises from the common areas. Tenant's inability to obtain or delay in obtaining any such Approval shall in no event reduce, delay, or terminate Tenant's rental, payment, and performance obligations hereunder. Tenant shall, at its own cost and expense, (i) make all installations, repairs, alterations, additions, or improvements to the Premises required by any law, ordinance, by-law, code, rule, regulation or order of any governmental or quasi-governmental authority; (ii) keep the Premises equipped with all required safety equipment and appliances; and (iii) comply with all laws, ordinances, codes, rules, regulations and orders and the requirements of Landlord's and Tenant's insurers applicable to the Premises, Building and Lot. Tenant shall not place a load upon any floor in the Premises exceeding the lesser of (a) the floor load per square foot of area which such floor was designed to carry as certified by Landlord's architect and (b) the floor load per square foot of area which is allowed by law. Landlord reserves the right to prescribe the weight and position of all business machines and mechanical equipment, including safes, which shall be placed so as to distribute the weight.

5.3 INSURANCE RISKS

Tenant shall not permit any use of the Premises which will make voidable or, unless Tenant pays the extra insurance premium attributable thereto as provided below, increase the premiums for any insurance on the Building or on the contents of said property or which shall be contrary to any law or regulation from time to time established by the New England Fire Insurance Rating Association (or any successor organization) or which shall require any alteration or addition to the Building. Tenant shall, within thirty (30) days after written demand therefor, reimburse Landlord

and all other tenants for the costs of all extra insurance premiums caused by Tenant's use of the Premises. Any such amounts shall be deemed to be additional rent hereunder.

5.4 ELECTRICAL EQUIPMENT

The Tenant shall not, without Landlord's written consent in each instance, connect to the electrical distribution system any fixtures, appliances, or equipment which will operate individually or collectively at a wattage in excess of the capacity of the electrical system serving the Premises as the same may be reasonably determined by Landlord and Landlord may audit Tenant's use of electric power to determine Tenant's compliance herewith. If Landlord, in its sole discretion, permits such excess usage, Tenant will pay for the cost of such excess power as additional rent, together with the cost of installing any additional risers, meters, or other facilities that may be required to furnish or measure such excess power to the Premises.

5.5 TENANT'S OPERATIONAL COVENANTS

(a) Affirmative Covenants

In regard to the use and occupancy of the Premises, Tenant will at its expense: (1) keep the inside and outside of all glass in the doors and windows of the Premises reasonably clean; (2) replace promptly any cracked or broken glass of the Premises with glass of like kind and quality; (3) maintain the Premises in a clean, orderly and sanitary condition and free of insects, rodents, vermin and other pests; (4) keep any garbage, trash, rubbish or other refuse in vermin-proof containers within the interior of the Premises until removed (and Tenant shall cause the Premises to be inspected and exterminated on a regular basis by a reputable, licensed exterminator and shall provide Landlord, on request, with a copy of Tenant's contract for such services); (5) keep all mechanical apparatus free of vibration and loud noise which may be transmitted beyond the Premises; and (6) comply with and observe all rules and regulations reasonably established by Landlord from time to time.

(b) Negative Covenants

In regard to the use and occupancy of the Premises and common areas, Tenant will not: (7) place or maintain any trash, refuse or other articles in any vestibule or entry of the Premises, on the sidewalks or corridors adjacent thereto or elsewhere on the exterior of the Premises so as to obstruct any corridor, stairway, sidewalk or common area; (8) permit undue accumulations of or burn garbage, trash, rubbish or other refuse within or without the Premises; (9) cause or permit objectionable odors to emanate or to be dispelled from the Premises; or (10) commit, or suffer to be committed, any waste upon the Premises or any public or private nuisance or other act or thing which may disturb the quiet enjoyment of any other tenant or occupant of the Building, or use or permit the use of any portion of the Premises for any unlawful purpose; (11) park trucks or other vehicles in a manner that will block access to the loading docks serving the Building, except when Tenant is actively using such loading docks.

5.6 SIGNS

Except as expressly permitted in this Section 5.6, Tenant shall not place any signs, placards, or the like on the Building or in the Premises that will be visible from outside the Premises (including without limitation both interior and exterior surfaces of windows). Subject to Tenant obtaining all necessary approvals and permits therefor, Tenant may erect one exterior sign in a location designated by Landlord containing Tenant's name and no advertising material. Plans and specifications, including, without limitation, artwork, for such sign must be submitted to Landlord for its written approval before installation, which approval shall not be unreasonably withheld. In any event, the total area of Tenant's exterior sign shall not exceed that proportion of the total area of exterior signage allowed on the Building under zoning that the floor area of the Premises bears to the total floor area of the Building. The costs of all interior and exterior signs and the installation thereof, including the costs of any required permits or approvals, shall be the responsibility of Tenant. The Tenant shall comply at its own expense with the requirements of all laws and regulations affecting the maintenance of Tenant's signs. Tenant shall remove all signs upon termination of this Lease and shall return the Premises and the Building to their condition prior to the placement or erection of said signs.

5.7 HAZARDOUS MATERIALS

The Tenant shall not use, handle, store or dispose of any oil, hazardous or toxic substances, materials or wastes (collectively "Hazardous Materials") in, under, on or about the Property except for such storage and use consented to by Landlord in advance which consent may be withheld in Landlord's sole and absolute discretion. Any Hazardous Materials in the Premises, and all containers therefor, shall be used, kept, stored and disposed of in conformity with all applicable laws, ordinances, codes, rules, regulations and orders of governmental authorities. If the transportation, storage, use or disposal of Hazardous Materials anywhere on the Property in connection with Tenant's use of the

Premises results in (1) contamination of the soil or surface or ground water or (2) loss or damage to person(s) or property, then Tenant agrees (i) to notify Landlord immediately of any contamination, claim of contamination, loss or damage, (ii) after consultation with and approval by Landlord, to clean up all contamination in full compliance with all applicable statutes, regulations and standards, and (iii) to indemnify, defend and hold Landlord harmless from and against any claims, suits, causes of action, costs and fees, including, without limitation, attorneys' fees, arising from or connected with any such contamination, claim of contamination, loss or damage. This provision shall survive the termination of this Lease. No consent or approval of Landlord shall in any way be construed as imposing upon Landlord any liability for the means, methods, or manner of removal, containment or other compliance with applicable law for and with respect to the foregoing. The terms of this Section 5.7 shall apply to any transportation, storage, use or disposal of Hazardous Materials irrespective of whether Tenant has obtained Landlord's consent therefor but nothing in this Lease shall limit or otherwise modify the requirement of obtaining Landlord's prior consent as set forth in the first sentence of this Section 5.7.

ARTICLE VI
INSTALLATIONS, ALTERATIONS AND ADDITIONS

6.1 INSTALLATIONS, ALTERATIONS, AND ADDITIONS

Tenant shall not make structural installations, alterations, or additions to the Premises, but may make nonstructural installations, alterations or additions provided that Landlord consents thereto in advance and in writing, which consent shall not be unreasonably withheld, delayed or conditioned as to work in the existing industrial space that will not affect the utility or building service systems or equipment. In any event, Tenant shall not demolish the existing office space in the Premises, without the prior written approval of Landlord, which approval may be withheld in Landlord's sole and absolute discretion. In no event shall Landlord's approval of any proposed installations, alterations, or additions to the Premises, whether in connection with Tenant's initial leasehold improvements or otherwise, constitute a representation by Landlord that such work complies with the requirements of any applicable law or regulation, including without limitation the requirements of the ADA. Any installations, alterations, or additions made by Tenant shall be at Tenant's sole cost and expense and shall be done in a good and workmanlike manner using materials of a quality at least equivalent to that of the existing improvements and in compliance with the requirements of Section 5.2; and prior to Tenant's use of the Premises, after the performance of any such work, Tenant shall procure certificates of occupancy and any other required certificates. Tenant shall not suffer or permit any mechanics' or similar liens to be placed upon the Premises for labor or materials furnished to Tenant or claimed to have been furnished to Tenant in connection with work of any character performed or claimed to have been performed at the direction of Tenant, and shall cause any such lien to be released of record forthwith without cost to Landlord. Any and all Tenant installations, alterations, and additions, in or to the Premises, that are intended to become or do become part of the real estate or fixtures therein (other than trade fixtures that are readily removable without damage to the Premises) including but not limited to equipment, appliances, and machinery, shall be fully paid for and free and clear of any and all chattel mortgages, conditional bills of sale, security interests, or any liens or encumbrances of any kind or nature. At all times when any installation, alteration, or addition by Tenant is in progress, there shall be maintained, at Tenant's cost and expense, insurance meeting the requirements of Section 11.3 below and certificates of insurance evidencing such coverage shall be furnished to Landlord prior to the commencement of any such work. Any installations, alterations or additions made by Tenant to the Premises, including, without limitation, all utility systems, fixtures, machinery, equipment, and appliances installed in connection therewith, other than movable personal property, shall become the property of Landlord at the termination or expiration of this Lease, unless Landlord requires, at the time of Landlord's approval of such work, Tenant to remove any of the same, in which event Tenant shall, at its own cost and expense, comply with such requirement and repair any damage caused by such removal.

ARTICLE VII
ASSIGNMENT AND SUBLETTING

7.1 PROHIBITION

Notwithstanding any other provision of this Lease, Tenant shall not, directly or indirectly, assign, mortgage, pledge or otherwise transfer, voluntarily or involuntarily, this Lease or any interest herein or sublet (which term, without limitation, shall include granting of concessions, licenses, and the like) or allow any other person or entity to occupy the whole or any part of the Premises, without, in each instance, having first received the express consent of Landlord, which consent may be withheld in Landlord's sole discretion. Any assignment of this Lease or subletting of the whole or any part of the Premises (other than as permitted to a subsidiary or a controlling corporation as set forth below) by Tenant without Landlord's express consent shall be invalid, void and of no force or effect. This prohibition

includes, without limitation, any assignment, subletting, or other transfer which would occur by operation of law, merger, consolidation, reorganization, acquisition, transfer or other change of Tenant's corporate or proprietary structure, including a change in the partners of any partnership, and the sale, pledge, or other transfer of any of the issued or outstanding capital stock of any corporate Tenant (unless such stock is publicly traded on a recognized security exchange or over-the-counter market). Any request for consent under this Section 7.1 shall set forth, in detail reasonably satisfactory to Landlord, the identification of the proposed assignee or sublessee, its financial condition and the terms on which the proposed assignment or subletting is to be made, including, without limitation, the rent or any other consideration to be paid in respect thereto and such request shall be treated as Tenant's warranty in respect of the information submitted therewith.

In any case where Landlord shall consent to any assignment or subletting, Tenant originally named herein shall remain fully liable for Tenant obligations hereunder, including, without limitation, the obligation to pay the rent and other amounts provided under this Lease and such liability shall not be affected in any way by any future amendment, modification, or extension of this Lease or any further assignment, other transfer, or subleasing and Tenant hereby irrevocably consents to any and all such transactions. Tenant agrees to pay to Landlord, within fifteen (15) days of billing therefor, all reasonable legal and other out-of-pocket expenses incurred by Landlord in connection with any request to assign or sublet. It shall be a condition of the validity of any permitted assignment or subletting that the assignee or sublessee agree directly with Landlord, in form satisfactory to Landlord, to be bound by all Tenant obligations hereunder, including, without limitation, the obligation to pay all Rent and other amounts provided for under this Lease and the covenant against further assignment or other transfer or subletting.

Without limiting Landlord's discretion to grant or withhold its consent to any proposed assignment or subletting, if Tenant requests Landlord's consent to assign this Lease or sublet all or any portion of the Premises, Landlord shall have the option, exercisable by notice to Tenant given within thirty (30) days after Landlord's receipt of such request, to terminate this Lease as of the date specified in such notice which shall be not less than thirty (30) nor more than sixty (60) days after the date of such notice for the entire Premises, in the case of an assignment or subletting of the whole, and for the portion of the Premises, in the case of a subletting of a portion. In the event of termination in respect of a portion of the Premises, the portion so eliminated shall be delivered to Landlord on the date specified in good order and condition in the manner provided in Section 8.1 at the end of the Lease Term and thereafter, to the extent necessary in Landlord's judgment, Landlord, at Tenant's sole cost and expense, may have access to and may make modification to the Premises so as to make such portion a self-contained rental unit with access to common areas, elevators and the like. Rent and Tenant's Proportionate Share shall be adjusted according to the extent of the Premises for which this Lease is terminated. Without limitation of the rights of Landlord hereunder in respect thereto, if there is any assignment of this Lease by Tenant for consideration or a subletting of the whole of the Premises by Tenant at a rent which exceeds the rent payable hereunder by Tenant, or if there is a subletting of a portion of the Premises by Tenant at a rent in excess of the subleased portion's pro rata share of the Rent payable hereunder by Tenant, then Tenant shall pay to Landlord, as additional rent, forthwith upon Tenant's receipt of the consideration (or the cash equivalent thereof) therefor, in the case of an assignment, and in the case of a subletting, seventy-five percent (75%) of the amount of any such excess rent. The provisions of this paragraph shall apply to each and every assignment of this Lease and each and every subletting of all or a portion of the Premises, whether to a subsidiary or controlling corporation of Tenant or any other person, firm or entity, in each case on the terms and conditions set forth herein. For the purposes of this Section 7.1, the term "rent" shall mean all rent, additional rent or other payments and/or consideration payable by one party to another for the use and occupancy of all or a portion of the Premises.

The requirement of Landlord's prior consent and Landlord's recapture right shall not, however, be applicable to an assignment of this Lease by Tenant to a subsidiary (for such period of time as at least 50% of the stock of such subsidiary continues to be owned by Tenant, it being agreed that the subsequent sale or transfer of the stock of such subsidiary (either individually or in the aggregate) resulting in Tenant owning less than 50% of the stock of such subsidiary shall be treated as if such sale or transfer were, for all purposes, an assignment of this Lease governed by the provisions of this Section 7.1) or controlling corporation, provided (and it shall be a condition of the validity of any such assignment) that such subsidiary or controlling corporation agree directly with Landlord to be bound by all of the obligations of Tenant hereunder, including, without limitation, the obligation to pay the rent and other amounts provided for under this Lease, the covenant to use the Premises only for the purposes specifically permitted under this Lease and the covenant against further assignment; but such assignment shall not relieve Tenant herein named of any of its obligations hereunder, and Tenant shall remain fully liable therefor. Further, Landlord's consent shall not be required for an assignment of this Lease in connection with a transfer of substantially all operations of Tenant to another entity by way of merger, consolidation or sale of substantially all of the stock therein or assets

thereof, provided that at the time of such assignment such entity has a net worth at least equal to that of Tenant or any guarantor on the date hereof or on the date of such assignment, whichever is greater.

7.2 ACCEPTANCE OF RENT FROM TRANSFEREE

The acceptance by Landlord of the payment of Rent, additional rent, or other charges following assignment, subletting, or other transfer prohibited by this Article VII shall not be deemed to be a consent by Landlord to any such assignment, subletting, or other transfer, nor shall the same constitute a waiver of any right or remedy of Landlord.

ARTICLE VIII
REPAIRS AND MAINTENANCE

8.1 TENANT OBLIGATIONS

From and after the date that possession of the Premises is delivered to Tenant and until the end of the Lease Term, Tenant shall keep the Premises and every part thereof in good order, condition, and repair, reasonable wear and tear and damage by casualty, as a result of condemnation, or as a result of the failure of Landlord to provide services required to be provided hereunder only excepted; and shall return the Premises to Landlord at the expiration or earlier termination of the Lease Term in such condition.

8.2 LANDLORD OBLIGATIONS

Except as may be provided in Articles XII and XIII, Landlord agrees to keep in good order, condition, and repair the structural components and the roof of the Building, the common utility and Building systems, the common hallways, entrances, restrooms and elevators, the paved surface of the parking areas serving the Building and the sprinkler system to the extent the same is located outside the Premises (Tenant being responsible for all portions of the sprinkler system located within the Premises), except that Tenant shall reimburse Landlord, as additional rent hereunder, for the costs of maintaining, repairing, or otherwise correcting any condition caused by an act, omission, neglect or default under this Lease of Tenant or any employee, agent, or contractor of Tenant or any other party for whose conduct Tenant is responsible. Without limitation, Landlord shall not be responsible to make any improvements or repairs other than as expressly provided in this Section 8.2, and Landlord shall not be liable for any failure to make such repairs unless Tenant has given notice to Landlord of the need to make such repairs and Landlord has failed to commence to make such repairs within a reasonable time thereafter.

ARTICLE IX
SERVICES TO BE FURNISHED BY LANDLORD; UTILITIES

9.1 LANDLORD'S SERVICES

The Landlord agrees to cause the parking areas, driveways, and walkways on the Lot to be kept clear of accumulations of dirt, litter, rubbish, ice and snow, cause the landscaping on the Lot to be kept in a neat and attractive condition, keep the parking areas on the lot lighted as necessary from the hours of 6:00 a.m. until 8:00 p.m. and perform its obligations with respect to maintenance and repair set forth in Section 8.2 above. Except as expressly set forth in the preceding sentence, Tenant acknowledges that this is a fully net lease and agrees to contract separately for all utilities and building and other services required for Tenant's use and occupancy of the Premises hereunder. Upon the request of Tenant from time to time, Landlord shall use reasonable efforts to provide services at hours other than the times set forth above and Tenant shall reimburse Landlord as additional rent for the cost of such services within thirty (30) days after invoice therefor. Landlord shall have no obligation to provide utilities or equipment other than the utilities and equipment within the Premises as of the Term Commencement Date of this Lease. Tenant shall not, without first having obtained Landlord's prior written consent, install or use any additional air-conditioning or heating equipment in the Premises. In the event that Tenant should require additional utilities, appliances, machines or equipment, the installation, maintenance and costs thereof shall be Tenant's sole obligation, provided that any such installation shall require the written consent of Landlord, which consent Landlord shall not unreasonably withhold.

9.2 CAUSES BEYOND CONTROL OF THE LANDLORD

The Landlord shall in no event be liable for failure to perform any of its obligations under this Lease when prevented from doing so by causes beyond its reasonable control, including without limitation labor dispute, breakdown, accident, order or regulation of or by any governmental authority, or failure of supply, or inability by the exercise of reasonable diligence to obtain supplies, parts, or employees necessary to furnish services required under this Lease, or because of war or other emergency, or for any cause due to any act, neglect, or default of Tenant or Tenant's servants, contractors, agents, employees, licensees or any person claiming by, through or under Tenant, and in no event

shall Landlord ever be liable to Tenant for any indirect, special or consequential damages under the provisions of this Section 9.2 or any other provision of this Lease. In furtherance of the foregoing and not in limitation thereof, in no event shall Landlord be liable for the failure of a prior tenant of the Premises or any part thereof to vacate the Premises, and Tenant's sole and exclusive remedy on account thereof shall be an extension of the Term and Rent Commencement Dates for the amount of days by which the Term Commencement Date is delayed due to a previous tenant's failure to vacate the Premises or any portion thereof. If there is an interruption of utility service or other building services to the Premises due to the negligence or willful misconduct of Landlord or its agents, employees, or contractors that renders all or any portion of the Premises untenantable for the Permitted Use hereunder and Tenant actually vacates all or any portion of the Premises and notifies Landlord thereof, then, commencing on the third business day after Tenant so vacates the Premises and notifies Landlord thereof, then, as Tenant's sole and exclusive remedy therefor, the Rent shall proportionately abate until such services are restored and Landlord gives Tenant notice thereof or Tenant reoccupies the Premises (or such vacated portion), whichever occurs first.

9.3 SEPARATELY METERED UTILITIES

Tenant shall pay directly to the utility, as they become due, all bills for electricity, gas, water and sewer, and other utilities (whether they are used for furnishing heat or for other purposes) that are furnished to the Premises and now or hereafter separately metered or billed by the utility to the Premises. If any utilities used or consumed by Tenant are not separately metered, Tenant shall pay its allocable share of such utilities, based on use, as determined by Landlord.

ARTICLE X
INDEMNITY

10.1 THE TENANT'S INDEMNITY

The Tenant shall indemnify and save harmless Landlord, the directors, officers, agents, and employees of Landlord, against and from all claims, expenses, or liabilities of whatever nature (a) arising directly or indirectly from any default or breach by Tenant or Tenant's contractors, licensees, agents, servants, or employees under any of the terms or covenants of this Lease (including without limitation any violation of Landlord's Rules and Regulations and any failure to maintain or repair equipment or installations to be maintained or repaired by Tenant hereunder) or the failure of Tenant or such persons to comply with any rule, order, regulation, or lawful direction now or hereafter in force of any public authority, in each case to the extent the same are related, directly or indirectly, to the Premises or the Building, or Tenant's use thereof; or (b) arising directly or indirectly from any accident, injury, or damage, however caused, to any person or property, on or about the Premises; or (c) arising directly or indirectly from any accident, injury, or damage to any person or property occurring outside the Premises but within the Building or on the Lot, where such accident, injury, or damage results, or is claimed to have resulted, from any act, omission, or negligence on the part of Tenant, or Tenant's contractors, licensees, agents, servants, employees or customers, or anyone claiming by or through Tenant: provided, however, that in no event shall Tenant be obligated under this clause (c) to indemnify Landlord, the directors, officers, agents, or employees of Landlord, to the extent such claim, expense, or liability results from any omission, fault, negligence, or other misconduct of Landlord or the officers, agents, or employees of Landlord on or about the Premises or the Building.

This indemnity and hold harmless agreement shall include, without limitation, indemnity against all expenses, attorney's fees and liabilities incurred in connection with any such claim or proceeding brought thereon and the defense thereof with counsel acceptable to Landlord. At the request of Landlord, Tenant shall defend any such claim or proceeding directly on behalf and for the benefit of Landlord.

10.2 THE TENANT'S RISK

The Tenant agrees to use and occupy the Premises and to use such other portions of the Building and the Lot as Tenant is herein given the right to use at Tenant's sole risk; and Landlord shall have no responsibility or liability for any loss or damage, however caused, to furnishings, fixtures, equipment, or other personal property of Tenant or of any persons claiming by, through, or under Tenant.

10.3 INJURY CAUSED BY THIRD PARTIES

The Tenant agrees that Landlord shall not be responsible or liable to Tenant, or to those claiming by, through, or under Tenant, for any loss or damage resulting to Tenant or those claiming by, through, or under Tenant, or its or their property, that may be occasioned by or through the acts or omissions of persons occupying any part of the Building,

or for any loss or damage from the breaking, bursting, crossing, stopping, or leaking of electric cables and wires, and water, gas, sewer, or steam pipes, or like matters.

10.4 SECURITY

Tenant agrees that, in all events, Tenant is responsible for providing security to the Premises and its own personnel.

ARTICLE XI
INSURANCE

11.1 PUBLIC LIABILITY INSURANCE

The Tenant agrees to maintain in full force from the date upon which Tenant first enters the Premises for any reason, throughout the Lease Term, and thereafter so long as Tenant is in occupancy of any part of the Premises, (a) a policy of commercial general liability insurance, written on an occurrence basis and including contractual liability coverage to cover any liabilities assumed under this Lease, insuring against all claims for injury to or death of persons or damage to property on or about the Premises or arising out of the use of the Premises, including products liability, and completed operations liability, and (b) automobile liability insurance covering all owned vehicles, hired vehicles and all other nonowned vehicles. Each such policy shall designate Tenant as a named insured, shall be reasonably satisfactory to Landlord, including, without limitation, the amount of any deductible thereunder, and Landlord, its managing agent, if any, and any mortgagees (as may be set forth in a notice given from time to time by Landlord) shall be named as additional insureds, as their interests appear.

Each such policy shall expressly provide that it shall not expire or be amended or canceled without at least thirty (30) days' prior written notice to Landlord in each instance and that the interests of Landlord thereunder or therein shall not be affected by any breach by Tenant of any policy provision, and a duplicate original or certificate thereof shall be delivered to Landlord. The minimum limits of liability of such insurance shall be bodily injury and property damage combined single limit of $3,000,000 per occurrence. The Landlord shall have the right from time to time to increase such minimum limits upon notice to Tenant, provided that any such increase shall provide for coverage in amounts similar to like coverage being carried on like property in the greater Boston area.

11.2 HAZARD INSURANCE

The Tenant agrees to maintain in full force from the date upon which Tenant first enters the Premises for any reason, throughout the Lease Term, and thereafter so long as Tenant is in occupancy of any part of the Premises, a policy, reasonably satisfactory to Landlord, including, without limitation, the amount of any deductible thereunder, insuring any leasehold improvements paid for by Tenant and all fixtures, equipment, and other personal property of Tenant against damage or destruction by fire or other casualty in an amount equal to the full replacement cost of such property. Tenant shall also maintain insurance against such other hazards as may from time to time reasonably be required by Landlord or the holder of any mortgage on the Premises, provided that such insurance is customarily carried in the area in which the Premises are located on property similar to the Building and that Tenant receives written notice specifying all such additional insurance as may be required. At Landlord's request, any such policies of insurance shall name any such mortgagee as loss payee under a standard mortgagee's clause.

Notwithstanding the foregoing, Tenant shall be permitted to self-insure its fixtures, equipment and other personal property from time to time located in, on or about the Premises, and all leasehold improvements to the Premises constructed or installed by Tenant, provided that at all times when Tenant so self-insures the same or any portion thereof, Tenant's net worth shall be and remain at least Twenty Million and 00/100 Dollars ($20,000,000.00). During all periods in which Tenant so self-insures any of the same, the rights and obligations of Landlord and Tenant shall remain the same as if Tenant shall have purchased and kept in force thereon insurance from an independent, institutional insurer of recognized responsibility, and, without limitation, the provisions of Sections 10.2 and 11.5 of this Lease shall remain in full force and effect. The Tenant represents, by so self-insuring, that Tenant then is financially able to absorb any loss thereto without significant reduction of available capital or any other material, adverse effect on Tenant or its business operations, and that Tenant then is of at least such minimum net worth.

The Landlord shall maintain in full force throughout the Lease Term a policy of insurance upon the Building and its fixtures and equipment.

11.3 CONSTRUCTION PERIOD INSURANCE

At any time when demolition or construction work is being performed on or about the Premises or Building by or on behalf of Tenant, the Tenant shall keep in full force and effect the following insurance coverage in each instance with policies reasonably acceptable to Landlord, including, without limitation, the amount of any deductible thereunder:

(1) builder's risk completed value (nonreporting form) in such form and affording such protections as required by Landlord, naming Landlord and its mortgagees as additional insureds; and

(2) workers' compensation or similar insurance in form and amounts required by law.

Tenant shall cause a certificate or certificates of such insurance to be delivered to Landlord prior to the commencement of any work in or about the Building or the Premises, in default of which Landlord shall have the right, but not the obligation, to obtain any or all such insurance at the expense of Tenant, in addition to any other right or remedy of Landlord. The provisions of this §11.3 shall survive the expiration or earlier termination of this Lease.

11.4 RENTAL ABATEMENT INSURANCE

The Landlord shall keep and maintain in full force and effect during the Lease Term rental abatement insurance against abatement or loss of Rent in case of fire or other casualty, in an amount at least equal to the amount of the Rent payable by Tenant during the then current lease year as reasonably determined by Landlord. All premiums for such insurance shall be included in Operating Costs for the purposes of this Lease.

11.5 WAIVER OF SUBROGATION

Insofar as and to the extent that the following provisions may be effective without invalidating or making it impossible to secure insurance coverage from responsible insurance companies doing business in The Commonwealth of Massachusetts (even though extra premium may result therefrom): Landlord and Tenant mutually agree that with respect to any loss which is covered by insurance then being carried by them, the one carrying such insurance and suffering said loss releases the other of and from any and all claims with respect to such loss; and they further mutually agree that their insurance companies shall have no right of subrogation against the other on account thereof. In the event that an additional premium is payable by either party as a result of this provision, the other party shall reimburse the party paying such premium the amount of such extra premium. If, at the written request of one party, this release and nonsubrogation provision is waived, then the obligation of reimbursement shall cease for such period of time as such waiver shall be effective, but nothing contained in this Section shall be deemed to modify or otherwise affect any releases elsewhere contained in this Lease.

ARTICLE XII
CASUALTY

12.1 DEFINITION OF "SUBSTANTIAL DAMAGE" AND "PARTIAL DAMAGE"

The term "substantial damage," as used herein, shall refer to damage which is of such a character that in Landlord's reasonable, good faith estimate the same cannot, in ordinary course, be expected to be repaired within 60 calendar days from the time that such repair work would commence. Any damage which is not "substantial damage" is "partial damage."

12.2 PARTIAL DAMAGE TO THE BUILDING

If during the Lease Term there shall be partial damage to the Building by fire or other casualty and if such damage shall materially interfere with Tenant's use of the Premises as contemplated by this Lease, Landlord shall promptly proceed to restore the Building to substantially the condition in which it was immediately prior to the occurrence of such damage.

12.3 SUBSTANTIAL DAMAGE TO THE BUILDING

If during the Lease Term there shall be substantial damage to the Building by fire or other casualty and if such damage shall materially interfere with Tenant's use of the Premises as contemplated by this Lease, Landlord shall promptly restore the Building to the extent reasonably necessary to enable Tenant's use of the Premises, unless Landlord, within ninety (90) days after the occurrence of such damage, shall give notice to Tenant of Landlord's election to terminate this Lease. The Landlord shall have the right to make such election in the event of substantial damage to the Building whether or not such damage materially interferes with Tenant's use of the Premises. If Landlord shall give such notice, then this Lease shall terminate as of the date of such notice with the same force and

effect as if such date were the date originally established as the expiration date hereof. If Landlord has not restored the Premises to the extent required under this Section 12.3 within nine (9) months after the date of such damage or destruction, such nine-month period to be extended to the extent of any delays of the completion of such restoration due to matters beyond Landlord's reasonable control, or if the Premises shall be substantially damaged during the last nine (9) months of the Lease Term then, in either such case, Tenant may elect to terminate this Lease by giving written notice of such election to Landlord within thirty (30) days after the end of such nine-month period and before the substantial completion of such restoration. If Tenant so elects to terminate this Lease, then this Lease and the term hereof shall cease and come to an end on the date that is thirty (30) days after the date that Landlord receives Tenant's termination notice, unless on or before such date Landlord has substantially completed such restoration.

12.4 ABATEMENT OF RENT

If during the Lease Term the Building shall be damaged by fire or casualty and if such damage shall materially interfere with Tenant's use of the Premises as contemplated by this Lease, a just proportion of the Base Rent payable by Tenant hereunder shall abate proportionately for the period in which, by reason of such damage, there is such interference with Tenant's use of the Premises, having regard to the extent to which Tenant may be required to discontinue Tenant's use of the Premises, but such abatement or reduction shall end if and when Landlord shall have substantially restored the Premises or so much thereof as shall have been originally constructed by Landlord (exclusive of any of Tenant's fixtures, furnishings, equipment and the like or work performed therein by Tenant) to substantially the condition in which the Premises were prior to such damage.

12.5 MISCELLANEOUS

In no event shall Landlord have any obligation to make any repairs or perform any restoration work under this Article XII if prevented from doing so by reason of any cause beyond its reasonable control, including, without limitation, the requirements of any applicable laws, codes, ordinances, rules, or regulations, the refusal of the holder of a mortgage or ground lease affecting the premises to make available to Landlord the net insurance proceeds attributable to such restoration, or the inadequacy of such proceeds to fund the full cost of such repairs or restoration, but reasonably promptly after Landlord ascertains the existence of any such cause, it shall either terminate this Lease or waive such condition to its restoration obligations and proceed to restore the Premises as otherwise provided herein. Further, Landlord shall not be obligated in any event to make any repairs or perform any restoration work to any alterations, additions, or improvements to the Premises performed by or for the benefit of Tenant (all of which Tenant shall repair and restore) or to any fixtures in or portions of the Premises or the Building which were constructed or installed by or for some party other than Landlord or which are not the property of Landlord.

ARTICLE XIII
EMINENT DOMAIN

13.1 RIGHTS OF TERMINATION FOR TAKING

If the Premises, or such portion thereof as to render the balance (if reconstructed to the maximum extent practicable in the circumstances) physically unsuitable for Tenant's purposes, shall be taken (including a temporary taking in excess of 180 days) by condemnation or right of eminent domain or sold in lieu of condemnation, Landlord or Tenant may elect to terminate this Lease by giving notice to the other of such election not later than thirty (30) days after Tenant has been deprived of possession.

Further, if so much of the Building (which may include the Premises) or the Lot shall be so taken, condemned or sold or shall receive any direct or consequential damage by reason of anything done pursuant to public or quasi-public authority such that continued operation of the same would, in Landlord's opinion, be uneconomical, Landlord may elect to terminate this Lease by giving notice to Tenant of such election not later than thirty (30) days after the effective date of such taking.

Should any part of the Premises be so taken or condemned or receive such damage and should this Lease be not terminated in accordance with the foregoing provisions, Landlord shall promptly after the determination of Landlord's award on account thereof, expend so much as may be necessary of the net amount which may be awarded to Landlord in such condemnation proceedings in restoring the Premises to an architectural unit that is reasonably suitable to the uses of Tenant permitted hereunder. Should the net amount so awarded to Landlord be insufficient to cover the cost of so restoring the Premises, in the reasonable estimate of Landlord, Landlord may, but shall have no obligation to, supply the amount of such insufficiency and restore the Premises to such an architectural unit, with all reasonable diligence, or Landlord may terminate this Lease by giving notice to Tenant within a reasonable time after Landlord has determined the estimated cost of such restoration.

13.2 PAYMENT OF AWARD

The Landlord shall have and hereby reserves and excepts, and Tenant hereby grants and assigns to Landlord, all rights to recover for damages to the Building and the Lot and the leasehold interest hereby created, and to compensation accrued or hereafter to accrue by reason of such taking or damage, as aforesaid. The Tenant covenants to deliver such further assignments and assurances thereof as Landlord may from time to time request. Nothing contained herein shall be construed to prevent Tenant from prosecuting in any condemnation proceedings a claim for the value of any of Tenant's trade fixtures installed in the Premises by Tenant at Tenant's expense and for relocation expenses, provided that such action shall not affect the amount of compensation otherwise recoverable hereunder by Landlord from the taking authority.

13.3 ABATEMENT OF RENT

In the event of any such taking of the Premises, the Base Rent or a fair and just proportion thereof, according to the nature and extent of the damage sustained, shall be suspended or abated, as appropriate and equitable in the circumstances.

13.4 MISCELLANEOUS

In no event shall Landlord have any obligation to make any repairs under this Article XIII if prevented from doing so by reason of any cause beyond its reasonable control, including, without limitation, requirements of any applicable laws, codes, ordinances, rules, or regulations or requirements of any mortgagee. Further, Landlord shall not be obligated to make any repairs to any portions of the Premises or the Building which were constructed or installed by or for some party other than Landlord or which are not the property of Landlord, and Tenant shall be obligated to perform any repairs on and restorations to any alterations, additions, or improvements to the Premises performed by or for the benefit of Tenant.

ARTICLE XIV

14.1 TENANT'S DEFAULT

(a) If at any time any one or more of the following events (herein referred to as a "Default of Tenant") shall occur:

(i) Tenant shall fail to make payment of rent or any other monetary amount due under this lease within five (5) days after Landlord has sent to Tenant notice of such default.

However, if: (A) Landlord shall have sent to Tenant a notice of such default, even though the same shall have been cured and this Lease not terminated; and (B) during the lease year in which said notice of default has been sent by Landlord to Tenant, Tenant thereafter shall default in any monetary payment, the same shall be deemed to be a Default of Tenant upon Landlord giving Tenant written notice thereof, without the five (5) day grace period set forth above; or

(ii) Tenant shall fail to perform or observe any other covenant or provision herein contained on Tenant's part to be performed or observed and Tenant shall fail to remedy the same within thirty (30) days after notice to Tenant specifying such neglect or failure, or, if such failure is of such a nature that Tenant cannot reasonably remedy the same within such thirty (30) day period, Tenant shall fail to commence promptly to remedy the same and to prosecute such remedy to completion with diligence and continuity.

However, if (A) Landlord shall have sent to Tenant a notice of such default, even though the same shall have been cured and this Lease not terminated; and (B) during the lease year in which said notice of default have been sent by Landlord to Tenant, Tenant thereafter shall default in any nonmonetary matter, the same shall be deemed to be a Default of Tenant upon Landlord giving Tenant written notice thereof, and Tenant shall have no grace period within which to cure the same; or

(iii) except as otherwise provided by applicable law, if the estate hereby created shall be taken on execution or by other process of law, or if Tenant shall be judicially declared bankrupt or insolvent according to law, or if any assignment shall be made of the property of Tenant for the benefit of creditors, or if a receiver, guardian, conservator, trustee in involuntary bankruptcy or other similar officer shall be appointed to take charge of all or any substantial part of Tenant's property by a court of competent jurisdiction, or if a petition shall be filed for the reorganization of Tenant under any provisions of law now or hereafter enacted, and such proceeding is not dismissed within sixty (60) days after it is begun, or if Tenant shall file a petition for such reorganization, or for arrangements under any provisions of such laws providing a plan for a debtor to settle, satisfy or extend the time for the payment of debts; or

(iv) Tenant shall vacate or abandon the Premises, then,

in any such case, Landlord may, in addition to any remedies otherwise available to Landlord, immediately or at any time thereafter, and without demand or notice, enter into and upon the Premises or any part thereof in the name of the whole and repossess the same as of Landlord's former estate, and expel Tenant and those claiming by, through or under it and remove its or their effects (forcibly if necessary) without being deemed guilty of any manner of trespass, and without prejudice to any remedies that might otherwise be used for arrears of rent or preceding breach of covenant and/or Landlord may terminate this Lease by notice to Tenant and this Lease shall come to an end on the date of such notice as fully and completely as if such date were on the date herein originally fixed for the expiration of the term of this Lease (Tenant hereby waiving any rights of redemption, if any, under G.L. c. 186, § 11 to extent that such rights may be lawfully waived), and Tenant will then quit and surrender the Premises to Landlord, but Tenant shall remain liable as herein provided. To the extent permitted by law, Tenant hereby expressly waives any and all rights of redemption granted by or under any present or future laws in the event of Tenant being evicted or dispossessed, or in the event of Landlord obtaining possession of the Premises, by reason of the violation by Tenant of any of the covenants and conditions of this Lease. In the event of any such termination, entry or re-entry, Landlord shall have the right to remove and store Tenant's property and that of persons claiming by, through or under Tenant at the sole risk and expense of Tenant and, if Landlord so elects, (x) to sell such property at public auction or private sale and apply the net proceeds to the payment of all sums due to Landlord from Tenant and pay the balance, if any, to Tenant, or (y) to dispose of such property in any manner in which Landlord shall elect, Tenant hereby agreeing to the fullest extent permitted by law that it shall have no right, title or interest in any property remaining in the Premises after such termination, entry or reentry.

(b) Tenant covenants and agrees, notwithstanding any termination of this Lease as aforesaid or any entry or reentry by Landlord, whether by summary proceedings, termination or otherwise, to pay and be liable for on the days originally fixed herein for the payment thereof, amounts equal to the several installments of Rent and other charges reserved as they would become due under the terms of this Lease if this Lease had not been terminated or if Landlord had not entered or re-entered, as aforesaid, and whether the Premises be relet or remain vacant, in whole or in part, or for a period less than the remainder of the Term, or for the whole thereof; but in the event the Premises be relet by Landlord, Tenant shall be entitled to a credit in the net amount of rent received by Landlord in reletting, after deduction of all expenses incurred in reletting the Premises (including, without limitation, remodeling costs, brokerage fees, attorney fees and the like), and in collecting the rent in connection therewith. As an alternative, at the election of Landlord, Tenant will upon such termination pay to Landlord, as damages, such a sum as at the time of such termination represents the amount of the excess, if any, of the then value of the total Rent and other benefits that would have accrued to Landlord under this Lease for the remainder of the Lease Term if the lease terms had been fully complied with by Tenant over and above the then cash rental value (in advance) of the Premises for what would be the then unexpired Lease Term if the same remained in effect. For purposes of this Article, if Landlord elects to require Tenant to pay damages in accordance with immediately preceding sentence, the total amount due shall be computed by assuming that Tenant's Proportionate Share of Taxes and Tenant's Proportionate Share of Operating Costs would be, for the balance of such unexpired term, the amount thereof respectively for the tax and lease years in which such termination, entry or reentry shall occur.

(c) In case of any Default of Tenant, reentry, entry, expiration and dispossession by summary proceedings or otherwise, Landlord may (i) relet the Premises or any part or parts thereof, either in the name of Landlord or otherwise, for a term or terms that may at Landlord's option be equal to or less than or exceed the period that would otherwise have constituted the balance of the Lease Term and may grant concessions or free rent to the extent that Landlord considers advisable or necessary to relet the Premises and (ii) make such alterations, repairs and decorations in the Premises as Landlord, in its sole judgment, considers advisable or necessary for the purpose of reletting the Premises; and no action by Landlord in accordance with the foregoing shall operate or be construed to release Tenant from liability hereunder as aforesaid. It is specifically understood and agreed that Landlord shall be entitled to take into account in connection with any reletting of the Premises all relevant factors that would be taken into account by a sophisticated developer in securing a replacement tenant for the Premises, such as, but not limited to, the first class quality of the Building and the financial responsibility of any such replacement tenant. Landlord shall in no event be liable in any way whatsoever for failure to relet the Premises, or, in the event that the Premises are relet, for failure to collect the rent under such reletting, and Tenant hereby waives, to the extent permitted by applicable law, any obligation Landlord may have to mitigate Tenant's damages. The Landlord agrees to list the Premises with a broker in the event of a termination, entry or reentry under this ARTICLE XIV, provided that Landlord's obligation to list the Premises as provided herein is independent of Tenant's obligations under this ARTICLE XIV and shall not be construed to entitle Tenant

to setoff against any amounts payable by Tenant hereunder in the event of a breach or alleged breach by Landlord of such obligation. In no event shall Landlord be obligated to give priority to the reletting of the Premises over any other Premises in the Building or any other building owned by Landlord.

(d) If there is at any time a guarantor or assignee of this Lease or any interest of Tenant herein or any sublessee, franchisee, concessionee or licensee of all or any portion of the Premises, the happening of any of the events described in paragraph (a)(iii) of this Section with respect to such guarantor, assignee, sublessee, franchisee, concessionee or licensee shall constitute a Default of Tenant hereunder.

(e) The specified remedies to which Landlord may resort hereunder are not intended to be exclusive of any remedies or means of redress to which Landlord may, at any time, be entitled lawfully and Landlord may invoke any remedy (including the remedy of specific performance) allowed at law or in equity as if specific remedies were not herein provided for.

(f) All costs and expenses incurred by or on behalf of Landlord (including, without limitation, attorney fees and expenses) in enforcing its rights hereunder or occasioned by any Default of Tenant shall be paid by Tenant.

(g) Upon any Default of Tenant, or the expiration or termination of this Lease, Landlord shall have the right of summary process under G.L. c. 239, or other applicable statutes, and such other rights to recover possession as permitted by law. Tenant and Landlord each hereby waives any and all rights under the laws of any state to the right, if any, to trial by jury.

Nothing contained in this Lease shall limit or prejudice the right of Landlord to prove for and obtain in proceedings for bankruptcy, insolvency or like proceedings by reason of the termination of this Lease, an amount equal to the maximum allowed by any statute or rule of law in effect at the time when, and governing the proceedings in which, the damages are to be proved, whether or not the amount be greater than, equal to or less than the amount of the loss or damages referred to above.

14.2 LANDLORD’S DEFAULT

Landlord shall in no event be in default in the performance of any of Landlord’s obligations hereunder unless and until Landlord shall have failed to perform such obligations within thirty (30) days, or such additional time as is reasonably required to correct any such default, after notice by Tenant to Landlord specifying wherein Landlord has failed to perform any such obligation.

ARTICLE XV
THE LANDLORD’S ACCESS TO PREMISES

15.1 THE LANDLORD’S RIGHT OF ACCESS

The Landlord and its agents, contractors and employees shall have the right to enter the Premises at all reasonable hours upon reasonable advance notice, except in exigent circumstances, or any time in case of emergency, for the purpose of inspecting or of making repairs or alterations, to the Premises or the Building or additions to the Building, and Landlord shall also have the right to make access available at all reasonable hours to prospective or existing mortgagees or purchasers of any part of the Building. To assure access by Landlord to the Premises, Tenant shall provide Landlord with duplicate copies of all keys used by Tenant in providing access to the Premises.

For a period commencing twelve (12) months prior to the expiration of the Lease Term, Landlord may have reasonable access to the Premises at all reasonable hours for the purpose of exhibiting the same to prospective tenants.

ARTICLE XVI
RIGHTS OF MORTGAGEES

16.1 SUBORDINATION AND ATTORNMENT

(a) If any holder of a mortgage or holder of a ground lease of property which includes the Premises, executed and recorded subsequent to the date of this Lease, shall so elect, the interest of Tenant hereunder shall be subordinate to the rights of such holder, provided that such holder shall agree to recognize in writing the rights of Tenant under this Lease upon the terms and conditions set forth herein, and the performance by Tenant of Tenant’s obligations hereunder (but without any assumption by such holder of Landlord’s obligations under this Lease); or

(b) If any holder of a mortgage or holder of a ground lease of property which includes the Premises executed and recorded prior to the date of this Lease shall so elect, this Lease, and the rights of Tenant hereunder, shall be

superior in right to the rights of such holder, with the same force and effect as if this Lease had been executed and delivered, and recorded, or a statutory notice hereof recorded, prior to the execution, delivery and recording of any such mortgage.

The election of any such holder as to Subsection (a) above shall be exercised by notice to Tenant, in the same fashion as notices under this Lease are given by Landlord to Tenant, and, if such notice is given, such subordination shall be effective as to all advances then or thereafter made by such holder under such mortgage or in connection with such ground lease. Any election as to Subsection (b) above shall become effective upon either notice from such holder to Tenant in the same fashion as notices from Landlord to Tenant are to be given hereunder or by the recording in the appropriate registry or recorder's office of an instrument, in which such holder subordinates its rights under such mortgage or ground lease to this Lease.

(c) Forthwith upon the request of Landlord, the holder of any mortgage or deed of trust affecting the Premises, or the lessor under any ground lease affecting the Premises, Tenant shall execute and deliver to such party an attornment agreement providing that Tenant shall attorn to such holder or lessor in the event of a foreclosure of such mortgage or deed of trust or transfer in lieu thereof or a termination of such ground lease and incorporating such other terms and conditions as such party may reasonably require, provided that such agreement includes an agreement by such other party to recognize the rights of Tenant under this Lease. Irrespective of whether any such attornment agreement has been executed, Tenant shall, in the event any proceedings are brought for the foreclosure of, or in the event of exercise of the power of sale under, any mortgage or deed of trust made by Landlord, its successors or assigns, encumbering the Premises, or any part thereof, or in the event of termination of any ground lease, if so requested, attorn to the purchaser or ground lessor upon such foreclosure, sale or termination or upon any grant of a deed in lieu of foreclosure and recognize such purchaser or ground lessor as Landlord under this Lease.

d. Tenant agrees on request of Landlord to execute and deliver from time to time any instrument that Landlord may reasonably deem necessary to implement the provisions of this Section 16.1.

16.2 NOTICE TO MORTGAGEE AND GROUND LESSOR; OPPORTUNITY TO CURE

After receiving notice from any person, firm or other entity (or from Landlord on behalf of any such person, etc.) that it holds a mortgage that includes the Premises as part of the mortgaged premises, or that it is the ground lessor under a lease with Landlord as ground lessee, which includes the Premises as a part of the demised premises, no notice from Tenant to Landlord shall be effective unless and until a copy of the same is given to such holder or ground lessor, and the curing of any of Landlord's defaults by such holder or ground lessor shall be treated as performance by Landlord. Accordingly, no act or failure to act on the part of Landlord that would entitle Tenant under the terms of this Lease, or by law, to be relieved of Tenant's obligations hereunder shall have such an effect unless and until:

(a) Tenant shall have first given written notice to such holder or ground lessor, if any, specifying the act or failure to act on the part of Landlord that could or would give basis to Tenant's rights; and

(b) Such holder or ground lessor, after receipt of such notice, has failed or refused to correct or cure the condition complained of within a reasonable time thereafter, but nothing contained in this Section 16.2 or elsewhere in this Lease shall be deemed to impose any obligation on any such holder or ground lessor to correct or cure any such condition.

16.3 ASSIGNMENT OF RENTS

With reference to any assignment by Landlord of Landlord's interest in this Lease, or the rents payable hereunder, conditional in nature or otherwise, which assignment is made to the holder of a mortgage or ground lease on property that includes the Premises, Tenant agrees:

(a) that the execution thereof by Landlord, and the acceptance thereof by the holder of such mortgage, or the ground lessor, shall never be treated as an assumption by such holder or ground lessor of any of the obligations of Landlord hereunder, unless such holder or ground lessor shall, by notice sent to Tenant, specifically otherwise elect; and

(b) that, except as aforesaid, such holder or ground lessor shall be treated as having assumed Landlord's obligations hereunder only upon foreclosure of such holder's mortgage and the taking of possession of the Premises, or in the case of a ground lessor, the assumption of Landlord's position hereunder by such ground lessor.

ARTICLE XVII
MISCELLANEOUS PROVISIONS

17.1 CAPTIONS

The captions throughout this Lease are for convenience or reference only and shall in no way be held or deemed to define, limit, explain, describe, modify, or add to the interpretation, construction, or meaning of any provision of this Lease.

17.2 BIND AND INURE

Except as herein otherwise expressly provided, the obligations of this Lease shall run with the land, and this Lease shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. The reference herein to successors and assigns of Tenant is not intended to constitute a consent to assignment by Tenant, but has reference only to those instances in which Landlord may later give consent to a particular assignment as required by the provisions of Article VII. Neither the assignment by Landlord of its interest in this Lease as security to a lender holding a mortgage on the Building, nor the acceptance thereof by such lender, nor the exercise by such lender of any of its rights pursuant to said assignment shall be deemed in any way an assumption by such lender of any of the obligations of Landlord hereunder unless such lender shall specifically otherwise elect in writing or unless such lender shall have completed foreclosure proceedings under said mortgage. Whenever the Premises are owned by a trustee or trustees, the obligations of Landlord shall be binding upon Landlord's trust estate, but not upon any trustee, beneficiary or shareholder of the trust individually.

17.3 NO WAIVER

The failure of Landlord or of Tenant to seek redress for violation of, or to insist upon the strict performance of any covenant or condition of this Lease shall not be deemed to be a waiver of such violation or to prevent a subsequent act, which would originally have constituted a violation, from having all the force and effect of an original violation. The receipt by Landlord of Rent or additional rent with knowledge of the breach of any covenant of this Lease shall not be deemed to be a waiver of such breach by Landlord unless such waiver be in writing signed by Landlord. No consent or waiver, express or implied, by Landlord or Tenant to or of any breach of any agreement or duty shall be construed as a waiver or consent to or of any other breach of the same or any other agreement or duty.

17.4 NO ACCORD AND SATISFACTION

No acceptance by Landlord of a lesser sum than the minimum and additional rent then due shall be deemed to be other than on account of the earliest installment of such rent due, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as rent be deemed to be an accord and satisfaction, and Landlord may accept such check or payment without prejudice to Landlord's right to recover the balance of such installment or pursue any other remedy in this Lease or at law or in equity provided.

17.5 CUMULATIVE REMEDIES

The specific remedies to which Landlord may resort under the terms of this Lease are cumulative and not intended to be exclusive of any other remedies or means of redress to which it may be lawfully entitled in case of any breach or threatened breach by Tenant of any provisions of this Lease. In addition to the other remedies provided in this Lease, Landlord shall be entitled to the restraint by injunction of the violation or attempted or threatened violation of any of the covenants, conditions or provisions of this Lease or to a decree compelling specific performance of any such covenants, conditions or provisions. Except as otherwise set forth herein, any obligations of Tenant as set forth herein (including, without limitation, rental and other monetary obligations, repair obligations and obligations to indemnify Landlord) shall survive the expiration or earlier termination of this Lease, and Tenant shall immediately reimburse Landlord for any expense incurred by Landlord in curing Tenant's failure to satisfy any such obligation (notwithstanding the fact that such cure might be effected by Landlord following the expiration or earlier termination of this Lease).

17.6 PARTIAL INVALIDITY

If any term or provision of this Lease or any portion thereof or the application thereof to any person or circumstances shall, to any extent, be invalid or unenforceable, then the remainder of this Lease and of such term or provision and the application of this Lease and of such term and provision to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term of this Lease shall be valid and enforceable to the fullest extent permitted by law.

17.7 LANDLORD'S RIGHT TO CURE

If Tenant shall at any time default in the performance of any obligation under this Lease, Landlord shall have the right, but not the obligation, to enter upon the Premises and/or to perform such obligation, notwithstanding the fact that no specific provision for such substituted performance by Landlord is made in this Lease with respect to such default. In performing any such obligations, Landlord may make any payment of money or perform any other act. All sums so paid by Landlord (together with interest at the Lease Interest Rate) and all necessary incidental costs and expenses in connection with the performance of any such act by Landlord, shall be deemed to be additional rent under this Lease and shall be payable to Landlord immediately on demand. Landlord may exercise the foregoing rights without waiving any other of its rights or releasing Tenant from any of its obligations under this Lease.

17.8 ESTOPPEL CERTIFICATES

Tenant agrees on the Term Commencement Date and from time to time thereafter, upon not less than fifteen (15) days' prior written request by Landlord, to execute, acknowledge and deliver to Landlord a statement in writing, certifying that this Lease is unmodified and in full force and effect, that Tenant has no defenses, offsets or counterclaims against its obligations to pay rent and other charges required under this Lease and to perform its other covenants under this Lease and that there are no uncured defaults of Landlord or Tenant under this Lease (or, if there have been any modifications, that this Lease is in full force and effect, as modified, and stating the modifications, and, if there are any defenses, offsets, counterclaims or defaults, setting them forth in reasonable detail), and the dates to which the Rent and other charges have been paid. Any such statement delivered pursuant to this Section 17.8 may be relied upon by any prospective purchaser or mortgagee of the property which includes the Premises or any prospective assignee of any such mortgagee.

17.9 BROKERAGE

Each party hereto warrants and represents that it has dealt with no real estate broker or agent other than _____ (the "Broker") in connection with this transaction and agrees to defend, indemnify and save the other party harmless from and against any and all claims for commissions or fees arising out of this Lease which, as to the respective parties, are inconsistent with such party's warranties and representations. Landlord shall be responsible for any commissions or fees owed to the Broker in connection with this transaction in accordance with a separate agreement between Broker and Landlord.

17.10 ENTIRE AGREEMENT

All negotiations, considerations, representations, and understandings between Landlord and Tenant are incorporated herein and this Lease expressly supersedes any proposals or other written documents relating hereto. This Lease may be modified or altered only by written agreement between Landlord and Tenant, and no act or omission of any employee or agent of Landlord shall alter, change, or modify any of the provisions hereof.

17.11 HOLDOVER

If Tenant remains in the Premises after the termination of this Lease, by its own terms or for any other reason, such holding over shall not be deemed to create any tenancy, but Tenant shall be a tenant at sufferance only, at a daily rate equal to one hundred fifty percent (150%) of the Rent applicable immediately prior to such termination plus the then applicable additional rent and other charges under this Lease. Tenant shall also pay to Landlord all damages, direct or indirect, sustained by Landlord by reason of any such holding over. Otherwise, such holding over shall be on the terms and conditions set forth in this Lease as far as applicable.

17.12 COUNTERPARTS

This Lease is executed in any number of counterparts, each copy of which is identical, and any one of which shall be deemed to be complete in itself and may be introduced in evidence or used for any purpose without the production of the other copies.

17.13 CONSTRUCTION AND GRAMMATICAL USAGE

This Lease shall be governed, construed and interpreted in accordance with the laws of The Commonwealth of Massachusetts, and Tenant agrees to submit to the personal jurisdiction of any court (federal or state) in said Commonwealth for any dispute, claim or proceeding arising out of or relating to this Lease. In construing this Lease, feminine or neuter pronouns shall be substituted for those masculine in form and vice versa, and plural terms shall be substituted for singular and singular for plural in any place in which the context so admits or requires. If there be more than one party tenant, the covenants of Tenant shall be the joint and several obligations of each such party and, if Tenant is a partnership, the covenants of Tenant shall be the joint and several obligations of each of the partners and the obligations of the firm.

17.14 WHEN LEASE BECOMES BINDING

Employees or agents of Landlord have no authority to make or agree to make a lease or any other agreement or undertaking in connection herewith. The submission of this document for examination and negotiation does not constitute an offer to lease, or a reservation of, or option for, the Premises, and this document shall become effective and binding only upon the execution and delivery hereof by both Landlord and Tenant.

17.15 SECURITY DEPOSIT

If, in Section 1.2 hereof, a security deposit is specified, Tenant agrees that the same will be paid upon execution and delivery of this Lease, and that Landlord shall hold the same, throughout the term of this Lease, as security for the performance by Tenant of all obligations on the part of Tenant to be kept and performed. In no event shall said security deposit be deemed to be a prepayment of rent nor shall it be considered a measure of liquidated damages. Landlord shall have the right from time to time without prejudice to any other remedy Landlord may have on account thereof, to apply such deposit, or any part thereof, to cure a default by Tenant hereunder or Landlord's damages arising from any default on the part of Tenant. If any amount of such deposit is so applied, Tenant shall pay the amount so applied to Landlord upon demand therefor. Tenant not then being in default, Landlord shall return the deposit, or so much thereof as shall not have theretofore been applied in accordance with the terms of this Section 17.15 to Tenant on the expiration or earlier termination of the Lease Term and surrender of possession of the Premises by Tenant to Landlord. While Landlord holds such deposit, Landlord shall have no obligation to pay interest on the same and shall have the right to commingle the same with Landlord's other funds. If Landlord conveys Landlord's interest under this Lease, the deposit or any part thereof not previously applied may be turned over by Landlord to Landlord's grantee, and if so turned over, Tenant agrees to look solely to such grantee for proper application of the deposit in accordance with the terms of this Section 17.15 and the return thereof in accordance herewith.

Neither a successor landlord, the holder of a mortgage nor the lessor in a ground lease of property which includes the Premises shall ever be responsible to Tenant for the return or application of any such deposit, whether or not it succeeds to the position of Landlord hereunder, unless such deposit shall have been received in hand by such successor, holder or ground lessor.

17.16 LANDLORD'S ENFORCEMENT EXPENSES

Unless prohibited by applicable law, the Tenant agrees to pay to the Landlord the amount of all fees and expenses (including, without limitation, attorneys' fees and costs) incurred by the Landlord arising out of or resulting from any act or omission by the Tenant with respect to this Lease or the Premises, including without limitation, any breach by the Tenant of its obligations hereunder, irrespective of whether Landlord resorts to litigation as a result thereof.

17.17 NO SURRENDER

The delivery of keys to any employee of Landlord or to Landlord's agents or employees shall not operate as a termination of this Lease or a surrender of the Premises.

17.18 COVENANT OF QUIET ENJOYMENT

Subject to the terms and provisions of this Lease and on payment of the Rent, additional rent, and other sums due hereunder and compliance with all of the terms and provisions of this Lease, Tenant shall lawfully, peaceably and quietly have, hold, occupy, and enjoy the Premises during the term hereof, without hindrance or ejection by Landlord or by any persons claiming under Landlord; the foregoing covenant of quiet enjoyment is in lieu of any other covenant, express or implied.

17.19 NO PERSONAL LIABILITY OF THE LANDLORD

The Tenant agrees to look solely to Landlord's then equity interest in the Building and the Lot at the time owned, or in which Landlord holds an interest as ground lessee, for recovery of any judgment from Landlord; it being specifically agreed that neither Landlord (whether Landlord be an individual, partnership, firm, corporation, trustee, or other fiduciary) nor any partner, policyholder, officer, manager, member, shareholder or director of Landlord, nor any trust of which any person holding Landlord's interest is trustee nor any successor in interest to any of the foregoing shall ever be personally liable for any such judgment, or for the payment of any monetary obligation to Tenant. The covenants of Landlord contained in this Lease shall be binding upon Landlord and Landlord's successors only with respect to breaches occurring during Landlord's and Landlord's successors' respective periods of ownership of Landlord's interest hereunder.

17.20 NOTICES

Whenever, by the terms of this Lease, notice shall or may be given either to Landlord or to Tenant, such notice shall be in writing and shall be delivered by hand or sent by registered or certified mail, postage prepaid or by so-called “express” mail (such as Federal Express or U.S. Postal Service Express Mail):

If intended for Landlord, addressed to Managing Agent at the address set forth in Section 1.2 with a copy to Landlord at the address set forth in Section 1.2 and to _____, or to such other addresses as may from time to time hereafter be designated by Landlord by like notice.

If intended for Tenant, addressed to Tenant at the address set forth on the first page of this Lease with a copy to _____, or to such other address or addresses as may from time to time hereafter be designated by Tenant by like notice.

All such notices shall be effective upon delivery, attempted delivery, or refusal, whichever occurs first, at the address or addresses of the intended recipient, as set forth above.

IN WITNESS WHEREOF, the parties hereto have executed this instrument under seal as of the date set forth in Section 1.2, above.

LANDLORD:

BY: ______________________________
Its:

BY: ______________________________
Its:

TENANT:

BY: ______________________________
Its:

EXHIBIT A
PLAN SHOWING THE PREMISES

EXHIBIT 2C—Definition of Percentage Rent

ARTICLE V
PERCENTAGE RENT

Section 5.1. In addition to the minimum rent specified in ARTICLE IV above, and as part of the total rent to be paid by the Tenant to the Landlord, the Tenant covenants and agrees to pay to the Landlord, as aforesaid, as percentage rent for each lease-year (as hereinafter defined) of the term hereof, a sum equal to the percentage specified in Section 1.1(g) hereof, multiplied by the amount by which gross sales (as hereinafter defined) during such lease-year exceeds the Base gross sales specified in Section 1.1(g) hereof, if there is any such excess.

For any lease-year with respect to which the minimum rent paid by the Tenant under this lease is a sum which is less than the total amount of minimum rent specified in Section 1.1(f) hereof as payable for such lease-year, the Base gross sales figure shall be reduced proportionately to the same extent as the amount of minimum rent actually paid by the Tenant hereunder for and with respect to such lease-year bears to the minimum rent stated as payable for such lease-year in said Section 1.1(f). In addition, to the extent that any lease-year constitutes less than a full twelve (12) calendar month period, the Base gross sales figure shall be reduced proportionately to the same extent as the number of days in such lease-year bears to 365. In the event the Tenant is not open for business during the days and hours required hereunder, then, in addition to all other remedies available hereunder, the Base gross sales figure shall be proportionately reduced.

Section 5.2. Lease-years shall be the twelve month periods from February 1 through January 31. However, the first lease-year shall run from the date the Tenant first opens for business in the demised premises through the 31st day of January immediately following; and the last lease-year shall run from the previous February 1 through the date of the expiration or earlier termination of the term of this lease.

Section 5.3. The phrase “gross sales,” as used in this lease, is hereby defined to mean the dollar aggregate of:

(a) the sales prices of all goods, wares and merchandise sold, and the charges for all services performed by the Tenant at, in, on or from the demised premises, whether made for cash, on credit or otherwise, without reserve or deduction for inability or failure to collect, including but not limited to such sales and services (i) where the orders therefor originate at and are accepted by the Tenant in the demised premises but delivery or performance thereof is made from or at any place other than the demised premises, (ii) pursuant to mail, telegraph, telephone, computer or other similar orders received or filled at or from the demised premises, (iii) by means of mechanical and other vending devices in the demised premises (except for those used in the nonsales area of the demised premises exclusively by the Tenant’s employees), (iv) as a result of transactions originating upon the demised premises, and/or (v) that the Tenant in the normal and customary course of its operations would credit or attribute to its business upon the demised premises, or any part or parts thereof; and

(b) all moneys or other things of value received by the Tenant from its operations at, in, on or from the demised premises that are not expressly excluded from gross sales by the other provisions of this definition.

“Gross sales” shall not include (i) the exchange of merchandise between stores and/or warehouses of the Tenant where such exchanges are made solely for the convenient operation of the Tenant’s business and not for the purpose of consummating a sale that has theretofore been made at, in, on or from the demised premises and/or for the purpose of depriving the Landlord of the benefit of a sale that otherwise would have been made at, in, on or from the demised premises, or (ii) returns to shippers or manufacturers, or (iii) sales of fixtures or equipment after use thereof in the conduct of the Tenant’s business in the demised premises, or (iv) the sales prices of merchandise sold from the demised premises to the Tenant’s employees of the demised premises at discounts substantially below the nondiscounted prices charged therefor to the shopping public, provided that in no event shall such corresponding nondiscounted prices therefor exceed in the aggregate one percent (1%) of gross sales during any lease-year, or (v) charges imposed by the Tenant on customers of the demised premises for delivery of merchandise sold from the demised premises, which charges are separately stated on the Tenant’s sales slips, or (vi) the proceeds of property insurance received by the Tenant for loss or damage to the Tenant’s merchandise or equipment while located in the demised premises, or (vii) the proceeds received by the Tenant of bona fide, close-out bulk sales to jobbers at or below the Tenant’s costs, where the items so sold are removed from and not thereafter sold to the public from the demised premises (but this exclusion shall not be construed to permit any such sales in violation of the provisions contained in Section 10.2 or elsewhere herein). Further, there shall be deducted from gross sales (x) cash or credit refunds made upon transactions included within gross sales, not exceeding the selling price of merchandise returned by the purchaser and accepted by the Tenant, and (y) the amount of any city, county, state

or federal sales, luxury, or excise or value added tax on such sales that is both (a) added to the selling price or absorbed therein, and (b) paid to the taxing authority by the Tenant.

The phrase "gross sales" shall also include such gross sales made by any sublessee, concessionaire, licensee or otherwise at, in, on or from the demised premises; and such gross sales made by sublessees, concessionaires, licensees or otherwise, shall be included in the reports provided for in this lease (but the foregoing shall not be construed to give the Tenant the right to sublease, concession or license, which right shall be governed by the provisions of ARTICLE X hereof).

Section 5.4. The Tenant agrees without notice or demand from the Landlord to deliver to the Landlord, within ten (10) days after the end of each month during the term hereof, a complete, uncertified statement signed by an executive officer of the Tenant or the store manager of the demised premises, showing gross sales for the preceding month. The Tenant shall utilize cash registers equipped with sealed continuous and cumulative totals (or computer equipment performing substantially similar functions) to record all gross sales and which shall number consecutive rings or such other devices for recording sales as Landlord shall reasonably approve to record all sales. The Tenant agrees to maintain accounting controls and books of account, in form adequate for auditing purposes, in accordance with generally accepted accounting principles to assure the proper recording of all gross sales and the exclusions and deductions therefrom provided in Section 5.3 hereof.

No percentage rent shall be payable for any lease-year until gross sales during that lease-year exceed the applicable Base gross sales figure. The Tenant agrees without notice or demand from the Landlord, within ten (10) days after the end of the month in each lease-year during which gross sales so exceed the Base gross sales during that lease-year and after each ensuing month during that lease-year (accompanied by the monthly statement showing gross sales for such preceding month), to pay to the Landlord on account of percentage rent a sum equal to the percentage of gross sales specified in Section 1.1(g) hereof, multiplied by the amount by which gross sales during the portion of that lease-year which had expired as of the end of such immediately preceding month exceed the applicable Base gross sales, less amounts theretofor paid hereunder for and with respect to that lease-year on account of percentage rent.

The Tenant agrees, without notice or demand from the Landlord, within sixty (60) days after the end of each lease-year, to cause a statement of the gross sales of the Tenant made at, in, on and/or from the demised premises for such lease-year to be certified by an executive officer of the Tenant, and shall be subject to further verification as provided in Section 5.5, and a copy of such statement certified by such officer shall be delivered by the Tenant to the Landlord within such sixty-day period, and such statement shall be accompanied by a check of the Tenant for the balance of the percentage rent, if any, payable with respect to such prior lease-year. In the event that the Tenant's quarterly [semi-annual or monthly] payments of percentage rent for and with respect to a lease-year shall in the aggregate exceed the percentage rent payable by the Tenant for such lease-year, the Landlord agrees to apply any such excess against the minimum rent next due under this lease.

All statements deliverable by the Tenant to the Landlord under this lease shall be delivered to the place where rent is then payable, or to such other place or places as the Landlord may from time to time direct by written notice to the Tenant.

If the first lease-year of the term hereof shall be less than twelve (12) full calendar months, gross sales for that lease-year shall be determined by multiplying gross sales for the first twelve (12) full calendar months of the term hereof by a fraction, the numerator of which is the number of days in such lease-year and the denominator of which is 365. Base gross sales for such lease-year shall be determined by multiplying $_____ by the same fraction as aforesaid. Payments on account of such percentage rent shall be made as set forth in Section 5.4 below and shall be accompanied by a statement of gross sales for the 12-month period certified by an executive officer of Tenant which shall be considered an annual statement of gross sales for the purpose of Section 5.6 hereof and an appropriate adjustment, if required, shall be made within sixty (60) days following the end of such 12-month period.]

Section 5.5. The Landlord shall have the right, upon ten (10) days' prior written notice and at any time within thirty-six (36) months after receipt of the annual statement of gross sales of the Tenant required to be furnished pursuant to Section 5.4 above, to audit all of the books of account, documents, records, returns, papers, tax returns, original sales records (including, without limitation, cash register tapes, sales slips, bank statements and deposit slips, credit-card records, mail orders, telephone orders, computer records and such other sales records, if any, which would normally be examined by an independent accountant pursuant to generally accepted auditing standards in performing an audit of the Tenant's gross sales) and files of the Tenant relating to gross sales for any lease-year; and the Tenant, on request of the Landlord, shall make all such matters available for such examination at the Shopping Center, or, at the Tenant's option, at the Tenant's home office, provided the same is located in the continental United States. If the Landlord shall have such an audit made for any lease-year, and (i) the gross sales shown by the Tenant's statement for such lease-year shall be found to be

understated by more than three percent (3%) or (ii) the Tenant fails to maintain sufficient records of its gross sales to enable the Landlord to perform such audit in accordance with generally accepted auditing standards, then the Tenant shall pay to the Landlord on demand the reasonable cost of such audit. In any event, the Tenant shall promptly pay to the Landlord any deficiency in percentage rent plus interest at the rate set forth in Section 21.20 from the date such payment should have been made to the date of payment. In the event the gross sales shown by the Tenant's statement for any three (3) lease-years of the term shall be found to have been understated by more than three percent (3%) in each instance, or for any one (1) lease-year of the term shall be found to have been understated by more than eight percent (8%), then the Landlord, in addition to all other remedies available at law or in equity or pursuant to the other provisions of this lease, shall have the right to terminate this lease upon written notice to the Tenant; provided, however, that in the event of the first such understatement by more than eight percent (8%) during the term, the Tenant shall have the opportunity to prove to the Landlord (to its reasonable satisfaction) that such understatement was due to a nondeliberate, clerical error, which proof shall be delivered to the Landlord within twenty (20) days of the Landlord's notice to the Tenant of such termination. If the Landlord is so reasonably satisfied, then the Landlord shall notify the Tenant that such termination notice is null and void. The Tenant's opportunity to prove such error shall be applicable only to the first instance of any such understatement by more than eight (8%) percent during the term; thereafter, the Landlord shall have such termination right upon thirty (30) days prior written notice to the Tenant without affording the Tenant the opportunity to prove any such error. Such examination and audit may be made by any accountant designated in writing by the Landlord from time to time. It is agreed that, unless there shall be bona fide cause, there shall be no more than one such audit by the Landlord of the Tenant's gross sales figures during any lease-year.

The Landlord agrees that the Landlord shall use reasonable efforts to hold in confidence any gross sales information obtained by the Landlord as a result of (i) any audit or inspection of gross sales, (ii) receipt of any statement of gross sales, or (iii) any other method, except that the Landlord may disclose such information to any of Landlord's employees, agents, attorneys and accountants, and to any prospective or then existing lender, purchaser or other transferee with respect to the Shopping Center, or as required by law, or in connection with any tax abatement proceedings, legal process, request or order of any court or governmental agency.

Section 5.6. Except as otherwise provided in this lease, computation of the percentage rent specified herein shall be made separately with regard to each lease-year of the term hereof; it being understood and agreed that the gross sales of any lease-year and the percentage rent due thereon shall have no bearing on, or connection with, the gross sales of any other lease-year of the term hereof. It is further understood and agreed that the Landlord shall in no event be construed or held to be a partner or associate of the Tenant in the conduct of the Tenant's business, nor shall the Landlord be liable for any debts incurred by the Tenant in the conduct of the Tenant's business; but it is understood and agreed that the relationship is and at all times shall remain that of landlord and tenant.

EXHIBIT 2D—Definition of Breakpoint and Gross Sales; Payment of Percentage Rent and Landlord's Audit Provisions

1.1. Breakpoint

A. *Breakpoint For a Full Lease Year*. The breakpoint for any full Lease Year (an "Annual Breakpoint") is an amount computed by dividing the Minimum Rent payable by Tenant for that same Lease Year (or the Minimum Rent that would have been payable by Tenant for that same Lease Year but for the reductions to Minimum Rent set forth in Article 13) by four percent (4%). In the event Tenant is not open for business in violation of this Lease during the days when the Shopping Center is open for business, the Annual Break Point shall be proportionately reduced.

B. *Breakpoint for a Partial Lease Year*. The breakpoint for any partial Lease Year (a "Partial Breakpoint") is an amount computed by multiplying the Annual Breakpoint applicable to the last Lease Year of the Term by the sum of the following percentages for each month contained in the partial Lease Year (pro rated for a partial month):

January	.054
February	.046
March	.071
April	.056
May	.059
June	.075
July	.070
August	.132
September	.098
October	.063
November	.096
December	.180

1.2. Gross Sales

(A) *Gross Sales Defined*. The term "Gross Sales" means the gross amount received (including for this purpose only the amount received from any Concessionaire, as defined in Section 21.2) from all sales and services, both for cash and on credit, made, performed, or rendered in, upon or from the Premises (and in cases of sales on credit whether or not payment be actually made therefor) and including the gross amount received by Tenant for merchandise sold pursuant to orders received in the Premises although filled elsewhere. Gross Sales shall not include:

(1) amounts received with respect to any sale to the extent of the net amount of any refund made or credit allowed upon any such sale, where the merchandise sold, or some part thereof, is returned to and accepted by Tenant;

(2) exchanges or transfers of merchandise between other stores of Tenant where such exchanges are made solely for the convenient operation of Tenant's business and not for the purpose of consummating a sale that has been made at, in, upon or from the Premises;

(3) returns to suppliers or manufacturers;

(4) the amount of any city, county, state or federal sales, use, luxury or excise tax on such sales that is both added to the selling price (or absorbed therein) and paid to the taxing authorities by Tenant;

(5) any penalty charged by Tenant for a returned check not to exceed one percent (1%) of the total Gross Sales in any Lease Year;

(6) reimbursement of amounts for postage, express or delivery services, including, but not limited to, United Parcel Service, incurred in delivering merchandise to customers, provided that such charges are at all times properly segregated from amounts includable in Gross Sales and so identified on Tenant's records;

(7) any sale at a discount to a bona fide employee of Tenant or a Concessionaire, to the extent that such sales do not exceed two percent (2%) of the total Gross Sales in any Lease Year;

(8) receipts from vending machines and coin-operated games from which revenues are donated to charitable organizations or are not available for use by the public and receipts from pay telephones;

(9) any charge added by Tenant to its regular cash price as a finance charge for sales on credit, provided that such charge is at all times properly segregated from amounts includable in Gross Sales and so identified on Tenant's records; each transaction involving the extension of credit shall be treated as a sale for the regular cash price in the month in which such transaction occurred, without regard to the time payment is made or title passes not to exceed three percent (3%) of the total Gross Sales in any Lease Year;

(10) any charges paid to the issuers of credit cards and for check authorization fees, not to exceed three percent (3%) of the total Gross Sales in any Lease Year;

(11) any sale of fixtures or equipment not in the regular course of Tenant's business or after use thereof;

(12) gift certificates, or like vouchers, until such time as the same have been converted into a sale by redemption at the Premises;

(13) Internet or catalog sales;

(14) layaway sales until the merchandise is delivered to the customer at the Premises or the payment(s) are forfeited;

(15) the amount of any special discount to customers for damaged or defective merchandise;

(16) bad debt expense with respect to merchandise sold on credit or purchased by check not to exceed three percent (3%) of the total Gross Sales in any Lease Year; and

(17) charges collected from customers for fittings and alterations, which services are provided primarily as a customer convenience, are separately stated on Tenant's sales slips, or at no profit to Tenant, and are in addition to the sales price.

The phrase "Gross Sales" shall also include such Gross Sales made by any sublessee, concessionaire, licensee or otherwise at, in, on or from the Premises; and such Gross Sales made by sublessees, concessionaires, licensees or otherwise, shall be included in the reports provided for in this Lease (but the foregoing shall not be construed to give the Tenant the right to sublease, concession or license, which right shall be governed by the provisions of Article 21 hereof).

B. *Reporting*. Tenant shall submit, within thirty (30) days after the end of each of Tenant's fiscal months during the Term, a written statement showing the amount of Gross Sales made in the Premises during the preceding fiscal month. Within sixty (60) days after the end of each Lease Year and sixty (60) days after the expiration or earlier termination of the Term, Tenant shall furnish Landlord with a statement, certified as complete and correct by Tenant (or if Tenant is a corporation, then by an authorized officer of Tenant), setting forth the Gross Sales made in, upon and from the Premises during the preceding Lease Year.

1.3. Payment of Percentage Rent

Tenant's obligation to pay Percentage Rent during any one Lease Year (or partial Lease Year) shall first accrue in the month (the "Threshold Month") in which Tenant's Gross Sales for such Lease Year shall first exceed the Annual Breakpoint for such Lease Year (or Partial Breakpoint for any partial Lease Year). Tenant shall pay to Landlord, within thirty (30) days following the Threshold Month, four percent (4%) of all Gross Sales made during such Threshold Month in excess of the Annual Breakpoint (or Partial Breakpoint, as applicable). For all subsequent fiscal months during the balance of that Lease Year (or partial Lease Year, as applicable), Tenant shall pay to Landlord four percent (4%) of all Gross Sales made during that month, which payment shall be made at the same time as Tenant's monthly reports of Gross Sales for such month.

1.4. Landlord's Audit

Tenant shall, for a period of two (2) years after the end of each Lease Year, keep safe and intact at Tenant's principal offices all of the records, books, accounts and other data which are regularly kept by Tenant in the ordinary course of its business to establish Tenant's Gross Sales, in upon and from the Premises. The acceptance by Landlord of payments of Percentage Rent shall be without prejudice to Landlord's right to an examination of Tenant's books and records in order to verify the amount of Gross Sales made by Tenant in upon and from the Premises. Landlord may cause, once per Lease Year, at any time during normal business hours and upon reasonable prior notice to Tenant, an audit to be made at Tenant's main accounting office of records required to be kept hereunder relating to the Premises for the period covered by any annual statement of Gross Sales furnished by Tenant as above set forth. If such audit shall disclose a liability for Percentage Rent in excess of three percent (3%) of the Percentage Rent

theretofore computed by Tenant for such period, Tenant shall promptly pay to Landlord the reasonable cost of such audit in addition to any deficiency in Percentage Rent, which deficiency shall be payable in any event. Such examination and audit may be made by any accountant designated from time to time in writing by Landlord. With respect to any such audit by Landlord of Tenant's Gross Sales figures pursuant to the foregoing, it is agreed that the results thereof shall be held in strict confidence by Landlord other than sharing the same on a strictly confidential basis with any present or prospective mortgagees or prospective purchasers of the Shopping Center or an interest therein, or as otherwise may be required under law or in connection with a lawsuit or similar proceeding.

EXHIBIT 2E—Office Definition of Operating Costs

A. Definition of Landlord's Operating Expenses

"Landlord's Operating Expenses" means all costs of Landlord in servicing, operating, managing, maintaining, and repairing the Building and Land, and providing services to tenants, including, without limitation, the costs of the following: (i) supplies, materials and equipment purchased or rented and total wage and salary costs paid to an on account of all persons engaged in the operating, maintenance, security, cleaning and repair of the Building and Land, including employment taxes and so-called "fringe benefits" (such personnel expenses to be limited to expenses reasonably allocable to the Building unless such personnel are employed solely with respect to the Building); (ii) building services furnished to tenants of the Building at Landlord's expense and maintenance of and services provided to or on behalf of the Building performed by Landlord's employees or by other persons under contract with Landlord or Landlord's Managing Agent; (iii) utilities consumed and expenses incurred in the operation and maintenance of the Building and Land including, without limitation, oil, gas, electricity (including electricity serving Tenant in the Premises and other tenants in their premises), water, sewer and snow removal; (iv) insurance; (v) management fees to the extent consistent with prevailing customs and practices in the Greater Boston area; and (vi) "Landlord's Taxes" as defined below.

B. Capital Expenditures

1. *New Capital Items*. If Landlord, in its sole discretion, installs a new capital item in the Building or on the Land for the purpose of reducing or conserving the use of energy in the Building, reducing Landlord's Operating Expenses, or to comply with applicable laws, rules or regulations enacted or promulgated after the date of this lease, the amount of such expenditure or the cost of such item shall be included in Landlord's Operating Expenses for the year in which such expenditure is made and in the next following years on the following basis:

   a. Such expenditure shall be amortized over the useful life of such item in accordance with generally accepted accounting principles, with interest at the so-called base rate from time to time announced by the Bank of Boston at its head office in Boston, Massachusetts (FNBB Prime Rate); and

   b. The amount included in Landlord's Operating Expenses for any calendar year shall be limited to the annual amortized charge (including interest).

2. *Replacement Capital Items*. If Landlord, in its sole discretion, shall replace any capital items (collectively called "replacement capital expenditures"), the amount of such expenditure or the cost of such item shall be included in Landlord's Operating Expenses for the year in which such expenditure is made and in the next following years on the following basis:

   a. The amount by which such expenditure exceeds the cost of the capital item that is being replaced shall be amortized over the useful life of such item in accordance with generally accepted accounting principles, with interest at the FNBB Prime Rate; and

   b. The amount included in Landlord's Operating Expenses for any calendar year shall be limited to such annual amortized charge (including interest).

3. *Accelerated Recovery Based upon Projected Savings*. Notwithstanding the foregoing, if Landlord reasonably concludes on the basis of engineering estimates that a particular capital expenditure will effect savings in Landlord's Operating Expenses including, without limitation, energy-related costs, and that such projected savings will, on an annual basis ("Projected Annual Savings"), exceed the annual amortized charge (including interest) of such capital expenditure computed as aforesaid, then and in such events, the annual amortized charge to be included in Landlord's Operating Expenses for any year shall be increased to an amount equal to the Projected Annual Savings; and in such circumstances, the increased annual amortized charge (in the amount of the Projected Annual Savings) shall be made for such period of time as it would take to fully amortize the cost of the capital item in question, together with interest thereon at the FNBB Prime Rate, in equal monthly payments, each in the amount of one-twelfth (1/12th) of the Projected Annual Savings, with such payments being applied first to interest and the balance to principal.

C. Exclusions

Landlord's Operating Expenses shall not include any costs or expenses incurred by Landlord in the construction and development of the Building; payments of principal, interest or other charges on mortgages and ground rent; and salaries of executives or principals of Landlord (except as the same may be reflected in the management fee for the

Building or attributable to actual Building operations). The cost of all of Landlord's services provided by Landlord or its affiliates (i.e., not provided by arms-length third parties) shall not exceed the commercially comparable rates for such services to similar first-class buildings in city in which the Building is located.

EXHIBIT 2F—Retail Definition of Operating Costs

A. Definition of Operating Costs.

"Operating Costs" shall mean total costs and expenses incurred in operating, maintaining, restoring and repairing the Common areas, including without limitation: the costs and expense of landscaping, gardens and planting; painting (including line painting and exterior area building painting); decorating; non-structural repairs of structural items; paving; lighting; electrical power; sanitary control; removal of snow, trash, garbage and other refuse; heating, ventilating and air conditioning of the enclosed malls and sidewalks; fire protection; water and sewage charges; the cost of all insurance carried by Landlord covering the Common Areas, including without limitation, public liability, personal and bodily injury and proper damage liability and automobile coverage, fire and extended coverage, vandalism and malicious mischief and all broad form coverage, sign insurance and any other insurance that may be carried by Landlord covering the Common Areas, all in limits reasonably selected by Landlord's operation of loud speakers and any other equipment supplying music of the Common Areas or any parts thereof; operation of public toilet, installing and renting of signs; maintenance, repair and replacement of utility systems serving the Common Areas, including water, sanitary sewer and storm water lines and other utility lines, pipe repair of existing common elements if, at Landlord's sole discretion, such repair will improve existing common elements due to technological straight line depreciation, operating machinery and equipment owned in an used in the operation policing, maintenance and repair of the Common Areas and the directing traffic and parking or automobiles on the parking areas thereof and administrative costs equal to fifteen percent (15%) of the total Operating Costs. Landlord may, however, cause any or all of said services to be provided by an independent contractor or contractors.

B. Exclusions from Operating Costs.

Notwithstanding anything to the contrary herein contained, Landlord's cost for the purpose of computing Tenant's common area charge shall expressly *exclude*: (i) wages, salaries, fees, and fringe benefits paid to administrative or executive personnel or officers of partners of the Landlord; (ii) any charge for depreciation of the Shopping Center buildings or equipment or any interest or other financing charge; (iii) any charge for Landlord's income taxes, excess profit taxes, franchise taxes; (iv) all costs relating to activities for the solicitation of an execution of leases of other spaces in the Shopping Center; (v) the cost of electric current furnished to any other leaseable area in the Shopping Center; (vi) the cost of correcting defects in the original construction of the Shopping Center; (vii) the cost of any repair made by Landlord due to the total or partial destruction of the Shopping Center subsequent to the date of original construction or the exercise of the right of eminent domain; (viii) the cost of any repairs, alterations, additions, changes, replacements or other items which under generally accepted accounting principles are properly classified as capital expenditures to the extent that same upgrade or improve the Shopping Center as opposed to replacement of existing items that have been worn out; (ix) the cost of testing for, or the cost of removal of, asbestos, asbestos containing material or other hazardous substance or material from the Shopping Center land or buildings; (x) the costs incurred as a result of the negligence or willful misconduct of Landlord, its agents, employees or contractors.

EXHIBIT 2G—Operating Costs Exclusions

1. Repairs or other work occasioned by fire, windstorm or other casualty or by the exercise of eminent domain.
2. Leasing commissions, attorneys' fees, costs and disbursements and other expenses incurred in connection with negotiations or disputes with tenants, other occupants, or prospective tenants or occupants.
3. Renovating or otherwise improving, decorating, painting or redecorating space for tenants or other occupants of the Building.
4. Landlord's cost of electricity and other services that are sold to tenants and for which Landlord is entitled to be reimbursed by tenants as an additional charge or rental over and above the basic rent, tax escalation, and operating expense escalation payable under Landlord's lease with such tenant.
5. Depreciation and amortization, except as provided in this Section.
6. Expenses in connection with services or other benefits of a type which are not provided Tenant but which are provided to another tenant or occupant.
7. Costs incurred due to violation by Landlord or any tenant of the terms and conditions of any lease.
8. Overhead and profit increment paid to subsidiaries or affiliates of Landlord for services on or to the real property, to the extent only that the costs of such services exceed competitive costs of such services were they not so rendered by a subsidiary or affiliate (provided however, that this Paragraph 8 shall not apply to the management fee).
9. Interest on debt or amortization payments on any mortgage or mortgages, and rental under any ground or underlying lease or leases.
10. Landlord's general overhead except as it directly relates to the operation and management of the Building, Tenant hereby acknowledging that Operating Costs shall include a competitive management fee.
11. Any compensation paid to clerks, attendants or other persons in commercial concessions operated by Landlord.
12. All items and services for which Tenant is separately charged, reimburses Landlord or pays third persons.
13. Advertising and promotional expenditures.
14. Any fines or penalties incurred due to violations by Landlord of any governmental rule or authority.
15. Any costs incurred by Landlord in the event that the Building does not comply with governmental rules in effect as of the Execution Date of this Lease.
16. Costs for sculpture, paintings or other objects of art.
17. Costs incurred in the operation of the Garage or other parking concessions.
18. Wages, salaries, or other compensation paid to any executive employees above the grade of building superintendent, except that if any such employee performs a service which would have been performed by an outside consultant, the compensation paid to such employee for performing such service shall be included in Operating Costs, to the extent only that the cost of such service does not exceed competitive cost of such service had such service been rendered by an outside consultant.
19. Construction or other work performed by Landlord for another tenant(s), whether or not Landlord is entitled to be reimbursed for the cost of such work.
20. The excess cost (if any) of providing services to retail tenants over what would be the cost of providing services to such retail tenants' premises if they were office premises.

EXHIBIT 2H—Tax Definition

"Taxes" shall mean the real estate taxes and other taxes, levies and assessments imposed upon the Building and the land on which it stands and upon any personal property of Landlord used in the operation thereof, or Landlord's interest in the Building or such personal property; charges, fees and assessments for transit, housing, police, fire or other governmental services or purported benefits to the Building; service or user payments in lieu of taxes; and any and all other taxes, levies, betterments, assessments and charges arising from the ownership, leasing, operating, use or occupancy of the Building or based upon rentals derived therefrom, which are or shall be imposed by National, State, Municipal or other authorities. As of the Execution Date, "Taxes" shall not include any franchise, rental, income or profit tax, capital levy or excise, provided, however, that any of the same and any other tax, excise, fee, levy, charge or assessment, however described, that may in the future be levied or assessed as a substitute for or an addition to, in whole or in part, any tax, levy or assessment which would otherwise constitute "Taxes," whether or not now customary or in the contemplation of the parties on the Execution Date of this Lease, shall constitute "Taxes," but only to the extent calculated as if the Building and the land upon which it stands is the only real estate owned by Landlord. "Taxes" shall also include expenses of tax abatement or other proceedings contesting assessments or levies.

"Tax Base" shall be the amount stated on Exhibit 1 and shall apply to a fiscal tax period of twelve months. Tax Base shall be reduced pro rata if and to the extent that any fiscal tax period during the term of this lease is less than 12 months.

EXHIBIT 2I—Audit Provision

1. Such documentation and calculation shall be made available to Tenant at the offices where Landlord keeps such records during normal business hours within a reasonable time after Landlord receives a written request from Tenant to make such examination.
2. Tenant shall have the right to make such examination no more than once in respect of any period in which Landlord has given Tenant a statement of the actual amount of Operating Costs.
3. Any request for examination in respect of any Operating Year may be made no more than sixty (60) days after Landlord advises Tenant of the actual amount of Operating Costs in respect of such period.
4. Such examination may be made only by a national recognized independent certified public accounting firm approved by Landlord. Without limiting Landlord's approval rights, Landlord may withhold its approval of any examiner of Tenant who is, or has, within the last five years prior to Tenant's request, represented any other tenant in the Building or in other buildings owned by Landlord or an affiliate of Landlord, or any examiner of Tenant who is being paid by Tenant on a contingent fee basis.
5. As a condition to performing any such examination, Tenant and its examiners shall be required to execute and deliver to Landlord an agreement, in form acceptable to Landlord, agreeing to keep confidential any information which it discovers about Landlord or the Building in connection with such examination. Without limiting the foregoing, such examiners shall be required to agree that they will not represent any other tenant in the Building or in other buildings owned by Landlord or an affiliate of Landlord.

EXHIBIT 2J—Subordination, Nondisturbance, and Attornment Agreement

THIS AGREEMENT, made this _____ day of _____, _____, by and among _____, a _____ with offices at _____, _____, _____ (hereinafter called "Tenant"), _____, a _____ with offices _____, _____, _____ (hereinafter called "Landlord") and _____, a _____ having a mailing address at _____, _____, _____ (hereinafter called "Mortgagee").

W I T N E S S E T H :

WHEREAS, the Tenant has entered into a certain lease (the "Lease") dated _____, _____, with Landlord covering premises located in _____, Massachusetts (the "Premises") and more particularly described in Exhibit "A" attached hereto and incorporated herein; and

WHEREAS, the Mortgagee has agreed to make a mortgage loan (the "Loan") to Landlord secured by, among other security, a mortgage (the "Mortgage"; which term includes all modifications, renewals, replacements, consolidations and extensions thereof) on the Premises from Landlord and a certain Assignment of Leases and Rents from Landlord to Mortgagee (the "Assignment"; which term includes all modifications, renewals, replacements, consolidations and extensions thereof) pertaining to the Premises; and

WHEREAS, Mortgagee has been requested by Tenant and Landlord to enter into a nondisturbance agreement with Tenant.

NOW, THEREFORE, in consideration of the premises and mutual covenants hereinafter contained and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and in order to induce Mortgagee to make the Loan to Landlord, the parties hereto covenant and agree as follows:

1. The Lease and any extensions, renewals, replacements or modifications thereof, and all of the right, title and interest of the Tenant in and to said Premises are and shall be subject and subordinate to the Mortgage and to all of the terms and conditions contained therein, except as otherwise set forth in this Agreement. With respect to the obligations to make available insurance proceeds to restore the Premises as a result of fire or other casualty, so long as no other event of default has occurred under the Mortgage, to the extent there is an inconsistency between the Lease and the Mortgage, the Lease shall govern.

2. In the event of foreclosure of said Mortgage, or in the event Mortgagee comes into possession, makes entry upon or acquires title to the Premises as a result of the enforcement or foreclosure of the Mortgage or the promissory note, or the Assignment or as a result of any other means, Mortgagee agrees that the Lease shall not thereby be terminated and further agrees that Tenant shall not be disturbed in its possession of the Premises for any reason other than one which would entitle the Landlord to terminate the Lease under its terms or would cause, without any further action by such Landlord, the termination of the Lease or would entitle such Landlord to dispossess the Tenant from the Premises.

3. Tenant agrees with Mortgagee that, if the interests of Landlord in the Premises shall be transferred to and owned by Mortgagee by reason of foreclosure or other proceedings brought by it, or by any other manner, or if Mortgagee takes possession of or makes entry upon the Premises pursuant to the Mortgage, the Assignment or any other document evidencing or securing the Loan, Tenant shall be directly bound to Mortgagee under all of the terms, covenants and conditions of the Lease for the balance of the term thereof remaining and any extensions or renewals thereof which may be effected in accordance with any option therefor in the Lease, with the same force and effect as if Mortgagee were the Landlord under the Lease, and Tenant does hereby attorn to Mortgagee as its Landlord, said attornment to be effective and self-operative without the execution of any further instruments on the part of any of the parties hereto immediately upon Mortgagee succeeding to the interest of the Landlord in the Premises. Tenant agrees, however, upon the election of and written demand by Mortgagee within twenty (20) days after Mortgagee receives title to the Premises to execute an instrument in confirmation of the foregoing provisions, satisfactory to Mortgagee, in which Tenant shall acknowledge such attornment and shall set forth the terms and conditions of its tenancy.

4. Tenant agrees with Mortgagee that, if Mortgagee shall succeed to the interest of Landlord under the Lease, Mortgagee shall not be (a) liable for any act, waiver, representation (express or implied), or omission of any prior landlord (the term "prior landlord" as used in this Section 4 includes, without limitation, the Landlord) under the Lease or otherwise, or (b) subject to any offsets, counterclaims or defenses which Tenant might have against any prior landlord, or (c) bound by any rent, percentage rent or additional rent or charges which Tenant might have paid for more than one month in advance to any prior landlord, or (d) bound by any security deposit or tax and/or insurance escrow

which Tenant may have paid to any prior landlord, except to the extent such deposit and escrowed funds are in an escrow fund controlled by Mortgagee, or (e) bound by any amendment or modification of the Lease or any consent by any prior landlord under the Lease to any assignment or sublease of the lessee's interest in the Lease made without Mortgagee's prior written consent, or (f) bound by any provision in the Lease which obligates the Landlord to erect or complete any building or to perform any construction work or to make any improvements to the Premises or any parts thereof (including, without limitation, "Landlord's Work", as defined in the Lease), provided that nothing herein shall require Tenant to pay rent under the Lease except as provided in the Lease or (g) bound with respect to breaches other than those occurring during Mortgagee's possession of the Premises or ownership of the landlord's interest under the Lease. Notwithstanding the provisions of clause (f), above, Tenant agrees that Mortgagee shall have the election (but not the obligation) to complete, directly or indirectly, the Landlord's Work in accordance with the Lease, with Tenant being obligated to accept such as performance under the terms of the Lease. In addition, Tenant agrees to look solely to the landlord's interest in the Premises or if the Mortgagee acquires fee title to the Premises, to the Mortgagee's interest in the Premises for recovery of any judgment from Mortgagee, it being specifically agreed that neither Mortgagee nor anyone claiming under the Mortgagee shall ever be personally liable for any such judgment. Tenant further agrees with Mortgagee that Tenant will not voluntarily subordinate the Lease to any lien or encumbrance without Mortgagee's prior written consent.

5. Tenant hereby acknowledges that all of Landlord's right, title and interest as lessor under the Lease (and in any guarantees of Tenant's obligations thereunder) are being duly assigned to the Mortgagee pursuant to the terms of the Mortgage and/or the Assignment and that pursuant to the terms thereof all rental payments under the Lease shall continue to be paid to Landlord in accordance with the terms of the Lease unless and until Tenant is otherwise notified in writing by the Mortgagee. Upon receipt of any such written notice from the Mortgagee, Tenant covenants and agrees to make payment of all rental payments and other charges and payments then due or to become due under the Lease directly to the Mortgagee or to the Mortgagee's agent designated in such notice, whether or not the Mortgagee has made entry or become mortgagee in possession pursuant to the Mortgage or the Assignment, and to continue to do so until otherwise notified in writing by the Mortgagee. Landlord hereby irrevocably directs and authorizes Tenant to make rental payments directly to the Mortgagee following receipt of such notice, and covenants and agrees that Tenant shall have the right to rely on such notice without any obligation to inquire as to whether any default exists under the Mortgage or the Assignment or the indebtedness secured thereby, and notwithstanding any notice or claim of Landlord to the contrary, and that Landlord shall have no right or claim against Tenant for or by reason of any rental payments made by Tenant to the Mortgagee following receipt of such notice. Tenant further acknowledges and agrees: (a) that under the provisions of the Mortgage and/or Assignment, the Lease (and any guarantees thereof) cannot be terminated (nor can Landlord accept any surrender of the Lease) or modified in any of its terms, or consent be given to the waiver or release of Tenant from the performance or observance of any obligation under the Lease or to any assignments or subleases thereof not permitted by the terms of the Lease without the prior written consent of the Mortgagee, which consent to assignments or subleases shall not be unreasonably withheld, and without the prior written consent of the Mortgage no rent may be collected or accepted by Landlord more than one month in advance; (b) that the interest of Landlord as lessor under the Lease (and in any guarantees of Tenant's obligations thereunder) have been assigned to the Mortgagee for the purposes specified in Mortgage and/or Assignment and the Mortgagee assumes no duty, liability or obligation under the Lease, except only under the circumstances, terms and conditions specifically set forth in the Mortgage and/or the Assignment, copies of which are being recorded concurrently herewith; and (c) that a default by Tenant under the Lease (as the term "default" is used in Article 21 and Article 22 of the Lease) which is not cured within the earlier of (i) the applicable cure period provided under the Lease or (ii) the thirty (30) day period following the occurrence of such default will constitute, at Mortgagee's election, an event of default under the Loan with the Mortgagee having no obligation to provide Tenant with any notice thereof or cure opportunity therefor and notwithstanding the existence of any longer cure period provided to Tenant under the Lease.

6. Tenant, as lessee under the Lease, hereby covenants and agrees to give the Mortgagee written notice properly specifying wherein the landlord under the Lease has failed to perform any of the covenants or obligations of the landlord under the Lease, simultaneously with the giving of any notice of such default to the landlord under the provisions of the Lease. Tenant agrees that the Mortgagee shall have the right, but not the obligation, within sixty (60) days after receipt by the Mortgagee of such notice (or within such additional time as is reasonably required to correct any such default or is provided for in the Lease, whichever is longer) to correct or remedy, or cause to be corrected or remedied, each such default before the lessee under the Lease may take any action under the Lease by reason of such default. Such notices to the Mortgagee shall be delivered in duplicate to:

____
____
____
____

____
____
____
____

or to such other address as the Mortgagee shall have designated to Tenant by giving written notice to Tenant at:

____
____
____
____

with a copy to:

____
____
____
____

or to such other address as may be designated by written notice from Tenant to the Mortgagee. All written notices required or permitted hereunder shall be sent by registered or certified mail, return receipt requested, or by recognized overnight delivery service (such as Federal Express) by telex or fax with confirmation in writing mailed first-class, in all cases with postage and charges prepaid, and shall be considered effective when received or refused.

7. Tenant and Landlord agree with Mortgagee that, prior to the establishment of any collection account for the receipt and disbursement of rent under the Lease (as set forth in Section 5(a) of the Lease), they will notify Mortgagee of their intent to set up such account and obtain Mortgagee's prior written consent therefor which will not be unreasonably withheld or delayed. Once established such account shall not be changed without Mortgagee's prior written consent. In the event there occurs any event of default under the Loan or a condition exists or event occurs that with the passage of time and/or giving of notice could constitute an event of default under the Loan, Tenant and Landlord agree, at Mortgagee's election, to cooperate with Mortgagee in having the funds from such account transferred to an account immediately controlled solely by Mortgagee.

8. This Agreement shall bind and inure to the benefit of the parties hereto, their successors and assigns. Whenever a reference is made herein to a requirement for Mortgagee's consent, such reference shall mean that Mortgagee may give or withhold consent in its sole discretion, except as otherwise expressly provided in this Agreement. As used herein, the term "Tenant" shall include the Tenant, its successors and assigns, and the term "Landlord" shall include the Landlord and its successors and assigns. The foregoing references to successors and assigns of Tenant and Landlord is not intended to and does not constitute a consent by Landlord or Mortgagee to any assignment or sublease by Tenant of its interests under the Lease or any consent by Mortgagee to any assignment by Landlord of its interests under the Lease. The words "foreclosure" and "foreclosure sale" as used herein shall be deemed to include the acquisition of Landlord's estate in the Premises by voluntary deed (or assignment) in lieu of foreclosure, and the word "Mortgagee" shall include the Mortgagee herein specifically named and any of its successors and assigns, and anyone who shall have succeeded to Landlord's interest in the Premises by, through or under foreclosure of the Mortgage, including, without limitation, any purchaser of the Premises through foreclosure or any successor or assign thereof.

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

10. The use of the neuter gender in this Agreement shall be deemed to include any other gender, and words in the singular number shall be held to include the plural, when the sense requires.

IN WITNESS WHEREOF, the parties hereto have placed their hands and seals, the day and year first above written.

WITNESS:	TENANT:
______________________________	______________________________,
	a ______________________________
	By: ______________________________
	Its: ______________________________
	Hereunto duly authorized
WITNESS:	LANDLORD:
______________________________	______________________________,
	a ______________________________
WITNESS:	MORTGAGEE:
______________________________	______________________________,
	By: ______________________________
	Name: ______________________________
	Its: ______________________________
	Hereunto duly authorized

ACKNOWLEDGMENT

COMMONWEALTH OF MASSACHUSETTS

_____ __, _____

COUNTY OF

Before me, a Notary Public in and for said County and State, personally appeared _____ to me known to be the _____ of _____ the corporation which executed the foregoing instrument, who acknowledged that the foregoing instrument was signed and sealed for and on behalf of said corporation by authority of its Board of Directors and that the same is his free act and deed as such _____ and the free act and deed of said corporation.

____
Notary Public
My Commission expires: ______________________

COMMONWEALTH OF MASSACHUSETTS

_____ __, _____

COUNTY OF

Before me, a Notary Public in and for said County and State, personally appeared _____ known to me to be the President of _____, the corporation which executed the foregoing instrument as the sole general partner of _____, who acknowledged that the foregoing instrument was signed and sealed for and on behalf of said corporation by authority of its Board of Directors and that the same is his free act and deed as such President and the free act and deed of said corporation as such sole general partner.

____
Notary Public
My Commission expires: ______________________

COMMONWEALTH OF PENNSYLVANIA

_____ __, _____

COUNTY OF

Before me appeared _____ to me known to be the _____ of _____, the bank that executed the annexed instrument, and acknowledged the said instrument to be his/her free act and deed and the free act and deed of said bank, for the uses purposes therein mentioned, and on oath stated that he/she was authorized to execute said instrument on behalf of said bank.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

____

Notary Public
My Commission expires: _______________________

Drafting & Negotiating a Small Commercial Lease

Practical Skills Briefing for New Solo and Small-Firm Lawyers

Massachusetts Continuing Legal Education (MCLE)
August 17, 2022

Jennifer I. Connelly and Laura Kaplan

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Permitted Use / Exclusive Uses (Retail)

- **Landlord:** Favors a strictly limited permitted use (wants to be mindful of tenant mix and overall planning for the shopping center or other complex – this is less seen in office leases).
- **Tenant:** Favors a broadly defined permitted use (wants flexibility to pivot and perhaps change strategies if original business idea does not work as well as expected, or more marketable offramp in terms of assignment or subletting).
- **Exclusive uses** in retail leases are important for both parties. If you're representing a small tenant, it is less likely to find a landlord willing to grant your client the exclusive right to operate its type of business in the shopping center, but you'll want to be mindful of the exclusives and other restrictions granted by the landlord (or third parties, like in a recorded document) to other tenants and occupants of the shopping center.

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Examples of Use Clauses

- **Landlord Friendly:**
  - Permitted Use: Tenant agrees to use and occupy the Premises solely as a retail establishment for the sale of _____, operating under the trade name ____, and for no other purpose whatsoever. Tenant acknowledges Landlord's need to determine, in its sole discretion, all retail uses and operators within the Shopping Center, and agrees that no change in use of the Premises shall be permitted under any circumstances. Tenant further agrees that it shall not change its trade name without Landlord's prior written consent, which consent shall not be unreasonably withheld.
- **Negotiated:**
  - Permitted Use: The Premises shall be occupied and used by Tenant solely for the purpose of conducting therein the business of a __________ ***and incidental thereto, a __________ only,*** offering only those items shown on the menu attached hereto as Exhibit "C", and Tenant shall not use or permit or suffer the use of the Premises for any other business or purpose without Landlord's prior written consent, as further described below. Tenant agrees to inform Landlord of any and all material changes to the menu items at least thirty (30) days in advance of same (and all such changes shall be subject to Landlord's prior written approval); ***provided, however, Tenant may make changes to the Menu without Landlord's consent if such changes do not: (i) deviate from Tenant's primary use; and/or (ii) violate any exclusive granted by Landlord, and Tenant agrees to cease selling or reduce the display of any item that does so***.
- **Tenant Friendly:**
  - Permitted Use: Except as hereinafter provided, the Demised Premises may be used for any lawful purpose. No part of the demised premises shall be used for any purpose or business which is noxious or unreasonably offensive because of the emission of noise, smoke, dust or odors. The foregoing provisions of this Section constitute the sole restrictions applicable to the use of the Demised Premises.

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Delivery Conditions / Alterations

- Delivery condition depends on the property and the deal. See next slide.
- **Alterations:** Landlords want control over what the tenant does to the premises, especially if it affects the building structure or systems. Tenants want the flexibility to alter the space without having to seek landlord's approval or go through an overly burdensome process to have landlord sign off on every little thing they want to accomplish.

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Delivery Conditions

- Landlord Friendly:
  - Landlord is not required to make any improvements to the Premises unless otherwise stated in this Lease. Tenant has inspected the Premises and agrees, upon the Effective Date of this Lease, to accept delivery of the Premises "as is" and without warranty or representation by Landlord, express or implied, as to its condition or repair. If for any reason possession of the Premises is not delivered to Tenant within three (3) months after the date this Lease is executed, then either party may terminate this Lease by notice to the other. In such event, Landlord shall promptly return any deposit to Tenant, and neither party shall have any further liability to the other hereunder.
- Compromise Language:
  - Tenant agrees to inspect the Premises upon completion of Landlord's Work (defined in Section 11 below) and shall accept delivery of the Premises "as is," without warranty or representation by Landlord, express or implied, as to its condition or repair, on _______________ (the "**Target Delivery Date**") or on such later date when Landlord's Work is completed. If for any reason possession of the Premises is not delivered to Tenant within three (3) months after the Target Delivery Date, then either party may terminate this Lease by notice to the other. In such event, Landlord shall promptly return any deposit to Tenant, and neither party shall have any further liability to the other hereunder. Upon Landlord's prior written consent, at any time prior to the Lease Commencement Date, Tenant shall have the right, at its own risk, to enter the Premises solely for the purpose of taking measurements therein, and for any other reasonable purpose expressly permitted by Landlord; provided however, that such entry shall not interfere with any of the work then being done by or on behalf of Landlord (where applicable), Tenant shall indemnify and hold Landlord harmless against any loss, damages or liability arising from such entry as more particularly set forth in Section ___ below, and Tenant shall maintain all insurance policies during such entry onto the Premises as required under Section ___ below.]

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Operating Expenses

- **Landlord:** Responsible for common area maintenance / operating expenses for common areas and in NNN lease, landlord passes those expenses through to the tenants, usually by pro rata share of each tenant.
- **Tenant:** Might want to negotiate a cap on controllable expenses and also seek to limit what is charged as a common area expense. Push back on landlord attempt to pass through any administrative fees and other expansive cost categories.
- **Negotiated Language:** This provision of the lease will likely be heavily negotiated.
- **Audit Rights:** Tenants may want the right to inspect the Landlord's books/records to confirm the expenses are in line with reality.

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Assignment / Subletting

- Landlord Consent – Permitted Transfers
- Review Fees
- Profit-Sharing
- Recapture

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Default

- Monetary vs. Non-Monetary
- Remedies for Landlord
- Remedies for Tenant

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Relocation

- Characteristics of Substitution Space
- Costs
- Notice Period

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Questions?

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