



## **OUTLINE OF ISSUES CONCERNING RENT, SECURITY, DEFAULTS AND REMEDIES**

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### **RENT:**

#### **1. Authority**

- (a) Confirm the authority of the lease signatory.
- (b) *See St. James Apartments, LLC v. Coinmach Corporation*, 2013 U.S. Dist. LEXIS 106116 (D.N.J. 2013).

#### **2. Gross Lease v. Net Let v. Modified Gross Lease**

- (a) Gross lease – the tenant pays a fixed dollar amount that includes base rent and additional rent and the landlord pays all operating expenses.
- (b) Net Lease – the tenant pays a fixed dollar amount for base rent amount and, as additional rent, all expenses including maintenance, taxes and insurance.
- (c) Modified Gross Lease - unless a single tenant occupancy, most leases are a hybrid or modified gross lease under which the tenant pays a fixed dollar amount for base rent and, as additional rent, operating expense increases over a base year. The base rent will be a sum sufficient to cover the landlord's costs and provide a profit.

#### **3. Base Year**

- (a) In the event designated costs increase following the base year, then the tenant will pay the increase, or in a multi-tenant situation the tenant will pay its proportionate share.
- (b) The base year usually will be the calendar year in which the lease term commences. The tenant, however, will prefer the first twelve months of the lease term, particularly when the lease commences in the last quarter of the calendar year.

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\*© Copyright 2013 by Jack Fersko. Mr. Fersko is a partner in the Real Estate Department of Greenbaum, Rowe, Smith & Davis, LLP where he is the Co-Chair of the Alternative Energy & Sustainable Development Practice Group. This outline of issues is not exhaustive of all potential issues, but rather is intended to provide the reader with a starting point in the analysis of issues to address in the context of rent, security, defaults and remedies. Unless otherwise indicated, the clauses are presented primarily from a landlord perspective.

(c) The landlord should scrutinize the base year costs to ensure that there are no anomalies, such as extraordinary snow plowing costs, and reserve a right to make appropriate adjustments to the base year in the event of such anomalies.

#### 4. **Base Rent and Additional Rent - Generally.**

(a) The lease agreement should provide for the base rent (sometimes referred to as minimum rent) to be paid on the first day of the month, in advance, and without any offset, deduction or abatement.

(b) Provide for adjustments, if any, to the base rent

(i) Adjustments may be determined in any number of ways, including an increase in the consumer price index, a fixed percentage increase in base rent, a fixed dollar increase in base rent, and an increase to the fair market rental value.

(ii) Care should be given in the drafting of these clauses in order to ensure clarity in the manner in which the adjustment will be determined. *See generally, Enniss Family Realty I, LLC v. Schneider Nat'l Carriers, Inc., 2013 WL 2468864 (S.D. Miss. 2013); Cablevision of Oakland, L.L.C. v. CK Bergen Holdings, LLC, 2012 N.J. Super. Unpub. LEXIS 2436 (Ch. Div. Bergen Co. 2012).*

(c) Additional Rent:

(i) N.J.S.A. 2A:18-53 allows for a summary dispossession proceeding with respect to a tenant that holds over after defaulting in the payment of rent. As such, it is important to characterize all sums, in addition to base rent, due under the lease, as additional rent.

(ii) Additional rent may include, by way of example taxes, insurance premiums, utility charges, expenses attributable to reciprocal easements and business park expenses, building and common area operating expenses, costs incurred by the landlord to cure the tenant's breach of the lease agreement, legal fees to enforce the lease agreement, brokerage fees due to a tenant default, percentage rent and a late fee for failure to pay rent and additional rent when due or within a stated grace period.

(d) See **Appendix A** for an example of a general rent and additional rent clause.

#### 5. **Additional Rent based on Taxes.**

(a) The landlord will broadly define taxes to include, by way of example:

(i) Real estate taxes;

(ii) Assessments for municipal improvements;

- (iii) Payments in lieu of taxes (PILOT);
  - (iv) Business Improvement District/Special Improvement District Assessments;
  - (v) Water and sewer charges and other charges of governmental authorities that may be a lien on the property;
  - (vi) Taxes arising out of tenant equipment so affixed to the building as to become a fixture and included in the valuation of the property for real estate tax purposes; and
  - (vii) Taxes that may be imposed in the future such as sales tax on rent.
- (b) The tenant will seek to narrow the definition of taxes.
- (i) The tenant will seek to exclude certain taxes, such as, by way of example, gross receipts tax (as opposed to a tax on rents received), excise taxes, franchise taxes, income taxes, inheritance taxes, gift taxes, transfer taxes, taxes on profits and capital levies.
  - (ii) To the extent that a tax is payable in installments, the tenant will want the landlord to pay the tax in the greatest number of installments possible (e.g., assessments for municipal improvements may be paid over a ten (10) year period) and only obligate the tenant for those installments that fall due during the lease term.
- (c) Tax Escrow.
- (i) The landlord will want taxes to be paid in monthly installments so that the landlord has the funds available when taxes fall due. Depending upon the size of the leasehold space and the strength of the tenant, the tenant may negotiate for taxes to be paid as they become due (e.g., real estate taxes are due on the first day of the second month of each quarter).
- (d) Tax Appeal.
- (i) Adjust based on net costs after expenses. Provide for such adjustment regardless of who may prosecute the tax appeal. *See Crosspointe Developers, L.L.C. v. Wegmans Food Markets, Inc.*, 2013 N. J. Super. Unpub. LEXIS 2721 (App. Div. 2013).
  - (ii) If the landlord permits the tenant to prosecute a tax appeal, the landlord should provide that the tenant will be responsible for any increase in taxes for as long as such increase may apply regardless of the lease term.

## 6. **Additional Rent based on Insurance.**

- (a) The landlord will want the right to obtain liability and casualty insurance in as broad a form as it may determine and require the tenant to pay its share of the expense.

(b) The landlord will want the tenant's share of insurance costs to be paid in monthly installments so that the funds are available when the insurance premiums fall due.

#### **7. Additional Rent based on Utilities.**

(a) The landlord will broadly define utilities to include, by way of example water, sewer, standby water for sprinkler system, gas, electric, heat, phone, cable and all other utilities or services made available to the leased premises.

(i) In a single tenant occupancy setting, the landlord will want the tenant to pay all utilities, deposits and related fees, and may obligate the tenant to put the utilities in the tenant's name..

(ii) When the tenant pays utilities directly to the provider, even when the account is in the name of the tenant, it is important for the landlord to ensure that all utilities are paid or the landlord may be responsible to bring the account current before the utility company will permit a new account to be opened in the name of a subsequent tenant.

(iii) The landlord should account for potential future sustainable development by including in operating expenses a charge for such utilities and/or by obligating the tenant to purchase from any on-site or off-site source.

(b) For the tenant, it is important to determine how utilities are measured. If there is one meter for the property, determine whether there are sub-meters for each tenant's space.

(i) When there are sub-meters, the tenant should determine the basis for the landlord's charge to the tenant (i.e., whether the landlord bills at cost, or assesses an administrative fee or any other form of surcharge).

(ii) In a setting in which there is only one meter and the tenants pay utilities based on a pro rata percentage, the tenant should evaluate whether one tenant's use of certain utilities may be significantly disproportionate to the tenant's and negotiate an appropriate adjustment to the payment obligation.

#### **8. Additional Rent based on Expenses Attributable to Reciprocal Easement Agreement/Business Park Expenses.**

(a) The landlord will include in operating expenses, or may separately provide for the payment of expenses attributable to reciprocal easement agreements and/or the business park generally.

(b) The tenant will want to limit its obligation to those expenses that are attributable to the term, will want to exclude or limit capital expenditures (see discussion of capital expenditures in #9 below) and will need to evaluate the correct proportionate share based upon total business park building square footage.

9. **Additional Rent based on Operating Expenses.**

(a) See **Appendix B - Special Issues Related to Operating Expense Provisions in Leases** - for an excellent general discussion of the topic of operating expenses.

(b) The landlord will include a very broad clause, requiring the payment of all expenses of any nature related to the ownership, operation, maintenance, repair and management of the building and common areas as determined to be necessary and desirable by the landlord, followed by a representative, but not all inclusive list of operating expenses.

(i) The list of operating expenses will include, by way of example:

(A) Cost to keep the building and property in compliance with law;

(B) Cleaning expenses;

(C) Landscaping expenses;

(D) Snow removal costs;

(E) Heating, ventilation and air-conditioning as well as all other utility expenses for the building and common areas not otherwise provided for in a separate lease provision;

(F) Insurance costs not otherwise provided for in a separate lease provision;

(G) Management fees;

(H) Supplies used for the maintenance, repair, replacement, management or operation of the building and/or common areas;

(I) Taxes not otherwise provided for in a separate lease provision;

(J) Wages of employees performing any services with respect to the maintenance, repair, replacement, management or operation of the building and/or common areas, including fringe benefits;

(K) Independent contractor charges pertaining to the maintenance, repair, replacement, management or operation of the building and/or common areas;

(L) Inspection and permit fees, accounting fees, attorney and professional fees incurred in connection with the maintenance, repair, replacement, management or operation of the building and/or common areas;

(M) Maintenance, repairs and replacements to paving, curbing, fencing, walkways, electric power lines, light poles, bulbs and drainage systems;

(N) Line painting and signage;

(O) Security services;

(P) Maintenance, repair and replacement of water, storm, sewer and sanitary sewer lines;

(Q) Amortization and depreciation of equipment purchased and used to maintain, repair, replace, manage or operate the building and/or common areas;

(R) Cost of ground leases;

(S) Garbage collection and removal costs; and

(T) Costs imposed pursuant to municipal approvals, such as maintenance costs for park land or traffic controls.

(c) The tenant will seek to limit operating expenses and provide for certain exclusions from operating expenses, including, by way of example:

(i) Limitations:

(A) Management fees – Tenant will seek to limit to a fixed percentage of base rent and/or limit to fees of independent third party management companies, not to exceed a fixed percentage of base rent.

(ii) Exclusions:

(A) Interest on and amortization of debt;

(B) Refinancing costs;

(C) Expenses that must be treated as capital expenditures under GAAP and therefore must be capitalized and depreciated;

(D) Maintenance, repair or replacement charges pertaining to the roof, foundation, floor, walls, or structure;

(E) Leasehold improvements for new tenants;

- (F) Brokerage commissions;
- (G) Costs arising from defaults by other tenants and costs attributable exclusively to one or more tenants but not attributable to the tenant;
- (H) Amounts paid by landlord as ground rent;
- (I) Advertising and promotional costs;
- (J) Salaries for employees above the level of building supervisor;
- (K) Income taxes;
- (L) Cost of art work and sculptures;
- (M) Fines and penalties;
- (N) Expenses for which landlord is reimbursed by other tenants or insurance carriers; and
- (O) Charitable and political donations.

(d) Capital Costs.

(i) The landlord will seek to include but limit the amount of capital expenses rather than exclude capital expenses completely, for example by providing for the amortization of capital expenses over an agreed upon period of time, such as eight or ten years. If agreed upon in concept, the tenant will likely argue for useful life based on GAAP. The landlord will also seek to collect interest on the unamortized portion of the expense. To the extent the landlord agrees that capital expenses should be excluded from operating expenses, rather than included on a limited basis, the landlord should seek to carve out of the exclusion certain capital expenses, including, by way of example:

- (A) Capital expenses to address newly enacted laws and regulations;
- (B) Capital expenses that result in a cost savings with respect to building operation. In this latter event, the tenant will try to limit the expense to the actual annual savings achieved.

(e) Operating Expense Increase - Limitation.

(i) The tenant will seek to limit any increase in operating expenses to the lesser of actual operating expenses or a fixed percentage increase per year.

(ii) Landlord may then seek to counter such position by either:

(A) Carving out of any limitation provision uncontrollable expenses such as taxes, insurance, snow plowing and utilities; or

(B) Providing that in the event less than the full agreed upon percentage increase is achieved in any one year, the difference may be carried over to another year. By way of example, if the annual cap is four percent and in one year operating expenses increase by only two (2%) percent, then in a subsequent year, the landlord may increase the operating expenses by up to six (6%) percent. The increase is always limited by the actual increase. Without such a provision, the landlord has no incentive to reduce or save on operating expenses.

(f) Audits.

(i) Process: The lease should provide for the landlord to provide the tenant with a reconciliation of operating expenses by a date certain. Thereafter, the tenant should have a set period of time within which to audit the reconciliation. If the tenant fails to timely audit the reconciliation, the tenant should thereafter be barred from an audit. If the tenant does audit the reconciliation, then the tenant should have a set period of time to complete the audit and file any objection. The lease should provide a set period for the parties to amicably resolve the matter before any claim may be filed. The landlord should consider requiring confidential arbitration for any claim pertaining to the audit. In addition, the landlord will want to impose a confidentiality obligation with respect to the entire audit process by requiring that both the tenant and the party undertaking the audit on its behalf execute a non-disclosure agreement satisfactory to the landlord as a condition precedent to the exercise of the audit right. Finally, the landlord should provide that in the event of a breach of the non-disclosure agreement, the tenant will lose its audit rights.

(ii) The tenant should be obligated to provide a copy of the audit and a detailed list of its challenges.

(iii) The lease should address:

(A) Where the audit will be conducted;

(B) Who pays for the audit; and

(C) Who can perform the audit? The landlord will want to preclude a firm that charges a percentage of the savings rather than an hourly fee and a prior employee of the landlord or any of its management companies.

(i) Gross-up of operating expenses.

(i) If the building is less than 95% leased during the base year, the tenant will want the operating expenses to be grossed up to reflect 95% occupancy so that the base year operating expenses are not artificially low.

(ii) If the building is less than 95% occupied during any lease year, the landlord will want the operating expenses grossed up to insure that the landlord collects the complete increase in operating expenses. A landlord wants to recoup all increases in operating costs even if the building is not fully occupied. The tenant may argue that only costs that vary with occupancy should be grossed up as opposed to fixed costs that do not vary with occupancy.

**10. Additional Rent based on the Landlord's Costs Incurred in Performing the Tenant's Obligations.**

(a) The landlord will want to be reimbursed if the tenant fails to perform any of its obligations under the lease and the landlord proceeds to perform such obligations. The tenant will want an initial notice and an opportunity to cure before the landlord has a right to incur any expenses and will want any reimbursement obligation limited to those expenses incurred that were both reasonable and necessary. The landlord should be careful to reserve a right to cure a tenant breach without having the obligation to do so in order to avoid the odd result of a landlord breach arising from a tenant default.

**11. Additional Rent based on a Late Payment.**

(a) If rent or additional rent is not timely paid or paid within an agreed upon grace period (e.g., five days), then the landlord will want the tenant to pay a late fee.

(b) Late fees must be a reasonable estimate of the amount required to compensate the landlord for the loss/harm that the landlord will suffer as a result of the untimely payment or it may be challenged as a penalty. Penalties are not a permitted remedy for a contract breach.

**12. Additional Rent based on Legal Fees Incurred to Enforce the Tenant's Obligations under the Lease.**

(a) The landlord will want to be reimbursed for legal fees that it incurs as a result of the tenant's default. The lease should clearly specify whether legal fees are limited to litigation expenses or non-litigation expenses incurred in any enforcement effort. *See generally, Village Super Market, Inc. v. Estate of Saul Cantor*, 2011 N.J. Super. Unpub. LEXIS 2919 (App. Div. 2011); *2000 Clements Bridge, LLC v. OfficeMax North America, Inc.*, 2013 U.S. Dist. LEXIS 102444 (D.N.J. 2013).

(b) When the parties agree that the prevailing party will be entitled to legal fees they must be careful to define what constitutes "prevailing party." *See generally, Intercontinental Group v. KB Home Lone Star*, 295 S. W.3d 650 (2009). The parties may wish to provide that the party that obtains a determination of wrongful conduct by the other is the prevailing party regardless of whether actual damages are awarded.

(c) The landlord will also want to provide for reimbursement of legal expenses incurred to review any requests for consent from the tenant (assignment/subletting/alterations)

and for review of any documents the tenant may request the landlord provide, including, by way of example:

- (i) A Subordination, Non-Disturbance and Attornment Agreement (SNDA);
- (ii) A Landlord Waiver/Subordination; and
- (iii) An Estoppel Certificate.

### 13. **Percentage Rent.**

(a) Percentage rent is frequently calculated on the basis of gross sales. The landlord will want to broadly define gross sales to include, by way of example, the sales price for all goods sold and services performed by the tenant or any other entity in, at or from the premises regardless of whether for cash, credit or other consideration. The landlord will want to include in gross sales all orders that originate at the premises regardless of (i) where delivery may take place, (ii) whether the order is made in person or by any technology based system now or hereafter existing, including, by way of example, telephone, catalogue, facsimile, or internet, and (iii) customer deposits that are not refunded to the customer.

(b) Break Point. The obligation to pay percentage rent will typically attach upon the tenant reaching the annual break point, which is frequently determined by dividing the annual rent by the percentage rent figure. By way of example, if the annual rent is \$100,000 and the percentage rent is eight (8%) percent, the natural break point will equal \$1,250,000. As such, the obligation to pay percentage rent will be triggered by the first dollar of gross sales in excess of \$1,250,000.

(c) The tenant will seek to exclude certain sales from the gross sales calculation, including, by way of example:

(i) Exchanges of merchandise made between tenant stores (although the landlord will want to limit the exclusion to exchanges made for the convenience of the customer and not exchanges made for the purpose of ultimately effecting a sale from another store to avoid percentage rent);

(ii) Returns to suppliers or manufacturers;

(iii) Refunds to customers on transactions otherwise included in gross sales;

(iv) Sales to employees (although the landlord will want to include the sale net of any employee discount);

(v) Interest charges, service charges and installment sales charges;

(vi) Going out of business sales and lost leader sales (on the theory that such sales do not produce profits);

- (vii) Amounts from delivery service and installation charges;
- (viii) Mail order catalogue sales and internet sales;
- (ix) Vending machine sales (although the landlord will want to include the net collection amount); and
- (x) Sales, excise and similar type taxes (although the landlord will only exclude to the extent such amount was included within gross sales in the first place).

(d) The landlord and the tenant will have to address reporting and inspection/audit rights just as they must do in connection with operating expenses. The landlord will want point of sales data and sales tax returns.

(e) Provide for closure due to casualty. In this respect, the parties may need to adjust the break point, particularly if the casualty occurs during peak months such as November and December.

(f) The parties may want to negotiate a kick out right entitling one party to terminate the lease if a certain threshold of gross sales is not achieved. If the tenant seeks such a right, the landlord will want to require a continuous operation covenant and reimbursement for tenant improvements, free rent and brokerage expenses.

#### 14. **Free Rent.**

(a) It is important to be clear whether a period of free rent includes base rent and additional rent or just base rent.

(b) The landlord will seek a provision that requires payment of the free rent in the event the tenant defaults under the lease and the lease or possession is terminated.

(c) Determine whether free rent applies at the commencement of the lease, at the end of the lease, or at milestones during the lease term. Evaluate the impact of each to the intended holding period of the property and its future sale as well the timing of future refinancing.

#### 15. **Measurement.**

(a) Applies to determination of base rent and pass through percentage. It is important to account for possible building expansion. Also, it is important to express clearly the method by which the rentable and usable square footage of a building and the premises are measured in order to avoid post-lease commencement disputes. In the event that a tenant is granted measurement rights, provide for an express and limited timeframe for an exercise of the right. Also, the lease should express clearly any add on factor included in the method of measurement if not included by definition in an expressed method of measurement. *See generally, ACBB-Bits,*

*LLC v. 550 Broad St., L.P.*, 2011 N.J. Super. Unpub. LEXIS 2875 (App. Div. 2011); *cert. den.* 210 N.J. 217 (2012).

(b) Measurement methods. The Building Owners and Managers Association (BOMA) provides for several measurement standards for leased space, including:

(i) Industrial Buildings: Standard Methods of Measurement (ANSI/BOMA Z65.2-2009) which applies to warehouses, factories, flex space and distribution centers and has two methods of measurement, Method A (Exterior Wall Method) and Method B (Drip Line Method).

(ii) Gross Area of a Building: Standard Methods of Measurement (ANSI/BOMA Z65.3-2009) which usually is applied in a build to suit or sale-lease back transaction and includes two methods of calculation, the Construction Gross Area method and the Exterior Gross Area method.

(iii) Retail Buildings: Standard Methods of Measurement (ANSI/BOMA Z65.5-2010) which usually is used for shopping centers, strip malls and power centers.

(iv) Office Buildings: Standards Methods of Measurement (ANSI/BOMA Z65.1-2010) which supersedes the 1996 standard and has two methods, Method A and Method B.

### **SECURITY:**

1. The landlord seeks security due to a number of factors, including, by way of example:

(a) A concern for the creditworthiness of the tenant;

(b) A concern for the fact that the landlord will be investing a certain sum to perform the tenant fit-up pursuant to the landlord's work letter; and

(c) A concern for the fact that the landlord will have to pay a brokerage commission on the transaction before any meaningful lease term expires and any meaningful rent is collected.

2. Amount of security.

(a) The amount of security will depend upon the creditworthiness of the tenant, the amount of tenant improvement work to be performed by the landlord and the brokerage commission to be paid by the landlord.

(b) Although the amount may vary lease to lease, a security deposit will usually be in an amount equal to two months base rent; however, the amount of the security deposit is freely negotiable by the parties. The landlord will usually seek to increase the amount of the security deposit as base rent increases over the term of the lease.

(c) The commercial landlord is not required to pay interest on the security deposit and is not required to deposit the security into a segregated account. *See generally, Mort's Family Group, L.L.C. v. Yan Huang*, 2011 N.J. Super. Unpub. LEXIS 2427 (App. Div. 2011); *Presberg v. Chelton Realty, Inc.*, 136 N.J. Super. 78 (Dist. Ct. 1975).

### 3. Forms of Security.

(a) Guaranty. A guaranty of payment and performance from a creditworthy individual or entity.

(b) Cash. Cash will provide the landlord with use of the money during the term, including use of the money to perform the tenant improvement work. A cash security deposit will, however, be deemed a part of the tenant's bankruptcy estate in the event the tenant files bankruptcy and seizure will be subject to the bankruptcy automatic stay.

(b) Letter of Credit. A letter of credit will not be deemed a part of the tenant's bankruptcy estate. *See In Re Zenith Laboratories, Inc.*, 104 B.R. 667 (Bkr. D.N.J. 1989).

(d) UCC Lien on Tenant's Personalty. The problem with this form of security is that the lien of the landlord will interfere with the tenant's ability to obtain financing for its day to day business operations.

### 4. Letter of Credit.

(a) See **Appendix C** for a sample letter of credit lease clause.

(b) Letters of credit are governed by Article 5 of the Uniform Commercial Code (N.J.S.A. 12A:5-101 *et. seq.*) and either the Uniform Customs and Practice for Documentary Credits or the International Standby Practices 1998.

(c) The tenant will be obligated to pay for the letter of credit and any transfers and the landlord will want the letter of credit to comport with the following requirements:

(i) The landlord will want the letter of credit to be in form and content acceptable to the landlord, and will want the letter of credit to be an irrevocable, evergreen letter of credit that automatically renews unless the landlord is notified in writing within a certain number of days prior to the expiry date that the letter of credit will not be renewed. The letter of credit should not expire until at least thirty to forty-five days after the end of the lease term in order to provide the landlord with an opportunity to assess the condition of the property following the end of the lease term.

(ii) The letter of credit should be issued by a national U.S. bank reasonably acceptable to landlord, with an operational branch in the landlord's locale for purposes of drawing on the letter of credit. The letter of credit should be payable upon presentation of a sight draft and name the landlord as its beneficiary.

(A) If the bank fails, the landlord loses its security.

(B) Letters of credit are not covered by the Federal Deposit Insurance Corporation in the event of a bank takeover.

(iii) The letter of credit should be transferrable at no cost to the landlord so that the letter of credit can be transferred to a purchaser or to a mortgagee.

(iv) The letter of credit should permit full or partial draws, upon presentation of a sight draft signed by an officer or member of the landlord.

(v) The letter of credit should not express any conditions to a draw. If the tenant is concerned, then the lease agreement can provide for the conditions for draw, which should include, by way of example, a breach of the lease, a bankruptcy filing by the tenant or any guarantor, a failure to replace or reissue the letter of credit and a notice of non-renewal of the letter of credit.

(vi) The letter of credit should not condition a draw on any notice to the tenant.

(vii) The lease should provide that a draw on the letter of credit will not limit any of the rights and remedies of the landlord under the lease, or at law or in equity.

## 5. Guaranty.

(a) The guaranty should be absolute guaranty of payment and performance and not limited to collection. The guaranty must be in writing. *See N.J.S.A. 25:1-15. See Appendix D* for a sample form of Guaranty.

(b) If the guarantor is not located in the State of New Jersey then the guarantor should provide for a registered agent for service of process and agree to submit to the jurisdiction of the courts of the State of New Jersey.

(c) The guaranty should not require the landlord to notify the guarantor of any lease amendment, extension, holdover, sublease or lease assignment and the guaranty should expressly continue in full force and effect in the event of any lease amendment, extension, holdover, sublease or lease assignment, regardless of whether the guarantor acknowledges or consents to any of the foregoing. *See generally, Kanouse v. Wise*, 76 N.J.L. 423 (1908); *EAM Investments, LLC v. McDonagh Dodge*, 2012 N.J. Super. Unpub. LEXIS 839 (App. Div. 2012); *Center 48 Limited P'ship v. May Dept. Store*, 2002 W.L. 31741469 (App. Div. 2002).

(i) The landlord will expressly provide in the guaranty that the guarantor consents to any lease assignment, sublease, renewal, extension, space change (whether by addition, relocation or subtraction), and holdover.

(ii) The landlord also will expressly provide that the guaranty will run in favor of any assignee of the guaranty.

(d) The guaranty should provide for the payment of legal fees incurred in the enforcement of the guaranty.

(d) Good Guy Guaranty. Under a good guy guaranty, the guarantor will (i) not have any liability, or (ii) will have limited liability (either for the period from the default until surrender or for a stated period of time, such as one year's worth of rent and additional rent) if the tenant surrenders the premises without any delay provided that the premises is returned without any damage, without any construction liens and in accordance with the lease terms. If the premises is not promptly surrendered then the guaranty will "spring" into a full recourse guaranty. Depending on the nature of the tenancy, the landlord should consider either an added condition to the good guy guaranty, that the premises is returned free of any discharge of environmental violation, or a full recourse guaranty for environmental violations.

### **DEFAULTS:**

#### 1. Types of Tenant Default.

##### (a) Monetary Default.

(i) Failure to pay rent or additional rent.

(b) Non-Monetary Default – Failure to perform a non-monetary lease obligation, including, by way of example:

(i) Lease noncompliance;

(ii) Bankruptcy filing or other creditor's rights proceeding pertaining to the tenant or a guarantor;

(iii) Assignment or sublease in violation of lease;

(iv) Failure of the tenant to deliver the letter of credit or a replacement letter of credit;

(v) Failure of the issuing bank to honor a draw on a letter of credit or renew a letter of credit.

(v) Abandonment or vacation of the premises.

(c) Habitual default.

(i) Failure to pay rent or additional rent timely a stated number of times during a stated period of time, for example, two (2) times in any twelve (12) month period.

(ii) Failure to perform the same non-monetary covenant more than a stated number of times, for example, failure to timely deliver evidence of insurance more than two (2) times during the term of the lease.

2. Notice and Cure Rights.

(a) There are a number of issues for the landlord and the tenant to resolve with respect to notice and cure rights, including, by way of example:

(i) Should a written notice be given before a monetary default or non-monetary default? A notice of default must be clear and unambiguous in informing a tenant of the default. *See generally, Village Super Market, Inc. v. Estate of Saul Cantor*, 2011 N.J. Super. Unpub. LEXIS 2919 (App. Div. 2011).

(ii) If a written notice is required and an opportunity to cure is provided, how much notice and what length of time to cure should be given? In this respect, the landlord must remain mindful of its obligations to its lender and the timing for performance.

(iii) If the non-monetary default is not readily susceptible of a cure, should the tenant be afforded additional time to cure? Here too, the landlord must remain mindful of its obligations to its lender and the timing for performance. The landlord will condition any extension on the tenant's having been diligent in its efforts to cure and continuing to diligently complete a cure. Depending on the nature of the default, the landlord may impose an outside date for completion, such as by way of example, where the continuation of the default will place the landlord in default of its mortgage, or subject the premises to a lien or forfeiture, or subject the landlord to liability to a third party.

(b) There are a number of non-monetary defaults with respect to which the landlord will not afford the tenant a right to notice or a right to cure, including, by way of example:

(i) The tenant's failure to deliver an estoppel certificate in connection with a sale or financing of the premises after the landlord has provided a notice requesting delivery;

(ii) The tenant's failure to execute and deliver an SNDA after the landlord has provided a notice requesting delivery;

(iii) Environmental non-compliance;

(iv) The tenant's holding over after the expiration of the lease term;

(v) A bankruptcy filing or other insolvency proceeding filing with respect to the tenant or a guarantor;

(vi) An assignment, sublease or other transfer of the lease in violation of the terms of the lease agreement;

(vii) A failure concerning the letter of credit (delivery, replacement, honoring a draw); and

(viii) During the pendency of a separate and distinct default.

(c) The landlord will provide in the lease that the landlord is permitted to accept rent during any outstanding notice and cure period as well as during a period of default, without waiving the outstanding default. The landlord will seek to make it clear in the lease that rent tendered during the pendency of an outstanding notice and cure period or following a termination notice, only represents a payment on account of money due and does not constitute a waiver of any outstanding notice of breach, default or notice of termination.

### 3. Requests for Consent.

(a) The landlord will provide (i) that the landlord is not obligated to consider any request by a tenant for a consent (e.g., a request to consent to a lease assignment) and (ii) that the tenant is not entitled to exercise any rights (e.g., a right to renew or a right of first refusal), during an outstanding notice of default and related cure period.

## **REMEDIES:**

### 1. Landlord Remedies for a Tenant Default.

(a) The landlord will reserve a right of re-entry in the event of a default by the tenant under the lease, thereby permitting the landlord to re-enter by summary dispossession or other legal proceeding. The landlord will provide that even in the event of a re-entry, the tenant nevertheless will continue to be responsible under the lease through the expiration date based upon a survival clause that permits the landlord to sue for damages accruing after the re-entry, based upon the rent and additional rent remaining due under the lease.

(b) The landlord will reserve a right to terminate the lease in the event of any monetary or non-monetary default under the lease. As with the exercise of the right of re-entry, the landlord will provide that the tenant remains responsible under the lease pursuant to the survival clause and following the termination, for damages suffered by the landlord determined based upon the rent and additional rent remaining due under the lease.

(c) The landlord will also provide for the tenant to be responsible for base rent and additional rent arrearages to the date of re-entry or termination as well as certain expenses incurred by the landlord including, by way of example:

- (i) The cost of repairing, renovating and placing premises in good order;
- (ii) Unamortized brokerage expenses;
- (iii) Unamortized tenant improvements;
- (iv) Attorneys' fees and other costs of re-entering and re-letting the premises;
- (v) Any abated or free rent; and
- (vi) Any other obligations under the lease of the tenant that survive expiration or any earlier termination of the lease.

(d) Pursuant to N.J.S.A. 2A:18-53, a landlord has a limited right to sue for possession by way of a summary dispossession proceeding, including:

(i) Non-payment of rent (subject to the right of tenant to pay past due rent prior to the entry of a judgment for possession – N.J.S.A. 2A:18-55).

(ii) A failure to vacate at the end of the lease.

(iii) A violation of a non-monetary provision of the lease following which landlord terminates the lease and serves a notice to quit pursuant to N.J.S.A. 2A:18-56 and has reserved a right of re-entry. *See 350 Main Street LLC v. Guan*, 2011 N.J. LEXIS 1029 (App. Div. 2011), *cert. den.* 208 N.J. 338 (2011), (permitting the service of a notice to quit after the commencement of an action to dispossess but before entry of a judgment for possession).

(iv) In the event landlord obtains a judgment for possession, a warrant for removal will issue pursuant to N.J.S.A. 2A:18-57.

(e) Accelerated Rent.

(i) *See generally, Gannary v. Linker Realty Corp.* 131 N.J.L. 317 (E&A 1943). *See also, 2000 Clements Bridge, LLC v. OfficeMax North America, Inc.*, 2013 U.S. Dist. LEXIS 102444 (D.N.J. 2013) wherein tenant held responsible for rent and additional rent due to end of lease term in excess of rent payable by new tenant, discounted by 6%.

(ii) Accelerated rent is a contract remedy based upon the anticipatory breach by the tenant and its failure to pay rent due in the future. **See Appendix E** for a general form of landlord remedies and **Appendix F** for an alternative acceleration of rent clause.

(f) Waste. N.J.S.A. 2A:65-2 prohibits a tenant from committing waste and N.J.S.A. 2A:65-3 creates a cause of action for waste with a remedy of possession and treble damages. *See Birch v. Hanley*, 324 N.J. Super. 286 (Law Div. Special Part 1999).

(g) Right of Tenant to Excess Rents Collected by Landlord. The lease should provide expressly that the tenant is not entitled to the benefit of any excess rents collected by the landlord upon the re-letting of the premises. *See N.J. Indus. Prop. v. Y.C. & V.L., Inc.*, 100 N.J. 432 (1985).

(h) No Setoff. The landlord should expressly provide that the obligation of the tenant to pay rent is a covenant independent of all other rights of the tenant and obligations of the landlord and that the tenant must pay rent without any set-off, abatement or deduction. By structuring the obligation to pay rent as an independent covenant, the landlord will be in a position to argue that the tenant must pay rent regardless of any claim by the tenant of a default by the landlord.

(i) Self Help. The landlord should be careful about exercising self-help remedies and creating a basis for an alleged breach of the covenant of quiet enjoyment. *See N.J.S.A. 2A:39-1 et. seq.*

(j) Arbitration. If the lease includes an arbitration clause, the landlord should carve out from the obligation to arbitrate the pursuit of injunctive relief and the prosecution of a summary dispossess action. In such an event, the tenant should likewise carve out a right to remove the tenancy action to the Law Division. *See N.J.S.A. 2A:18-60; Morrocco v. Felton*, 112 N.J. Super. 226 (Law Div. 1970). The landlord will seek to include a waiver of the right to transfer regardless of whether there is an arbitration provision.

(k) Mitigation. The landlord has an obligation to mitigate damages even in a commercial lease transaction. *See McGuire v. City of Jersey City*, 125 N.J. 310 (1991); *Fanarjian v. Moscowitz* 237 N.J. Super. 395 (App. Div. 1989). A landlord's failure to mitigate damages, however, will not necessarily act as a complete bar to recovery. *See Harrison Riverside Limited Partnership v. Eagle Affil., Inc.*, 309 N.J. Super. 470 (App. Div. 1998).

(i) The landlord should maintain a record of mitigation efforts, including advertising, listing the space with a broker, placement of signs, maintaining records of property showings to prospective tenants, and consultations with brokers to determine the current fair market rental value of the property.

(ii) The landlord should expressly provide that it is not obligated to rent the tenant's space ahead of other available space the landlord may have in its portfolio. The landlord also should provide that it does not have an obligation to correct any damage caused to the premises by the tenant in order to make the premises more presentable for leasing.

(iii) The landlord should provide that the tenant has the burden to prove the landlord failed to mitigate its damages.

(iv) Open question – the right of the parties to contract away the obligation of the landlord to mitigate its damages in a commercial lease.

(l) Issues with Re-Entry. Exercising the right of re-entry has certain issues that a landlord must assess, including the obligation to deal in a commercially reasonable manner with the goods of third parties that are warehoused by the tenant and the furniture, fixtures, equipment and material of the tenant that is subject to a lender lien.

## 2. Landlord Defaults – Landlord Perspective.

(a) A critical issue for the landlord remains the ability to finance and sell the premises. Each of these economic interests will turn on the lease agreement. As such, the landlord will want to make it clear that there are no implied warranties including warranties of habitability or warranties against latent defects, and will include a limited covenant of quiet enjoyment.

(i) The landlord will also include an exculpatory clause to further limit the obligations of the landlord. Exculpatory clauses are enforceable. *See Designer License Holding Company, L.L.C. v. The Resource Club, Ltd.*, 2009 N.J. Super. Unpub. LEXIS 2904 (App. Div. 2009).

(ii) The landlord will want to limit any recovery by the tenant to the landlord's equity in the property. Since the tenant has no control over the equity the landlord may have in the property, the tenant should seek both a right of set-off and a right to recover against the landlord's interest in the real estate rather than its equity in the property. This will entitle the tenant to pursue both the rent stream from the tenant as well as other tenants on the property, and any equity.

(iii) The landlord will want to limit its liability following a sale of the property and an assignment of the lease in order to avoid continuing liability for post-sale events. *See generally, Renee Cleaners, Inc. v. Good Deal Supermarkets of N.J., Inc.*, 89 N.J. Super. 186 (App. Div. 1965).

(iv) The landlord will exclude any personal liability of its members, partners, shareholder, etc. no matter how arising out of the landlord/tenant relationship, whether the claim is sounded in contract, tort or otherwise.

## 3. Landlord Defaults – Tenant Position.

(a) In the event of a default by the landlord, the tenant will seek to have all rights and remedies available at law and in equity including a right of off-set and a right to recover legal fees incurred in any action against the landlord.

## Sources

Mark A. Senn, COMMERCIAL REAL ESTATE LEASES: PREPARATION, NEGOTIATION, AND FORMS (5th ed. 2013).

1 COMMERCIAL REAL ESTATE TRANSACTIONS IN NEW JERSEY (Jack Fersko ed., 3rd ed. 2010).

Milton R. Friedman and Patrick A. Randolph, Jr., FRIEDMAN ON LEASES (5th ed. 2005).

S. H. Spencer Compton and Joshua Stein, *Landlord's Checklist of Silent Lease Issues (Third Edition)*, PRAC. REAL EST. LAW, May 2013.

## APPENDIX A

### Rent for Demised Premises.

(a) **Annual Fixed Rent for the Term.** The Tenant shall pay the Landlord the fixed annual rent for the Demised Premises as set forth on the Annual Rent Schedule annexed as Exhibit \_\_\_\_\_. Annual rent shall be payable in lawful money of the United States of America, in twelve (12) equal consecutive monthly installments, on the first day of each month, in advance, with the exception that the first monthly installment of fixed annual rent shall be paid upon the signing of the Lease.

(b) **Additional Rent Based Upon Taxes.**

(i) **Personal Property Taxes.** The Tenant shall pay the Landlord, as additional rent, either upon demand (which may be made from time to time during the year, in order that the Landlord shall receive the additional rent prior to when such sums are due to the appropriate governmental authority), or, in the Landlord's discretion, in the manner provided in subparagraph (v) below, all taxes levied or otherwise charged or assessed against the Landlord or the Property, as the case may be, with respect to any and all personal property, equipment and/or trade fixtures placed by the Tenant in the Demised Premises, regardless of whether such tax is separately assessed as such or is a part of the computation of real estate taxes assessed and levied with respect to the Property.

(ii) **Real Estate Taxes.** The Tenant shall pay the Landlord, as additional rent, either upon demand (which may be made from time to time during the year, in order that the Landlord shall receive the Tenant's Proportionate Share prior to when such sums are due to the appropriate governmental authority), or, in the Landlord's discretion, as provided in subparagraph (v) below, the Tenant's Proportionate Share of all real estate taxes assessed and levied against the Property for the Lease term, regardless of the date of actual assessment and levy.

(iii) **Definition.** For the purpose of this Lease, the term "real estate taxes" shall include, in addition to real estate taxes and assessments, water and sewer rents or charges and other governmental impositions imposed upon or against the Property, of every kind and nature whatsoever, extraordinary as well as ordinary, foreseen and unforeseen, and each and every installment thereof, which shall or may during the Lease term be levied, assessed or imposed upon or against the Property.

(iv) **Adjustment.** If the real estate tax assessment shall be changed at any time during the Lease term, an appropriate adjustment shall be made. If there shall be more than one taxing authority, the real estate taxes for any period shall be attributable to each taxing authority.

(v) **Tax Escrow.** At the option of the Landlord, which the Landlord may exercise at any time, and from time to time, during the Lease term, the Tenant shall pay the Landlord, the Tenant's Proportionate Share of all real estate taxes and assessments, on the first day of each month in advance, in a sum equal to 1/12th of the Tenant's

Proportionate Share of all real estate taxes due and payable for the then calendar year. If at a time a payment is required the amount of the real estate taxes and assessments for the then calendar year shall not be known, the Tenant shall pay the Landlord, as additional rent, 1/12th of the Tenant's Proportionate Share of all real estate taxes and assessments for the preceding calendar year; and upon ascertaining the real estate taxes and assessments for the current calendar year, the Tenant shall pay the Landlord any difference upon demand, or if the Tenant shall be entitled to a credit, the Landlord shall, at its option, either pay the excess to the Tenant or credit the excess against the next monthly installment(s) of additional rent falling due. Additional rent based upon real estate taxes and assessments payable for the first and last years of the Lease Term, shall be adjusted and pro rated, so that the Landlord shall be responsible for the Landlord's pro rated share for the period prior to and subsequent to the Lease Term and the Tenant shall pay the Landlord its pro rated share for the Lease Term.

(c) **Additional Rent Based Upon Assessments for Public Improvements.**

The Tenant shall pay the Landlord, as additional rent, either upon demand (which may be made from time to time during the year, in order that the Landlord shall receive the additional rent prior to when such sums are due to the appropriate governmental authority), or, in the Landlord's discretion, in the manner provided in subparagraph (b)(v) above, the Tenant's Proportionate Share of all assessments for public improvements assessed and levied against the Property, regardless of the date of actual assessment or levy. If any assessment for public improvements shall be payable in installments, the Landlord shall pay such assessment in the maximum number of installments permitted by "Laws" (as defined in paragraph \_\_\_ below), and the Tenant's obligation to pay additional rent shall be limited to each installment or pro rata share thereof due and payable during the Lease Term.

(d) **Additional Rent Based Upon the Landlord's Insurance.**

(i) **Casualty Insurance.** The Tenant shall pay the Landlord, as additional rent, either upon demand or, in the Landlord's discretion, as provided in subparagraph (iii) below, the Tenant's Proportionate Share of the Landlord's Property Insurance (Special Form) (which may include, without limitation, rent insurance, water damage insurance, building ordinance coverage, vandalism and malicious mischief insurance, flood insurance and war and terrorism insurance, as well as and any other coverage which may be required by a mortgagee of the Landlord). This insurance may: (A) name only the Landlord and the Landlord's mortgagee, if any, as the insured and provide that any loss shall be payable to the Landlord and the Landlord's mortgagee, if any, as their respective interests may appear; (B) be in an amount equal to the full replacement cost of all buildings, improvements, alterations, additions and replacements now or hereafter on or at the Property (without imposing on the Landlord the obligation to insure any alterations made by the Tenant pursuant to the Lease); (C) provide that no act of the Tenant shall impede the right of the Landlord or the Landlord's mortgagee, if any, to receive and collect the insurance proceeds; and (D) provide that the right of the Landlord and the Landlord's mortgagee, if any, shall not be diminished because of any additional insurance carried by the Tenant for the Tenant's own account.

(ii) **Liability Insurance.** The Tenant shall pay the Landlord, as additional rent, either upon demand or, in the Landlord's discretion, as provided in subparagraph (iii) below, the Tenant's Proportionate Share of the Landlord's Commercial General Liability Insurance (including, without limitation, fire legal liability insurance), covering claims for bodily injury, death or property damage, occurring in or about the Property, including, without limitation, any sidewalks adjoining the Property. This insurance may be in an amount of \$5,000,000 for any single occurrence and shall name the Landlord as the insured. The Tenant shall also pay the Landlord, as additional rent, either upon demand or as provided in subparagraph (iii) below, the Tenant's Proportionate Share of the Landlord's Excess or Umbrella Liability Insurance, which insurance may be in the amount of \$10,000,000 for any single occurrence and shall name the Landlord as the insured. The Landlord may increase the limits of coverage of the foregoing policies if circumstances at the time reasonably warrant an increase.

(iii) **Insurance Escrow.** At the option of the Landlord, which the Landlord may exercise at any time, and from time to time, during the Lease Term, the Tenant shall pay the Landlord the Tenant's Proportionate Share of all insurance premiums for the insurance coverages referred to in subparagraphs (i) and (ii) above, on the first day of each month in advance, in a sum equal to 1/12th of the Tenant's Proportionate Share of all insurance premiums then due and payable. Additional rent based upon insurance premiums payable for the first and last years of the Lease Term, shall be adjusted and pro rated, so that the Landlord shall be responsible for the Landlord's pro rated share for the period prior to and subsequent to the Lease Term, and the Tenant shall pay the Landlord its pro rated share for the Lease Term.

(e) **Additional Rent Based Upon Utilities.**

(i) **Utilities.** As additional rent, the Tenant shall pay all charges for water, sewer, standby water for sprinkler system, and all other utilities or services which are made available to the Demised Premises, as provided for in this subparagraph (e) (collectively, "Utilities").

(ii) **Separate Meter for Demised Premises.** If a separate meter is installed or has been installed to meter the consumption of any Utilities used within the Demised Premises, then all charges incurred with respect to such Utilities shall be paid by the Tenant directly to the utility company. Should the Tenant not make payment thereof and should the Landlord become obligated to pay the same, then in addition to being in default hereunder, and the Landlord having all rights and remedies available to the Landlord under the Lease or by Laws, the Tenant shall promptly, upon demand, pay such sum to the Landlord, as additional rent.

(iii) **Separate Meter for Building.** If there is no separate meter to measure the consumption of any Utilities used within the Demised Premises, but a separate meter is installed or has been installed to meter the consumption of any Utilities used in the Building of which the Demised Premises is a part, then the Tenant shall pay the Landlord, as additional rent, upon demand, the Tenant's Proportionate Share of all such charges.

(f) **Additional Rent Based Upon Charges due Under or Pursuant to the Declaration, By-Laws and/or Rules and Regulations.**

The Tenant shall pay the Landlord, as additional rent, either upon demand (which may be made from time to time during the year, in order that the Landlord shall receive the additional rent prior to when such sums are due), or, in the Landlord's discretion, in the manner provided in subparagraph (b)(v) above, the Tenant's Proportionate Share of all sums due from the Property and/or the Landlord as "Owner" (as defined in the Declaration) of the Property, pursuant to the Declaration, the By-laws and/or the Rules and Regulations, regardless of the date of actual assessment or levy; however, the Tenant's obligation to pay such additional rent shall be limited to the amount due and payable during the Lease Term.

(g) **Additional Rent Based Upon Building Common Area Charges.**

(i) **Building Common Area Charges.** For the purposes of this Lease, "Building Common Area" shall include without limitation, all common areas of the Property, such as, but not limited to, the parking lot areas, landscaped areas, sections of the Building not leased or available for lease (including, without limitation, all hallways, stairwells, utility rooms, such as the sprinkler room, the water meter room and the electrical service room in the Building), walkways and sidewalks. The Tenant shall pay the Landlord, as additional rent, in the manner stated below, the Tenant's Proportionate Share of the charges not otherwise covered elsewhere in the Lease (the "Building Common Area Charges"), incurred during the Lease Term, regardless of the date of actual assessment or levy, including, without limitation, all costs and expenses incurred by the Landlord in owning, managing, equipping, maintaining, repairing, replacing and operating the Building and/or the Property and/or keeping the Building and/or the Property in compliance with all Laws, and/or otherwise complying with its obligations under the Lease, and further including, without limitation, (A) cleaning, (B) snow removal, (C) landscaping, (D) stripping, (E) Utilities attributable to the Building Common Area, (F) insurance costs not otherwise provided for in the Lease, (G) management fees charged by the Landlord or third parties with respect to the Property, (H) cleaning services, if provided, (I) janitorial services, if provided, (J) security services, if provided, (K) supplies, sundries and sales or use taxes on supplies or services, (L) costs of wages and salaries of all persons engaged in performing any of the foregoing activities (including so-called fringe benefits, social security taxes, unemployment insurance taxes, costs for providing coverage for disability benefits, costs of any pensions, hospitalization, welfare or retirement plans or any other similar or like expenses incurred under the provisions of any collective bargaining agreement, or any other reasonable cost or expense which the Landlord pays or incurs to provide benefits for employees directly engaged in performing any of the foregoing activities), (M) charges of any independent contractor who, under contract with the Landlord or its representatives, performs any of the foregoing activities, (N) legal and accounting expenses, (O) interest on amortization of any mortgage affecting the Property, (P) financing costs and (Q) any and all other expenses or charges whether or not specifically mentioned which are incurred in connection with the managing, owning, leasing, equipping, maintaining, repairing, replacing and operating the Building and/or the Property, and the like. There shall not be included in the Building Common Area Charges, depreciation, leasehold improvements made specifically for any tenant of the Building and brokerage commissions. The foregoing shall not, however, be

deemed to obligate the Landlord to undertake any activities, or provide any services not otherwise expressly provided for elsewhere in this Lease.

(ii) **Payment.** On or before the Commencement Date, and annually thereafter, the Landlord shall furnish to the Tenant, a written statement of the Landlord's estimate of the annual Building Common Area Charges (the "Annual Estimated Building Expenses"), based upon a calendar year. The Tenant shall pay to the Landlord, on the first day of each month in advance (with the exception that the first installment shall be paid upon the execution and delivery of the Lease), the Tenant's Proportionate Share of the amount equal to 1/12<sup>th</sup> of the Annual Estimated Building Expenses. The Landlord shall furnish the Tenant with an accounting when the actual Building Common Area Charges for such calendar year are known, and the Landlord shall notify the Tenant whether such amount paid by the Tenant to the Landlord for such calendar year is greater or less than the actual Building Common Area Charges for such calendar year. If there is a deficiency, the Tenant shall pay the deficiency to the Landlord within fifteen (15) days after demand from the Landlord; if there is an excess, the Landlord shall pay the excess to the Tenant within fifteen (15) days, or shall credit the sum due to the next ensuing installment of additional rent. If at any time during the course of such year the Building shall not be fully leased, then the Landlord shall have the right to make reasonable adjustments to either or both of the actual Building Common Area Charges and the Tenant's Proportionate Share in order to ensure that the Landlord shall recover 100% of the actual Building Common Area Charges for such calendar year.

(iii) **Adjustments.** Additional Rent based upon Building Common Area Charges, payable for the first and last years of the Lease Term shall be adjusted and pro rated, so that the Landlord shall be responsible for the Landlord's pro rated share for the period prior to and subsequent to the Lease Term, and the Tenant shall pay the Landlord its pro rated share for the Lease Term.

(iv) **Challenge to Accounting.** The accounting of the Landlord, referred to in subparagraph (ii) above, shall be conclusively deemed to be correct unless within thirty (30) days after the delivery of the accounting to the Tenant, the Tenant delivers a notice to the Landlord requesting a review of the Landlord's books and records with respect to the accounting and, within ten (10) days following the Tenant's review of the Landlord's books and records, files a written exception to any item of expense, setting forth the specific facts upon which such objection is based. The Tenant's review of the Landlord's books and records shall be performed, if at all, within ten (10) days of notice from the Landlord to the Tenant that the books and records are available for inspection, and thereafter the right of the Tenant to inspect the books and records shall be void and of no further force or effect. Notwithstanding the foregoing, in no event shall the foregoing be deemed to afford the Tenant any right to withhold any payment due from the Tenant to the Landlord. In the event the Tenant fails to file a written exception to any item of expense within the ten (10) day period provided for above, the accounting of the Landlord shall conclusively be deemed to be accurate. In the event the Tenant does file an exception to any item of expense, then the Landlord and Tenant shall endeavor to resolve the dispute over the ensuing thirty (30) day period and in the event, during such time period, they are unable to resolve the dispute, the Tenant may file an arbitration action in accordance with the provisions of Section \_\_\_\_\_ in order to challenge the Landlord's accounting with respect to any item of expense as to which the Tenant has provided timely

written exception. All other items of expense as to which no timely written exception has been filed shall conclusively be deemed to be accurate. Any audit conducted by the Tenant shall be performed only by the Tenant or a third party that charges on an hourly basis and not on a contingency basis. In no event may the Tenant use any former employee of the Landlord or any management company used by the Landlord for the management of the Property. Prior to conducting any audit, each of the Tenant and any third party retained by the Tenant shall execute and deliver to the Landlord a non-disclosure and confidentiality agreement in form and substance satisfactory to the Landlord and its counsel.

(h) **Additional Rent Based Upon Reimbursement to the Landlord.**

If the Tenant shall fail to comply with or to perform any term, condition or covenant of the Lease, the Landlord may (but with no obligation to do so) carry out and perform such term, condition and covenant, at the expense of the Tenant, which expense shall be payable by the Tenant, as additional rent, upon the demand of the Landlord.

(i) **Additional Rent Based Upon Late Payment.** If the Tenant defaults, for more than five (5) days in the payment of any monthly installment of fixed rent or additional rent, or any other sum required of the Tenant under the Lease, or if the Tenant, within five (5) days after demand from the Landlord, fails to reimburse the Landlord for any expenses incurred by the Landlord pursuant to the Lease, then the Tenant shall pay the Landlord, as additional rent, upon demand, a late charge of ten (10%) percent of the sum due. The Tenant acknowledges that the late charge is provided to ensure the Tenant's prompt payment of the fixed rent and additional rent when due so as to enable the timely payment by the Landlord of the expenses of the Property, to avoid the possibility of forfeiture, interest charges or penalties, additional management expenses to collect the fixed rent and additional rent, and to avoid the impairment of the Landlord's creditworthiness. The Tenant acknowledges that the late charge is a reasonable estimate of the damages that the Landlord will suffer in the event of the late payment of the sums due by the Tenant.

(j) **The Landlord's Legal Expenses in Enforcing the Lease and Brokerage Commissions.**

The Tenant shall pay the Landlord, as additional rent, all reasonable attorneys' fees and costs incurred by the Landlord in enforcing the Tenant's obligations under the Lease, within five (5) days of demand by the Landlord regardless of whether a court proceeding is commenced to enforce the Tenant's obligations and regardless of any monetary recovery by the Landlord. If the Landlord re-enters and re-possesses the Demised Premises or otherwise terminates the Lease, the Tenant shall also pay the Landlord, as additional rent, upon demand, an amount equal to the real estate brokerage commission, if any, incurred by the Landlord in effecting the Lease, multiplied by a fraction, the numerator of which shall be the number of unexpired full or partial months remaining in the Lease Term from and after the date of the Tenant's default, and the denominator of which shall be the number of months of the Lease Term.

(k) **Additional Rent Based Upon Taxes Based on Rent.**

If at any time during the term of the Lease a tax or charge shall be imposed by the State of New Jersey or the county or municipality in which the Demised Premises is located, pursuant to any future Laws, which tax or charge shall be based upon the fixed rent and/or additional rent due or paid by the Tenant to the Landlord, then the Tenant shall pay the Landlord, as additional rent, upon demand, such tax or charge. The foregoing shall not require payment by the Tenant of any income taxes assessed against the Landlord or of any capital levy, franchise, estate, succession, inheritance or transfer tax due from the Landlord.

(l) **Place and Form of Payment of Rent and Additional Rent.**

The payment of fixed rent and additional rent due from the Tenant under the Lease shall be paid by the Tenant to the Landlord at the address of the Landlord specified at the head of the Lease, or at such other place as the Landlord may, from time to time, notify the Tenant. The fixed rent and additional rent shall be paid by the Tenant to the Landlord when due, and without the need of notice or demand from the Landlord.

(m) **Additional Rent Based Upon Other Sums.** The Tenant shall pay the Landlord, as additional rent, all other sums of money on the Tenant's part to be paid pursuant to the terms, covenants and conditions of the Lease.

(n) **Proportionate Share.** The Tenant's proportionate share (the "Tenant's Proportionate Share") shall equal \_\_\_\_\_ (\_\_\_\_\_% ) percent.

(o) **Survival.** The provisions of this paragraph \_\_\_\_\_ shall, to the extent applicable, survive the expiration or earlier termination of the Lease.

(p) **Net Lease, No Setoff; Application and Effect of Payment of Rent.**

(i) **Net Lease.** It is the intention of the parties that this Lease is a "triple net lease" and the Landlord shall receive the fixed annual rent, additional rent and other sums required of the Tenant under the Lease, undiminished from all costs, expenses and obligations of every kind relating to the Building and the Property which shall arise or become due during the Lease Term, all of which shall be paid by the Tenant.

(ii) **No Setoff.** The Tenant shall pay the Landlord the fixed rent and additional rent without abatement, deduction or setoff, and irrespective of any claims that the Tenant may have against the Landlord; and this provision is independent of any other provision of the Lease.

(iii) **Application and Effect of Payment.** No payment by the Tenant or receipt by the Landlord of an amount less than the fixed rent or additional rent due under the Lease shall be deemed anything other than a payment on account of the earliest of those sums due from the Tenant under the Lease. No endorsement or statement on any check or any letter accompanying any check for the payment of fixed rent or additional rent shall be deemed an accord and satisfaction by the Landlord, and the Landlord may accept any payment

from the Tenant without prejudice to the Landlord's right to recover the balance due, and without prejudice to the Landlord to pursue any right or remedy provided to the Landlord under the Lease or by Laws.

(iv) **Non-Payment of Additional Rent.** In the event of a default by the Tenant in the payment of the additional rent, the Landlord shall be entitled to the same rights and remedies that the Landlord has for the non-payment of the fixed rent by the Tenant.

(q) **Rent Reserved.** The total fixed rent reserved under this Lease is \_\_\_\_\_ (\$ \_\_\_\_\_) Dollars, plus all additional rent and other sums referred to in this Lease.

## APPENDIX B

**Special Issues Related to Operating Expense Provisions in Leases**  
**ABA Real Property, Trusts and Estates Section**  
**Leasing Group Nuts and Bolts of Leasing Call**  
**October 30, 2013**  
**by**  
**G. Andrew Gardner, McDonald Hopkins LLC (Cleveland, Ohio)**

1. **Operating Expenses**

a. As part of any “typical” Triple-Net Lease, the Tenant will agree to reimburse the Landlord for most expenses incurred by the Landlord in connection with its operation of the building/property where the Tenant’s premises is located (“Property”).

b. Operating expense clauses are found in triple-net leases and typically include a statement that all costs related to the operation of the Property are considered Operating Expenses. Frequently a list of standard items is included in the Lease. [Note: Taxes and Landlord’s insurance often have separate provisions for reimbursement.]

- (i) **Typical List of Operating Expenses:** All costs and expenses of any kind, nature, and description incurred by the Landlord in connection with the maintenance, operation, care and repair of the Property which Landlord determines are desirable for the operation and maintenance of the Property in accordance with the standard maintained in the [City], [State] area for similar buildings and sites. **The following types of expenses are by way of illustration and not by way of limitation of the generality of the foregoing, to wit:** (1) the cost of providing all heating, ventilating, air conditioning, water and waste water services, and other utilities to the Building; (2) the cost of refuse, rubbish, and garbage collection and removal for the Property; (3) cleaning, gardening, and landscaping the Property (including, without limitation, the Common Areas); (4) costs of tie-ins or other costs for providing sanitary or storm sewers or control to and for the Property and Premises; (5) inspection and permit fees, accounting fees, and attorney and other professional fees incurred by Landlord in connection with the operation of the Property or Building; (6) repairs and replacements of the paving, curbs, fencing, walkways, electrical power lines, light poles, bulbs, drainage systems, and equipment used on the Property (including the Common Areas); (7) line painting; (8) attending the parking areas (if necessary); (9) any governmental charges, surcharges, fees, or taxes on the parking areas or parking spaces or on cars parking therein; (10) security services, including private police protection if obtained; (11) repair or replacement of on-site water lines, sanitary sewer lines, and storm sewer lines serving the Property; (12) rental of machinery, equipment, and tools used in operating and maintaining the Property, Building and/or Premises; (13) reasonable amortization or depreciation of

equipment purchased and used for operating or maintaining the Property, Building and/or Premises; (14) costs of signs, sign maintenance, and sound systems; (15) all personal property and similar taxes on equipment, machinery, tools, supplies, and other personal property and facilities used in the maintenance of the Property; (16) compensation, direct or indirect, paid to any person providing services to the Building, including the classification of building superintendent; (17) all repairs to the Property, Building or Premises; (18) all supplies and replacement items required for the Property, Building or Premises; (19) all costs for restoration, relocation or expansion of the Common Areas of the Property; (20) all charges for maintenance contracts, inspection contracts, elevator contracts and similar contracts for the Premises; (21) management charges for the operation of the Premises not to exceed \_\_\_\_\_ percent (\_\_\_%) of gross rentals; and (22) elevator service.

c. A list of exclusions is typically requested by Tenant's counsel.

- (i) Typical List of Exclusions. Operating Expenses shall expressly exclude: (1) costs of maintenance and repair reimbursed by insurance proceeds; (2) alterations or other specific costs attributable solely to other tenants' space in the Building and billed to such tenants; (3) leasing commissions, advertising expenses and other costs incurred in leasing space in the Building; (4) debt service (or ground lease payments, if applicable), interest on borrowed money or debt amortization; (4) depreciation on the Building or equipment or systems therein; (5) Real Estate Taxes; (6) attorneys' fees and expenses incurred in connection with lease negotiations or Lease disputes; (7) the cost (including any amortization thereof) of any improvements or alterations which would be properly classified as capital expenditures according to generally accepted accounting principles; (8) the cost of decorating, improving for tenant occupancy, painting or redecorating portions of the Building to be demised to tenants; (9) executive salaries above the title of general manager; (10) advertising; (11) the costs of artwork or sculpture; (12) costs for repairs or other work occasioned by fire, windstorm or other casualty; (13) wages, salaries or other compensation paid for clerks or attendants in concessions or newsstands operated by Landlord or Landlord's affiliates; (14) costs or expenses charged to or payable by tenants of the Building (including utility charges); (15) expenses in connection with services or other benefits of a type not provided to Tenant, but provided to another tenant or occupant of the Building; (16) any costs or expenses which are otherwise reimbursed to Landlord; (17) overhead and profit increments paid to subsidiaries or affiliates of Landlord for services on or to the Building to the extent such costs exceed the market cost for such services; (18) charitable or political donations or contributions; or (19) interest, charges or penalties arising by reason of Landlord's failure to timely pay any Real Estate Taxes or Operating Expenses.

See also Exhibit A for a more comprehensive list of exclusions.

2. Calculation of Operating Expenses.

a. Pro-Rata Share. Tenants typically pay a proportionate share of the Operating Expenses for a Building/Project/Shopping Center based upon a fraction that is typically expressed as follows:

$$\frac{\text{Square Footage of Premises}}{\text{Total Square Footage of Property/Building}}$$

Typically referred to as the Tenant's "Pro-Rata Share" or "Proportionate Share"), this percentage (calculated from the fraction above) may be agreed to in the Lease or subject to measurement following construction using industry standards (such as the Standard Method of Measuring Floor Area in Office Buildings, ANSI Z65.1 – 1996, commonly known as the "BOMA Standard") if the Premises are being altered or constructed. Standards like the BOMA Standard are known in the industry and can be used by an architect to calculate the square footage of the Premises and the Building to determine the Pro-Rata Share.

b. Changes in Measurement Standards. If a measurement standard is used, beware of granting the Landlord the ability to require a re-measurement of the Building in the absence of a physical alteration of the Building. Some people joke about buildings in some cities that have grown by thousands of square feet without any addition to the Building, due to changes in measurement standards. The re-measurement could take into account space not allocated to tenants under the current standard, resulting in an increase in the numerator (as well as the percentage share) which will increase the Tenant's Operating Expense payment. It is often best to provide that once the initial measurement is complete, absent manifest error, there will be no future measurement to the Building unless a significant addition is made. This provides comfort to the Tenant that there will not be a jump in expenses due to changed measurement.

c. "Gross-Up" Provision. Typically included within the Operating Expense provision is a "gross-up" provision. For example:

"If the Building is less than 95% occupied or in the event Landlord is providing services to less than 95% of the Building during any calendar year, the Operating Expenses for the year in question shall be adjusted to reflect a ninety-five percent (95%) occupancy or service level, as the case may be, of the Building."

Application of the "gross-up" provision typically results in the Tenant paying a larger share of the Operating Expenses incurred by the Landlord due to the artificial absorption of unoccupied space in the Building. For example, if a Building is at full (100%) occupancy, and the Landlord incurs costs per square foot equal to \$20.00, a Tenant occupying 20% of the Building would be paying \$4.00 per square foot for Operating Expenses (see the following example):

Fully Occupied Operating Expenses:	\$20.00
Tenant's Pro-Rata Share (20%):	\$ 4.00
Other Tenant's Operating Expenses (80%):	\$16.00
Amount Remaining for Landlord (0%):	\$ 0.00

If the Building is not fully occupied, for example if only 80% of the Building is occupied, and the Landlord's actual Operating Expenses (due to the Building being less than fully occupied) are \$16.00 per square foot (without gross up), the 20% Tenant's Operating Expenses would be \$3.20 per square foot.

Partially Occupied Operating Expenses:	\$16.00
Tenant's Pro-Rata Share (20%):	\$ 3.20
Other Tenant's Operating Expenses (60%):	\$ 9.60
Amount Remaining for Landlord (20%):	\$ 3.20

Instead, if the Landlord is permitted to apply the "gross-up" provision above, which would assume that the cost per square foot is \$19.00 (95% of the \$20.00 full occupancy costs) even though the actual Operating Expenses are \$16.00, the Tenant's per square foot charge increases from \$3.20/per square foot to \$3.80 per square foot.

Partially Occupied Operating Expenses:	\$16.00 are "Grossed Up" to \$19.00 (95% of \$20.00)
Tenant's Pro-Rata Share (20%):	\$3.80 (20% of "Grossed Up" \$19.00)
Other Tenant's Operating Expenses (60%):	\$11.40 (60% of "Grossed Up" 19.00)
Amount Remaining for Landlord (20%):	\$0.80 (\$16.00 minus \$3.80 and \$11.40)

The Tenant's attorney should request that only costs that vary with occupancy be permitted to be grossed-up (for example, utilities or management fees). Items such as building staff, window washing, landscaping and snow removal should not be grossed up. Finally, costs that are grossed up are not permitted to exceed Landlord's actual cost for such items.

Why are "Gross-Up" Provisions included? Because they even the playing field. When an Building/Project/Shopping Center is not fully occupied, the vacant areas (where the Landlord bears the expense burden) are not incurring expenses in the same manner that Tenant-occupied space is incurring expenses and, without this provision, the lease disproportionately places costs on the Landlord. Also, if the Tenant has a Base Year, it helps avoid "spikes" in future Operating Expense years due to increases over the "ungrossed" Base Year and provides productability in the amount of payments.

### 3. Audit Provisions.

a. "False" Review Provisions. Beware of Audit Provisions that do not provide a remedy. More frequently than you would expect, the audit provision states that the Tenant can audit the records, but does not provide for any adjustment if the Operating Expense payments by the Tenant were higher than estimated by Landlord.

“If Tenant disputes the amount set forth in the Final Statement, Landlord shall make available to Tenant Landlord’s books and records with respect to the calendar year which is the subject of the Final Statement to be reviewed by Tenant. Such review shall take place at the offices of Landlord where its books and records are located at a mutually convenient time during Landlord’s regular business hours.”

The provision should also provide:

“If the parties agree to the results of Tenant’s review of the Final Statement, Tenant’s Final Statement shall be appropriately adjusted (and any overpayment credited or refunded to Tenant) based upon the results of such review, and the results of such audit shall be final and binding upon Landlord and Tenant. If the parties do not agree upon the Tenant’s review or the inclusion or amount of any Operating Expense charged by Landlord, the sole remedy of Tenant shall be to submit the matter to arbitration within thirty (30) days after completion of the review to request an adjustment to any disputed Operating Expense or Final Statement. Tenant agrees that the results of any Operating Expense audit shall be kept strictly confidential by Tenant and shall not be disclosed to any other person or entity.”

b. Review Time. Provide your client with sufficient time to review. For most clients 60-90 days is sufficient.

c. Refunds: Operating Expense refunds should be in cash payments. The Tenant provided cash and should receive its refund in cash. Most Landlords will initially only provide that any overpayment by Tenant be credited toward the next payment/payments due under the Lease unless the Lease has expired.

d. Contingency Fees: Landlords typically restrict the right to use independent accounting (or other) firms that charge a fee equal to a percentage of the amount of Tenant’s savings as a result of the audit (contingency fee arrangements) as the Tenant does not have any “skin in the game”. It is important to distinguish the Landlord’s language with this restriction to be able to use a firm that sometimes uses contingency fees (but is not in the case of your client) vs. a restriction against using a firm that charges contingency fees so they may not be used. For example:

Contingency Example 1:

“Tenant shall not engage any firm that charges fees on a contingency basis to review the Landlord’s calculation of Operating Expenses.”

Contingency Example 2:

“Tenant shall not engage a firm charging fees on a contingency basis to review the Landlord’s calculation of Operating Expenses.”

You will note that the first provision is much broader in that it restricts the use of a firm that charges contingency fees, even if that is not the method being used for calculation with respect to your client, whereas the second provision restricts your client using a firm on a contingency basis.

e. Reimbursement of Audit Fees.

In the event that Landlord’s charges to Tenant for Operating Expenses exceeded an amount agreed upon by Landlord and Tenant to be a fair margin of error (typically between 3%-10% of the total amount of Operating Expenses charged to Tenant), Tenant’s counsel will request that the Landlord pay Tenant’s expenses related to the audit.

Notwithstanding the foregoing, in the event that the results of Tenant’s Audit determine that Landlord’s Operating Expense Calculation exceeded the amount of Tenant’s actual Operating Expense Payment (as determined by Tenant’s Audit for the applicable calendar year): (i) by more than \_\_\_\_\_ percent (\_\_%), then Landlord shall bear the reasonable costs of Tenant’s Audit (ii) by \_\_\_\_\_ percent (\_\_%) or less, then Tenant shall bear all costs of Tenant’s Audit.

## Exhibit A

### Operating Expense Exclusions (another form)

- a. Taxes, as defined in Section [Real Property Tax provision],
- b. franchise, or income, or other taxes imposed on Landlord,
- c. all leasing costs including appraisals, accounting or legal fees, and leasing and mortgage brokerage commissions,
- d. the cost of electrical energy and condenser water furnished directly to space leased or available for leasing to tenants and any survey costs or metering costs or meter reading costs in connection therewith,
- e. cost of tenant installations and decorating incurred in connection with preparing space for a new tenant;
- f. accounting costs or legal expenses or other out-of-pocket costs incurred in connection with leasing space in the Building or enforcing obligations of tenants under space leases or for negotiations relating to existing leases or proposed space leases in the Building including court costs and disbursements;
- g. depreciation or amortization of the Building or its equipment (except as expressly provided for in this Lease);
- h. expenses incurred by Landlord for the repair of damage to the Building;
- i. interest, principal (and ground rent on any ground lease), points and fees, amortization or other costs with respect to any mortgage, loan or refinancing of the Building or the Land;
- j. the cost of installing, operating and maintaining any specialty service such as an observatory, broadcasting facilities, luncheon club, athletic or recreational club, child care or similar facility, auditorium, cafeteria or dining facility or conference center, or making any additions to, or building additional stories on, the Building or its plazas, or adding buildings or other structures adjoining the Building;
- k. costs incurred in performing work or furnishing services for any tenant or tenant's space (except to the extent that Tenant would have to pay a separate charge therefor if Landlord were providing the service to Tenant (e.g., overtime air conditioning));
- l. capital improvements, except however that if any new capital equipment results (provided satisfactory proof of such saving and a consultant's certification of the amount thereof is provided to Tenant) in reducing any Operating Cost, then with respect to the calendar year in which the improvement is made, and each subsequent calendar year during the term of the Lease, Landlord may include in Operating Cost the straight-lined amortized (over the useful life of the

new equipment) cost of such capital improvement but not in excess, in any Operating Cost, of the amount by which the Operating Cost have been reduced for such Operating Cost Year;

m. the cost, if any, of inspection or removing, remediating, abating or otherwise treating asbestos or any other hazardous material or waste in the Building;

n. salaries, including, without limitation, wages, fringe benefits and all other compensation, of personnel above the grade of building manager and such building manager's supervisor;

o. repairs or other work occasioned by fire, windstorm or other insured casualty or hazard or any other expense for which Landlord is otherwise compensated through the proceeds of insurance (or would have been so compensated but for Landlord's failure to maintain the insurance required hereunder), or through reimbursement by any tenant or anyone else (including Tenant), or any expense of the Building for services in excess of the services Landlord is obligated to furnish to Tenant hereunder;

p. Landlord's advertising, entertainment and promotional costs for the Building;

q. the portion of any fee or expenditure paid to any Affiliate of Landlord which exceeds the amount which would be paid for comparable services and/or goods in the absence of such relationship;

r. auditing fees and other expenses incurred in connection with tenant (including Tenant) disputes;

s. repairs or rebuilding necessitated by condemnation;

t. to the extent any costs that are otherwise includable in Operating Cost are incurred with respect to the Building and other buildings owned or managed by Landlord, the amounts that are properly allocable to such other buildings shall be excluded from Operating Costs;

u. Operating Costs attributable solely to storage space in the Building;

v. Costs (including any legal fees, transfer taxes, mortgage recording taxes and other transaction costs) incurred in connection with the financing or refinancing of the Property, or a sale or transfer of all or any portion of the Property (including the acquisition or sale of air rights, transferable development rights, easements or other real property interests) or any interest therein or in any Person of whatever tier owing an interest therein;

w. costs and expenses incurred in connection with the enforcement of leases or other occupancy agreements, including court costs, accounting fees, auditing fees, attorneys fees and disbursements in connection with any summary proceeding to disposes any tenant;

x. costs and expenses incurred in connection with procuring tenants, including lease concessions, lease takeover or rental assumption obligations, architectural costs, engineering, fees and other similar professional costs and legal fees in connection with lease negotiations;

y. damages and attorneys' fees and disbursements and any other costs in connection with any proceeding, judgment, settlement or arbitration award resulting from any liability of Landlord and fines or penalties due to Landlord's negligence or wrongful acts;

z. any compensation paid to clerks, attendants or other persons in commercial concessions operated by Landlord (or its affiliates) not for the general benefit of all tenants of the Building;

aa. any interest, fines, late charges or similar punitive obligations incurred by Landlord because of the failure to cure with reasonable diligence the violation of any Laws which violation is the responsibility of Landlord to cure pursuant to this Lease;

bb. the cost of acquiring, leasing, installing, maintaining displaying, protecting, insuring, restoring or renewing works of art or temporary exhibitions located at or within the Building;

cc. costs relating to withdrawal liability or unfunded pension liability under the Multi-Employer Pension Plan Act or other Requirement;

dd. all costs, including, without limitation, the cost of repair made by Landlord to remedy damage caused by or resulting from the gross negligence, willful misconduct, or improper acts of Landlord, its agents, servants or employees, contractors, or suppliers;

ee. legal expenses, accounting and other professional service costs not allocable to the Operation of the Property;

ff. costs of overtime HVAC service provided to any other tenant of the Building;

gg. any bad debt loss, rent loss or reserves for bad debt or rent loss;

hh. any Operating Costs incurred exclusively to service retail space of the Building;

ii. all costs incurred by Landlord with respect to goods and services (including utilities sold and supplied to tenants and occupants of the Building), to the extent that Landlord shall be entitled to reimbursement from any tenant in the Building, including Tenant, for the cost of like goods and services furnished to Tenant pursuant to this Lease other than in the nature of Operating Costs;

jj. increases in Operating Costs attributable to changes in the percentage used for determining management fees in excess of \_\_\_\_\_;

kk. all rentals of capital equipment to the extent same would not be an Operating Costs if such equipment were purchased;

ll. all costs associated with Landlord's political, civic or charitable contributions;

mm. Landlord's general corporate overhead and expenses and general and administrative expenses;

- nn. the capital cost of any physical additions to the Building after the date hereof; and
- oo. any expenses for repairs or maintenance which are covered by warranties and service contracts and such expenses are reimbursed to Landlord pursuant thereto.
- pp. decorating space leased to any occupant or held available for lease;
- qq. the cost of any item to the extent the Landlord is actually reimbursed by insurance or pursuant to a warranty;
- rr. any additional costs incurred by Landlord to operate or maintain the Building due to the particular nature of business conducted by any tenant(s) within the Building which would not customarily be incurred in a comparable Building including, but not limited to, any such costs that would not customarily be incurred in a comparable Building in connection with any retail stores or retail space or retail operations, and/or any specialty services in the Building or food service tenants; and
- ss. any and all costs, charges and expenses incurred by Landlord in connection with any change of any company providing electricity or other utility service or telecommunication services to the Building Project, including, but not limited to, maintenance, repair, installation or services and costs associated therewith.

## APPENDIX C

### SECURITY.

**Amount of Security.** Simultaneously with the execution and delivery of this Lease, the Tenant shall deliver to the Landlord, as security (the "Security") for the full and faithful performance by the Tenant of the Tenant's obligations under this Lease, a letter of credit ("LOC") in the amount of \_\_\_\_\_ (\$\_\_\_\_\_) Dollars. The LOC shall be an unconditional, clean, irrevocable letter of credit, issued by a United States Bank, reasonably acceptable to the Landlord that accepts deposits, maintains accounts and has a local \_\_\_\_\_ County New Jersey office for purposes of drawing on the LOC. The LOC will be in form and content acceptable to the Landlord in its reasonable discretion, and transferable without cost to the Landlord, from time to time. The Tenant will pay all charges to obtain the LOC and all renewals and transfers thereof. The LOC shall be payable solely upon its presentation with a sight draft. The LOC shall be an "Evergreen Letter of Credit" that shall renew automatically from year to year unless it is terminated by the issuer upon forty-five (45) days prior written notice to the Landlord (and upon such notice, the Landlord shall be permitted to draw upon the LOC to convert the LOC to cash, unless a replacement LOC meeting the requirements of this paragraph is issued and received by the Landlord at least twenty (20) days prior to the termination of the existing LOC). The LOC shall be drafted so that the LOC shall not expire sooner than thirty (30) days following the Termination Date, as the Termination Date may be extended pursuant to this Lease. If a default under this Lease shall occur, the Landlord may, but shall not be required to, draw upon all or any portion of the LOC for payment of any rent or additional rent due as a result of the default. The use of the LOC or any part of it by the Landlord shall not prevent the Landlord from exercising any other right or remedy provided by this Lease or by Laws. The Landlord shall not be required to proceed against the LOC. The LOC shall not operate as a limitation on any recovery to which the Landlord may be entitled. Any amount of the LOC that is drawn upon by the Landlord, but is not used or applied by the Landlord, shall be held by the Landlord and be deemed Security. If any portion of the LOC is drawn, the Tenant shall, within five (5) days after demand of the Landlord, either: (A) deposit cash with the Landlord in an amount sufficient to cause the sum of the cash and the amount of the remaining LOC to equal the amount of the LOC then required under this Lease, or (B) reinstate the LOC to the amount then required under this Lease. If the Landlord transfers or mortgages the Property, the Landlord may transfer the Security, including, without limitation, the LOC, to the transferee and mortgagee and the Tenant shall look solely to the transferee or mortgagee for the return of the Security or LOC, or both, as the case may be.

**Return of Security.** The Tenant shall not have the right to apply the Security to the payment of fixed rent and/or additional rent due under this Lease. The Security shall be returned to the Tenant, after the Expiration Date, provided that the Tenant has fully and faithfully performed all of the provisions of this Lease applicable to the Tenant and delivered possession of the Demised Premises to the Landlord in accordance with the terms of this Lease.

**Application of Security.** During the Lease term, the Landlord may, if the Landlord so elects, have recourse to the Security (by making demand pursuant to the LOC) to make good any default by the Tenant and for any sum which the Landlord may expend by reason of the Tenant's default, in which event the Tenant shall, within five (5) days of demand of the Landlord, restore the Security to its full amount. The failure of the Tenant to restore the Security to its full amount shall entitle the Landlord to all of the same rights and remedies the Landlord has for the non-payment of the fixed rent by the Tenant.

**Security Runs with the Land.** The Landlord shall assign or transfer the Security to any subsequent owner or holder of the title to the Property, in which event the assignee shall become solely obligated for the repayment of the Security to the Tenant and the assignor shall be released of the obligation to return the Security. The above provisions shall be applicable to every transfer or sale of title to the Property.

**No Mortgage on Security.** The Tenant shall not mortgage, assign or encumber the Security.

**APPENDIX D**

**Lease Guaranty**

**Dated as of:** \_\_\_\_\_

The undersigned, Guarantor, in consideration of and as an inducement for the execution and delivery of a certain Lease Agreement by \_\_\_\_\_, a New Jersey \_\_\_\_\_ (the “Lessor”), made between the Lessor and \_\_\_\_\_, a New Jersey (the “Lessee”), guarantees to Lessor: (i) the full and prompt payment of all base rent, additional rent and other sums now or hereafter due under or with respect to a certain Lease Agreement dated \_\_\_\_\_ (the “Lease”); (ii) the full and prompt performance and observance by the Lessee of all the lease provisions to be performed and observed under the Lease; (iii) the full and prompt payment of all damages that may arise in consequence of any default or breach of the Lease, and/or enforcement thereof, including, without limitation, all reasonable counsel and expert fees and expenses incurred by the Lessor; and (iv) the full and prompt payment of all damages that may arise in consequence of any default or breach of this Guaranty, and/or the enforcement thereof, including, without limitation, all reasonable counsel and expert fees and expenses incurred by the Lessor.

This Guaranty is an absolute, continuing and unconditional guaranty of punctual payment and performance, and Guarantor waives notice of acceptance of the Guaranty by the Lessor.

This Guaranty shall be enforceable against Guarantor without the need of bringing any suit or other action against the Lessee, or any other guarantor, and without presentment, demand, protest, notice of non-payment, non-performance or non-observance, or of any other notice to which Guarantor might otherwise be entitled, all of which are waived by Guarantor.

The validity of this Guaranty and the obligation of Guarantor shall not be terminated, affected or impaired by reason of Lessor’s assertion or failure to assert against the Lessee or any other guarantor, any of the rights or remedies reserved to the Lessor by the Lease provisions or any other guaranty.

The liability of Guarantor shall not be affected or diminished by reason of any assignment, renewal, or extension of the Lease; or any amendment, modification, waiver or change in any of the terms, conditions or covenants of the Lease; or any extension of time that may be granted by the Lessor; or any dealings, transactions, matters or things occurring between the Lessor and the Lessee, including without limitation, an assignment of the Lease by the Lessor or the Lessee; or whether or not notice of any of the foregoing is given to Guarantor.

The liability of Guarantor shall in no way be affected by (1) the release or discharge of the Lessee or any other guarantor in any creditors' receivership, bankruptcy or other proceedings; (2) the impairment, limitation or modification of the liability of the Lessee or any other guarantor or the estate of the Lessee or any other guarantor in bankruptcy, or of any remedy for the enforcement of the Lessee’s liability under the Lease or any other guarantor’s liability under any guaranty resulting from the operation of any present or future provision of the National Bankruptcy Act or other statute, or from the decision in any court; (3) the rejection or disaffirmance of the Lease or any other

guaranty in any such proceedings; (4) any disability or other defense of the Lessee or any other guarantor; or (5) the cessation from any cause of the liability of the Lessee or any other guarantor.

This Guaranty shall not be affected by, and Guarantor hereby expressly waives the need or requirement for notice of or consent to, any lease amendment, extension, renewal, space change (whether by addition, relocation, or subtraction), assignment, sublease and/or holdover.

The Lessor's rights and remedies under this Guaranty are intended to be distinct, separate and cumulative, and no right or remedy is intended to be an exclusion or a waiver of any of the others. The Lessor and Guarantor waive trial by jury in any action or proceeding based on this Guaranty. This Guaranty shall be governed by and construed in accordance with the laws of the State of New Jersey and the parties submit to the jurisdiction of the courts of the State of New Jersey. The obligation of Guarantor, if there be more than one, shall be joint and several under this Guaranty. If Guarantor is a foreign entity, it must, on or before the date of this Guaranty, qualify with the Department of the Treasury of the State of New Jersey to do business in the State of New Jersey and promptly submit written proof of the qualification to Lessor.

This Guaranty shall be binding upon Guarantor and the heirs, executors, administrators, personal and legal representatives, successors and assigns of Guarantor, and shall inure to the benefit of the Lessor and the Lessor's executors, administrators, heirs, personal and legal representatives, successors and assigns.

Guarantor shall not exercise any right which Guarantor may have acquired by way of subrogation under this Guaranty or a contribution by any payment made under this Guaranty, or otherwise, unless and until all of the Lessee's obligations under the Lease have been paid and performed in full, and if any payment is made to Guarantor on an account of such subrogation or contribution rights at any time when all of such obligations have not been paid and performed in full, each and every amount so paid shall promptly be paid to the Lessor, to be credited and applied against those obligations, whether matured or unmatured, in accordance with the terms of those provisions of the Lease which are applicable.

If any action or proceeding is commenced against the Lessor in connection with this Guaranty, Guarantor shall pay all reasonable counsel and expert fees and expenses incurred by the Lessor.

If any claim is ever made upon the Lessor for repayment or recovery of any amount received in payment or on account of the Lease or any other guaranty, and the Lessor repays or becomes obligated to repay all or any part of the amount by reason of (i) a judgment, decree or order of any court or administrative body having jurisdiction over the Lessor or any of its property, or (ii) any settlement or compromise of any claim effected by the Lessor, then and in such event, Guarantor shall be bound by such judgment, decree, order, settlement or compromise, notwithstanding payment of all sums due to the Lessor pursuant to the Lease, this Guaranty or any other guaranty, or all of them, and Guarantor shall be and remain liable to the Lessor for the amount so repaid, recovered or otherwise due from the Lessor as provided above, to the same extent as if such amount had never been received by the Lessor. Without limitation, if payment is accepted by the Lessor from the Lessee or any other person or entity, and such payment is set aside as a voidable

preference or for any other reason, this Guaranty shall continue in full force and effect, entitling the Lessor to proceed as if the payment had not been made. The provisions of this paragraph shall survive the payment of all sums due to the Lessor and the payment of all obligations of Guarantor under this Guaranty.

The rights and remedies of the Lessor under this Guaranty are intended to be distinct, separate and cumulative, and no right or remedy or the exercise thereof is intended to be an exclusion or a waiver of any of the others.

If this Guaranty is executed by more than one party, the pronouns and relative words appearing in the singular shall have the same effect as if used in the plural where required by the context.

Each of the individuals signing this Guaranty on behalf of an entity, by signing this Guaranty, individually represents and warrants that it has the authority to sign this Guaranty and to bind the party on behalf of whom such individual is signing.

Signed and sealed by Guarantor.

Witness:

\_\_\_\_\_ (L.S.)  
\_\_\_\_\_, Individually [if applicable]  
Address: \_\_\_\_\_  
\_\_\_\_\_  
Social Security/Federal Business ID No. \_\_\_\_\_

## APPENDIX E

### DEFAULT AND REMEDIES

#### 1. Landlord's Right to Re-Enter and Re-Possess the Demised Premises.

The Landlord has the right (but without the obligation to do so) to re-enter and repossess the Demised Premises as the Landlord's own property, in the event that any of the following shall occur, each of which shall be deemed a default hereunder: (a) the Tenant fails to pay when due any rent or additional rent required to be paid by the Tenant under this Lease; (b) the Tenant fails to perform any non-monetary provision of this Lease applicable to the Tenant and such failure continues for fifteen (15) days after notice from the Landlord to the Tenant of the failure; (c) the Tenant vacates or abandons the Demised Premises; (d) proceedings are instituted by or against the Tenant and/or any guarantor under the existing or any future Federal Bankruptcy Code or Laws, as amended or modified (the "Bankruptcy Code"), or in insolvency or receivership; (e) the Tenant and/or any guarantor makes an assignment for the benefit of the creditors; (f) the Tenant and/or any guarantor enters into an agreement of composition with the Tenant's (or Guarantor's) creditors; (g) the Tenant's interest in this Lease or the estate of the Tenant passes to a party other than the Tenant as a result of any court proceeding, execution, levy, attachment, sale or operation of law; (h) the issuing bank fails to honor a draw upon the LOC and/or the Tenant fails to have a replacement LOC meeting the requisites of this Lease issued at least thirty (30) days prior to the expiration of any then current LOC, or within the timeframe set in this Lease regarding the issuer's termination of the LOC, or (i) the Tenant is habitually late in the payment of the monthly installments of the fixed rent and additional rent or in the performance of any non-monetary obligation under this Lease. For purposes of this Lease, habitually late is defined as failure by the Tenant to timely pay the monthly installments of fixed rent or additional rent, as provided in this Lease, three (3) or more times within a twelve (12) month period or the failure by the Tenant to timely perform the same non-monetary covenant more than three (3) times during the course of the Lease Term. However, notwithstanding the re-entry and re-possession by the Landlord, the Tenant shall nevertheless continue to be bound under this Lease pursuant to the provisions of paragraph 3, as well as any other provisions of this Lease where the Tenant's obligations survive the Expiration Date or any earlier termination date.

2. Landlord's Right to Terminate Lease. The Landlord has the option to terminate this Lease for any reason set forth in paragraph 1 (a) through (i), each of which shall be deemed a default under this Lease. In order to exercise this option, the Landlord shall give the Tenant notice of the termination at least five (5) days prior to the termination date fixed in the notice and this Lease Term shall terminate as of the date fixed in the notice. Notwithstanding such termination, the Tenant shall nevertheless continue to be bound under this Lease pursuant to the provisions of paragraph 3, as well as any other provisions of this Lease where the Tenant's obligations survive the Expiration Date or any earlier termination date.

#### 3. Rents and Expenses in Arrears and Damages.

(a) Rent Arrearages and Expenses. If the Landlord re-enters and re-possesses the Demised Premises as provided in this Lease or as otherwise provided by Laws, or in the event the Landlord terminates this Lease as provided in this Lease, the Tenant shall

nevertheless remain liable to the Landlord for the expenses the Landlord incurs in repairing, renovating, or making alterations, additions, or improvements to the Demised Premises so as to place the Demised Premises in good order and condition for re-renting, as well as for all brokerage commissions and attorney's fees and costs incurred by the Landlord in connection with the re-entry and re-possession, or termination and re-entry, and reletting, all fixed rent, additional rent and other sums, in arrears then due from the Tenant, all fixed rent and additional rent that otherwise would have been paid for the period provided for in Section \_\_\_\_\_ above, and all expenses incurred by the Landlord, after the default of the Tenant, for the care, maintenance, repair and replacement of the Demised Premises. The Landlord may re-let the Demised Premises, in whole or in part, for a term or terms which may be less or more than the full term of this Lease had the Landlord not re-entered and re-possessioned or terminated this Lease, and the Landlord may grant reasonable concessions in re-renting the Demised Premises to a new tenant without affecting the liability of the Tenant under this Lease. The Landlord shall in no way be responsible or liable for any failure to re-let all or any part of the Demised Premises, or for any failure to collect any rent due after any re-letting.

(b) **Survival Covenant-Liability of Tenant after Re-Entry and Repossession or Termination.**

If the Landlord re-enters and re-possessiones the Demised Premises as provided in paragraph 1 or as otherwise provided by Laws, or in the event the Landlord terminates this Lease as provided in paragraph 2, the Tenant shall nevertheless remain liable to the Landlord, for damages, for all fixed rent and additional rent to the Expiration Date, as though the Landlord had not re-entered and re-possessioned the Demised Premises or terminated this Lease, to the extent of the difference between the fixed rent and additional rent reserved to the Expiration Date, and the fixed rent and additional rent received by the Landlord to the Expiration Date, after deducting all expenses (of the type set forth in subparagraph (a) above) incurred by the Landlord; and the difference, if any shall be paid by the Tenant to the Landlord as such deficiencies arise and are ascertained from month to month, and in no event shall the Tenant be entitled to any surplus fixed rent and additional rent collected by the Landlord in excess of the fixed rent and additional rent due from the Tenant hereunder, or alternatively, and at the election of the Landlord, the Landlord shall have the right to recover from the Tenant, for damages, the fixed rent and additional rent past due, all expenses of the type set forth in subparagraph (a) above incurred by the Landlord, and all fixed rent and additional rent (fixed at the amount due as of the Landlord's termination or reentry as the case may be) for the balance of the Lease Term discounted to its present day value using an interest rate of six (6%) percent .

4. **Survival of Tenant's Obligations.** Any obligations of the Tenant respecting payment or performance applicable to the Tenant under the Lease that have not been satisfied at the expiration or sooner termination of the Lease, shall survive the expiration or sooner termination of the Lease.

5. **LEGAL PROCEEDINGS. THE LANDLORD AND THE TENANT WAIVE THE RIGHT TO JURY TRIAL IN ANY ACTION, SUMMARY DISPOSSESS PROCEEDING OR OTHER LEGAL PROCEEDING BETWEEN THEM AND THEIR SUCCESSORS, ARISING OUT OF THE LEASE, THE TENANT'S USE AND OCCUPANCY OF THE DEMISED PREMISES, OR THE TENANT'S RIGHT TO THE**

**DEMISED PREMISES. THE TENANT WAIVES THE RIGHT TO TRANSFER SUMMARY DISPOSSESS PROCEEDINGS BROUGHT AGAINST THE TENANT TO THE SUPERIOR COURT OF NEW JERSEY.**

6. **Remedies and Rights Not Exclusive.** No right or remedy conferred upon the Landlord is considered exclusive of any other right or remedy, but shall be in addition to every other right or remedy available to the Landlord under the Lease or by Law. Any right or remedy of the Landlord may be exercised from time to time, and as often as the occasion may arise. The granting of any right, remedy, option or election to the Landlord under the Lease shall not impose any obligation on the Landlord to exercise the right, remedy, option or election.

7. **Injunctive Relief.** Any violation, attempted violation, or threatened violation, of any provision of the Lease by the Tenant, can be remedied by an injunction, which shall be a cumulative remedy in addition to any other remedy available to the Landlord under the Lease or by any Law, and the Tenant shall not raise as a defense thereto that the Landlord has an adequate remedy at Law.

8. **Waiver of Right of Redemption.** The Tenant hereby waives all right of redemption to which the Tenant or any person under it may be entitled by any Law.

9. **No Mitigation of Damages.** In the event of a default which results in the Landlord recovering possession of the Demised Premises, the Landlord shall be under no duty to mitigate damages. **[Alternatively, if the landlord agrees to mitigate damages, include language providing the landlord with a safe harbor, not obligating the landlord to rent the space in advance of other space of the landlord and imposing on the tenant the burden of proof that landlord did not mitigate damages.]**

## **APPENDIX F**

### **ALTERNATIVE ACCELERATION CLAUSE**

If this Lease is terminated as provided in Section \_\_\_\_\_, or as permitted by Law, the Tenant shall peaceably quit and surrender the Demised Premises to the Landlord, and the Landlord may, without further notice, enter upon, re-enter, possess and repossess the same by summary proceedings, ejectment or other legal proceedings, and again have, repossess and enjoy the same as if this Lease had not been made, and in any such event neither the Tenant nor any person claiming through or under the Tenant by virtue of any Law or an order of any court shall be entitled to possession or to remain in possession of the Demised Premises, and the Landlord, at its option, shall forthwith, notwithstanding any other provision of this Lease, be entitled to recover from the Tenant (in lieu of all other claims for damages on account of such termination) as and for liquidated damages an amount equal to all unpaid base rent and additional rent reserved hereunder for the period from the date of such termination through the expiration of the Term of this Lease (conclusively presuming the additional rent to be the same as was payable for the year immediately preceding such termination), over the fair rental value of the Demised Premises at the time of termination for such period (the rent received on a reletting shall be conclusively accepted as the fair rental value), with the resulting sum discounted at the rate of six (6%) percent per annum to the then present worth, plus any accrued unpaid Term base rent and additional rent owing as of the date of such termination. Nothing herein contained shall limit or prejudice the right of the Landlord, in any bankruptcy or reorganization or insolvency proceeding, to prove for and obtain as liquidated damages by reason of such termination an amount equal to the maximum allowed by any bankruptcy or reorganization or insolvency proceedings, or to prove for and obtain as liquidated damages by reason of such termination, an amount equal to the maximum allowed by any statute or rule of Law.