**ICSC+LAW SYMPOSIUM OH/KY/IN/MI/PA**

**Renaissance Columbus Downtown Hotel**

**Columbus, OH**

**Friday, March 18, 2022**

**Session Materials**

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# ICSC+LAW SYMPOSIUM OH/KY/IN/MI/PA

**Renaissance Columbus Downtown Hotel**

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**Friday, March 18, 2022**

**9:15 – 10:15 am**

## Session 1A: Cannabis Retailing and Retail Real Estate

### Panelists

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## CANNABIS RETAILING AND RETAIL REAL ESTATE

Zoning, financing, leasing, constructing, fixturing, securing, insuring, and banking are just some of the issues impacting retail real estate involved in cannabis retailing. The dynamic growth in normalization of this use in the world of brick and mortar retail threatens to leave behind those who only know enough to be dangerous and a little knowledge is just that. This panel of legal experts from around the country will take your understanding of the complexities of this area to a higher level, add to the value you provide in identifying potential issues, avoiding them where possible and helping resolve them if they occur.

## CANNABIS RETAILING AND RETAIL REAL ESTATE

## SPEAKER BIOGRAPHIES

**ROBERT HOBAN** Bob Hoban sits at the center of the world's largest commercial cannabis industry network; a cannabis industry ecosystem that he has cultivated since 2008. Mr. Hoban is an attorney, an entrepreneur, and an executive. Bob has earned a reputation as a cannabis industry dealmaker representing start-ups, entrepreneurs, governments, and companies in all stages of development. He is a visionary industry leader, who has founded, created, bought, and sold over fifteen of his own cannabis companies. He has served as a C-Suite executive in multiple companies, and as a director on a number of boards. Bob is the Co-Chair of Clark Hill's Cannabis Industry Group. And He served as a cannabis policy instructor at the University of Denver, where he lectured regarding cannabis regulation and policy. He has crafted cannabis policy solutions for over thirty different countries around the world. He has consistently been recognized as one of the most influential people in the global cannabis industry by a variety of organizations and publications over the course of the past thirteen years.

**BRIDGET HILL-ZAYAT** Bridget Hill-Zayat is a partner at Smart Counsel a women and minority owned law firm. She is also the Executive Director of the Maryland Wholesale Medical Cannabis Trade Association. Her practice focuses on regulated commodities with a focus on the energy, hemp, and cannabis industries. Specifically, she takes cannabis companies from cradle to grave, from incorporation and license applications to compliance practices through to sale. Bridget advises successful applicants on how to improve their energy efficiency, apply for state tax credit programs, liaises with regulators, and handles the ongoing regulatory issues relevant to a cannabis business. Ms. Hill-Zayat was selected to participate in Pennsylvania State Senator Daylin Leach's regulatory cannabis conference to develop standards and methods for cannabis in Pennsylvania. Bridget participated in the Maryland Medical Cannabis Commission's industry and government working group on edibles and loan programs for licensees and regularly testifies for states like Maryland, New Jersey, and Pennsylvania on the development of legal cannabis markets. Her speaking engagements include: Stockton

University, Marijuana Business Daily's Next Conference, the National Cannabis Bar Association, Accelerate Cannabis, CannaGather, and Women Grow.

**PAUL S. MAGY** Paul represents owners, managers, tenants and real estate professionals in transactional and litigation matters involving every aspect of commercial real estate and has for nearly 40 years. His mantra emphasizes understanding each client's business and developing cost effective, creative solutions to vexing problems. Paul was Chair of the International Council of Shopping Centers (ICSC) Legal Advisory Council, is a Past Chair of the ICSC OKIMP Law Symposium, a Past Michigan State Director, is current Chair for Michigan ICSC Continuing Real Estate Education and was awarded ICSC's Trustees Distinguished Service Award. He is a Past President of the Building Owners and Managers Association of Metro Detroit. Paul is a frequent presenter at real estate law conferences. He graduated from Wayne State University Law School in 1982 and is a Life Member of the Judicial Conference of the U. S. Court of Appeals.

**THOMAS A. MARRINSON** Tom's practice includes coverage litigation, complex commercial litigation and insurance-related counseling. His coverage litigation experience spans a broad array of insurance disputes, including those involving first-party property and business interruption, D&O, professional liability, asbestos and other mass tort claims, environmental clean-up, and lead paint exposure. He also frequently counsels Fortune 500 companies on many types of insurance-related matters. Tom's insurance coverage practice is nationwide and has involved litigation in jurisdictions throughout the United States. In addition to his insurance coverage experience, Tom's litigation practice has included products liability, commercial contracts and business fraud, and class action defense. Tom is a frequent lecturer, and has also authored numerous articles and publications, as well as two treatises, Insurance Coverage Disputes, a comprehensive guide to the law of insurance coverage, and Professional Liability Insurance, a treatise for lawyers grappling with professional liability cases. Tom is an Adjunct Professor at the UIC Law School, where he teaches Mediation and Mediation Advocacy.

**STEVEN M. SCHAIN** Winner of National Law Journal's "2019 Finance, Banking, & Capital Markets Trailblazer" award, Steve Schain runs 100% woman owned, national cannabis law firm Smart-Counsel, LLC's PA and NJ practices and Chair its Financial Services Group. Admitted to practice in PA and New Jersey, Steve represents entities, governments and individuals in litigation, regulation and compliance, license applications, entity formation, and drafting legislation. Steve is also an Adjunct Faculty Member of, and teaches "Cannabis Law" at, Stockton University, one of only 5 universities offering a minor in Cannabis Studies. A nationally recognized *Cannabis*, banking law and consumer finance litigation expert, Steve serves as a court appointed judge *pro tempore* and arbitrator, is a *The Legal Intelligencer*, *New Jersey Law Journal*, and *Cannabis Business Executive* columnist, and frequent presenter for the National Cannabis Industry Association, International Cannabis Bar Association, Pennsylvania Credit Union Association, Bank Secrecy Act Compliance Group, Marijuana Business Daily, Pennsylvania Bar Institute and National Bar Institute. Reach Steve at steve@smart-counsel.com.

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**Friday, March 18, 2022**

**9:15 – 10:15 am**

## Session 1B: It's Hot, Hot, Hot! Triple Net Lease Deals

**Panelists**

**Kris Brandenburg**

**Thompson Hine LLP**

**Cincinnati, OH**

**Melissa A. Breeden**

**Realty Income Corporation**

**Phoenix, AZ**

The demand for credit-grade triple net lease deals has never been hotter. This session will explore net lease market trends, including the rise in new net lease investment platforms. Creative approaches to tackling the obstacles to net lease deals will be explored, along with provisions that should be included in leases to maximize long-term value and flexibility.

## I. WHAT'S IN A NAME?

A. Triple Net Lease (NNN Lease)

B. Double Net Lease (NN Lease)

## II. WHERE DO WE FIND TRIPLE NET LEASES?

A. Traditional Shopping Center Outparcel

B. Other Real Estate Structures

1. Stand Alone Single Asset
    a) *Tenants: Retail, Office, Industrial/Distribution*
    b) *Location*
2. In-Line Space
    a) *Tenant: Retail*
    b) *Location: Community Centers, Strip Centers, Power Centers, or Open Air Lifestyle or Outlets*

## III. MONETIZING YOUR PROPERTY

A. Existing Shopping Center Assets v. New Development

B. Types of Assets

1. Traditional Outparcels
2. Inline Tenants

C. Considerations

1. Subdivision/Condominium
    a) *Process*
    b) *Timing*
    c) *Efficiency & Cost*
2. CC&Rs and REAs
    a) *Cross-Access/Cross-Parking*
    b) *Signage*
    c) *Assessments and Cost Sharing*
    d) *Maintenance Responsibilities*
    e) *Insurance & Indemnity*
    f) *Voting Rights*
    g) *Approval Rights/Architectural Standards*
3. Lease Restrictions/Third-Party Rights
    a) *Consent/Approval Rights*
    b) *Exclusive/Prohibited Uses*
    c) *Co-Tenancy Requirements*
    d) *Purchase Options/Rights of First Refusal*

e) *Protected Areas*

4. Municipal Approvals
   a) *Building Code Requirements*
   b) *Zoning Requirements*

## IV. PITFALLS/AREAS OF CONCERN

A. Municipal Approval Process
   1. Length of Process/Covid Delays
   2. Uncertainty in Process
   3. Cost
   4. Attendance at Meetings
   5. Local Counsel Engagement

B. Poor Lease Drafting
   1. Unclear Rights
   2. Poorly defined "Premises"/Leakage
   3. Missing Exhibits

C. Unusual Lease Restrictions
   1. Restrictions in Deeds
   2. Broad Consent Rights

D. Negotiation of Supplemental CC&Rs

E. Third-party Consents

## V. TACKLING OBSTACLES

A. Subdivision Process

B. Exclusive and Prohibited Uses

C. Co-Tenancy Requirements

D. Building Restrictions

E. Common Areas

F. Parking Requirements

G. Declaration/Reciprocal Easement Agreements
   1. Cross Access
   2. Cross Parking
   3. Signage
   4. Assessments and Cost Sharing
   5. Maintenance Responsibilities
   6. Insurance; Indemnity
   7. Voting Rights

8. Approval Rights; Architectural Review
9. Existing Restrictions
10. Protected Areas

The demand for credit-grade triple net lease deals has never been hotter. This session will explore net lease market trends, including the rise in new net lease investment platforms. Creative approaches to tackling the obstacles to net lease deals will be explored, along with provisions that should be included in leases to maximize long-term value and flexibility.

**WHAT'S IN A NAME?**

**Triple Net Lease (NNN Lease)**: A lease wherein the tenant is responsible for all of the expenses of the property (property taxes, insurance, maintenance costs, utilities, etc.). Tenant pays rent plus all expenses.

- **Caution**: The term "triple net lease" is often used to describe types of leases that are not actually triple net. Check with the client (landlord or tenant) as to what the parties intend (who is doing what). It's not always clear from the letter of intent.

**Drafting Tip**: Be clear as to how this will work. Will tenant pay these costs direct and do the maintenance work itself or will landlord pay the costs and/or do the work and receive a reimbursement from tenant? Some landlords want to have control over when the real estate tax bill gets paid to obtain a discount and/or to ensure the bill gets paid but then landlord will require a real estate tax reimbursement from tenant. This concept can apply for some or all of the expenses. Check with the client (landlord or tenant) to understand the expectations of the businesspeople since the details are not always clear in the letter of intent.

**Double Net Lease (NN Lease)**: A lease wherein the tenant is responsible for some but not all of the expenses of the property. In other words, tenant pays rent plus some of the expenses, but landlord is obligated for some expenses.

- **Caution**: Some sources define a double net lease as one in which the tenant is responsible for taxes, insurance, and utilities, but the landlord is responsible for maintenance; however, anything is negotiable, and the responsibilities of the parties can vary and are not locked in to this formula. For instance, in a double net lease, the business deal may be that landlord pays the taxes and tenant is responsible for insurance, maintenance, and utilities or perhaps tenant is responsible for insurance, maintenance, and utilities and only part of the maintenance.

**Drafting Tip**: When landlord is performing some aspect of maintenance, be clear about the exact maintenance obligations of landlord versus those of tenant. Capture all aspects of an obligation. For instance, if landlord is "responsible for the roof", does that mean landlord is to perform maintenance and repair? If so, is landlord performing the work at its sole cost and expense? Or does landlord perform the work and then bill tenant for the work? Does being "responsible for the roof" include roof replacement or is that to be done by tenant? What about damage to the roof caused by tenant? The same concept can be applied to other maintenance obligations.

Net leases often take the form of a ground lease or lease of land and an existing building. Sometimes a triple net lease is associated with a sale leaseback transaction, which is in essence a financing mechanism where a property owner/operator can unlock value by selling its land (or land and building) to a third party and then leasing the land (or land and building) back. The purchaser becomes the landlord under the lease, and the seller or former property owner/operator becomes the tenant under the lease. Triple net leases are particularly attractive for sale leaseback transactions because the landlord has little risk in owning the property and collecting rent, and the tenant remains fully responsible for everything it was prior to the sale leaseback and usually retinas much of the same control over the property as before the transaction.

- ❖ **Caution**. There may be another party involved. Read the lease documents, including the assignments, carefully. Your landlord client could be in the "sandwich" position of the lease. In some cases, your landlord client may not own the fee, and instead the fee is owned by a third party. How does this work?

  Third Party Fee Owner = Ground Lessor under Ground Lease

  Landlord Client = Lessee under Ground Lease and

  Landlord under Lease of Land and Building Lease

  Tenant = Tenant under Land and Building Lease

**Traditional Mall Outparcel**: Outparcel usually located outside the ring road and may contain familiar retail such as a bank, restaurant (sit down or QSR), gas station.

**Mall Parking Lot or Anchor Parcel**: Over the last several years, center owners have tried to find new income producing real estate within their centers or they have been faced with needing to re-purpose dark anchor space within the center. In some cases, we see the former parking area or former anchor parcel or pad being leased to a new tenant on a triple net (or double net) lease.

**Other Real Estate Structures**

- **Stand Alone Single Asset**
  - Tenants: Retail, Office, Industrial/Distribution: Retail examples include large national drug stores (usually located on a corner), dollar stores, restaurants (often QSR). Office examples include entire office building occupied by one company (insurance companies, commercial or industrial headquarters, etc.). Industrial or distribution examples include logistics facilities, warehouse facilities.
  - Location: A stand-alone site, not part of a shopping center and usually along a busy street or in a busy office or industrial area.

- **In-line Space**
  - Tenant: Usually Retail or Retail/Service: Big Box or former Big Box, Grocery Ancho or Gym

- Location: Community Centers, Strip Centers, Power Centers, or Open Air Lifestyle or Outlets. Carving a parcel out of an inline creates challenges in addition to those found in Traditional Mall Outparcels, Mall Parking Lot, Anchor Parcels and Stand Alone Single Asset Parcel since the leases for these spaces were drafted as in-line leases which are now becoming their own parcels and part of a larger center.

**Tip**: Review the lease, but also order and review title, including the ancillary documents such as the REA, CCRAs, easements. Consider whether the lease and/or any ancillary documents need to be amended. Do new documents need to be drafted? If tenant was paying CAM to the center owner, how will that work when the parcel is its own parcel? Does there need to be an REA or a CCRA to cover those costs? Consider how the utilities, including water are set up for the center and how those services will be provided and costs paid for the new parcel. See below for further considerations.

## MONETIZING YOUR PROPERTY

Utilizing avenues such as subdivision or condo regimes can allow shopping center owners to monetize parts of the center without selling the whole.

**Existing Shopping Center Assets v. New Development** There are different issues to consider depending on if the retail center to be split up is existing, or undeveloped. Existing centers may have a set of master CC&Rs in place for an anchor tenant. Future outparcel owners may want to create a separate set of CC&Rs (a sub-CC&Rs to govern those areas of center outside of the anchor's ground premises). For buyers who are first to purchase in a center, they may have an easier time in obtaining rights important to them (such as exclusive use rights), whereas when buying in a long-standing center where rights are firmly established, a buyer may have to consider how feasible it will be to obtain these same rights.

### Considerations

- **Subdivision**
  - A traditional outparcel may have its own legal description, allowing for an easy sale to a third-party. But if it is not, an owner will need to go through a process to separate the triple-net asset from the remainder of ther shopping center. Subdivision is the most common way to break off an asset. The process, specifically cost and timing, will depend upon state and local municipal requirements. Owners will need to consult closely with counsel, including local counsel and third-party service providers, such as survey and zoning professionals, to navigate the process.

**Tip**: While subdivision is the most commonly utilized manner of splitting parts of a shopping center up, a condominium regime is an alternative that may work if subdivision is not an option.

- ❖ **Caution**. Just because an asset has its won tax parcel does not mean it has been subdivided and can be broken off from the shopping center. Many jurisdictions allow a tax parcel to be created for a portion of the shopping center. But this does not mean it is its own separate legal parcel. It may still need to go through the subdivision process.
- **CC&Rs and REAs**
  - Any number of issues may need to be addressed by way of covenants conditions & restrictions or reciprocal easement agreements. Owners may need to account for cross-access and cross-parking rights, signage rights, maintenance, assessments and cost sharing, insurance and indemnity and voting rights.
- **Lease and Third-Party Rights**
  - Lease and third-party rights are among the most important considerations in evaluating the subdivision or condo of a triple-net asset. Owners will need to closely evaluate consent and approval rights, exclusive and prohibited uses, protected areas, co-tenancy requirements and other rights such as rights of first refusal and options to purchase. These rights are frequently preserved in CC&Rs and REAs once the asset is split from the shopping center.
- **Municipal Approvals**.
  - Subdivision approval is often contingent on satisfaction of other municipal approvals, such as building and zoning codes. Owners will need to analyze what implications this may have on the proposed subdivision.
- ❖ **Caution**, Shared components are often problematic in this regard. Owners will need to have a detailed understanding of the site, with particular attention to items such as shared party walls or shared water/sprinkler lines that can become problematic during the subdivision and municipal approval process.

## PITFALLS/AREAS OF CONCERN

Although triple-net leases are hotter than ever and monetizing portions of a shopping center are attractive options, the process can be fraught with pitfalls.

### Municipal Approval Process

- Length of Process/Covid Delays. In addition to meeting the base requirements, the process of subdividing can be lengthy. This has only been exacerbated by covid. This can inject a great deal of uncertainty into the process, especially in the context of contingencies in a Purchase Agreement. Sample language for a Purchase Agreement is included at the end of these materials.
- Cost. Depending on the length of the process and the extent of local counsel involvement, cost can become a prohibitive factor.
- Attendance at Meetings. Again, depending on local requirements, one or several in-person meetings or hearings may be required to obtain subdivision and other municipal approval.

**Local Counsel Engagement:** Owners should select local counsel carefully as they can be key to subdivision and other municipal approval. Not only do owners need the technical expertise to fully understand the subdivision or condominium process, owners also need the responsiveness that will keep the project on track when timing is critical.

**Poor Lease Drafting**

- Unclear Rights. Lack of clarity in lease provisions is often an issue when conducting analysis in advance of subdividing a triple-net asset. Options to purchase and rights of first refusal are sometimes drafted in a manner that makes uncertain as to whether it would apply to the current transaction. Leases are sometimes missing exhibits
- Poorly defined "Premises"/Leakage. Owners should play close attention to how the Premises is defined under the triple-net lease. To the extent that the Premises is unclearly defined or defined differently than the proposed subdivided parcel or the new or existing tax parcel, leakage may occur on taxes or other costs that the owner will need to absorb.

**Unusual Lease Restrictions**

- Deed Restrictions. Be alert for unusual restrictions contained in the shopping center leases. For example, some tenants require their prohibited or exclusive uses to be contained in any deeds conveying all or a portion of the shopping center.
- Broad Consent Rights. It's not uncommon for anchor or even larger tenants to have broad consent rights. These may include consent rights to a subdivision, a condominium regime or any new REAs or CC&Rs.

**Negotiation of Supplemental CC&Rs**. In addition to negotiating through consent rights with existing tenants, negotiation of CC&Rs and REAs can be difficult with buyers.

**SAMPLE PURCHASE AGREEMENT SUBDIVISION APPROVAL LANGUAGE**

Subdivision. The parties acknowledge that the Property does not constitute a Legal Lot or parcel of land that may be conveyed as a separate lot or parcel in accordance with the Map Act.

i. Seller shall, at its sole cost and expense, use diligent efforts to complete a lot line adjustment, lot tie covenant or subdivision map (the "Subdivision"), to bring the Property into compliance with the Map Act such that the same constitutes a Legal Lot. Upon completion of the Subdivision, the final legal description of the Property shall be established and used as the legal description for the Property in the Grant Deed, and in all other transfer and conveyance documents relating thereto.

ii. Buyer shall have a right to approve (a) the legal description, (b) any new Exceptions that affect the Property as a result of the completion of the Subdivision, and (c) each of the conditions imposed by the governmental authorities ("Approval Items").

iii. Buyer shall have twenty (20) days following the date Buyer receives notice of any Approval Items (the "Inspection Period"), to deliver to Seller a written notice identifying any objections Buyer may have to the same (the "Objections").

iv. No later than ten (10) days following its receipt of the Objections, Seller shall elect to either cure Buyer's objections on or prior to Closing or not cure such objection on or prior to Closing ("Seller's Notice"), and Seller shall cure prior to Closing any such objection Seller has agreed (or is deemed to have agreed) to so cure. If Seller fails to timely deliver a Seller's Notice as to a particular objection within such ten (10) day period, then Seller shall be deemed to have made the election to cure same. If Seller elects not to cure any such objection, then Buyer shall have until ten (10) business days from receipt of Seller's Notice to notify Seller that either Buyer is willing to purchase the Property subject to such objection or (2) Buyer elects to terminate this Agreement. [CALIFORNIA PROVISION]

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**Renaissance Columbus Downtown Hotel**

**Columbus, OH**

**Friday, March 18, 2022**

**10:30 – 11:30 am**

## Session 2A: In the Market for Security: Cyber Security and Data Privacy Issues in the Retail Setting

**Panelists**

**Michael P. Hindelang, CIPP/US, CIPM**

**Honigman LLP**

**Detroit, Michigan**

**Zachary Heck, CIPP/US, CIPP/E**

**Taft Stettinius & Hollister**

**Dayton, Ohio**

# Privacy, Security, and Ransomware Response for Commercial Real Estate Sector

Zachary S. Heck, Esq., CIPP/US, CIPP/E

Taft/

# Privacy/Security Terms To Look For

| Statute/Regulation | Associated Information | Regulated Entity |
|---|---|---|
| General Data Protection Act (GDPR) | Personal Data | Businesses collecting personal data from individuals in the European Union |
| Gramm-Leach-Bliley Act (GLBA) | Non-public information | Financial institutions (banks, credit unions) |
| Health Insurance Portability & Accountability Act (HIPAA) | Protected Health Information | Providers, Healthcare Plan, Healthcare Clearinghouse, Business Associate (per agreement) |
| NIST 800-171 | Controlled Unclassified Information | Businesses under contract with Department of Defense |

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# Encryption Requirements

- Often overly broad.
- Mandatory encryption for all “personally identifiable information” is unreasonable. Encryption can be time consuming and expensive.
- Negotiate to limit encryption requirements to “sensitive information.”
  - Examples: SSNs, Tax information, credit card information, regulated data

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# Scope of Security Breach

- Another term that is often overly broad.
- Breach is a legal term of art defined by applicable statute.
  - Similar, but different for all 50 states.
  - Different based on governing federal statute or regulation (if applicable).
- Should work to narrow "any breach of security leading to ***compromise of confidentiality, availability, or integrity*** of sensitive information."
- Applicable law may require notice to law enforcement, data subjects, or state agency before disclosure to contracted party.

Taft/

# Obligations for Contracted Party

- Often omitted from privacy/security riders.
  - Owner of data must have sole responsibility for accuracy, quality, and legality of data.
  - Must agree to comply with applicable obligations of “data controller” (GDPR) or “business” (California law).

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# Carve-outs for Questionable Data Handling

- Some information processing activities may be prohibited by law.
- If party is pushing instructions for information handling, negotiate for carve out to refuse instruction if reasonable belief exists it may violate governing applicable law.

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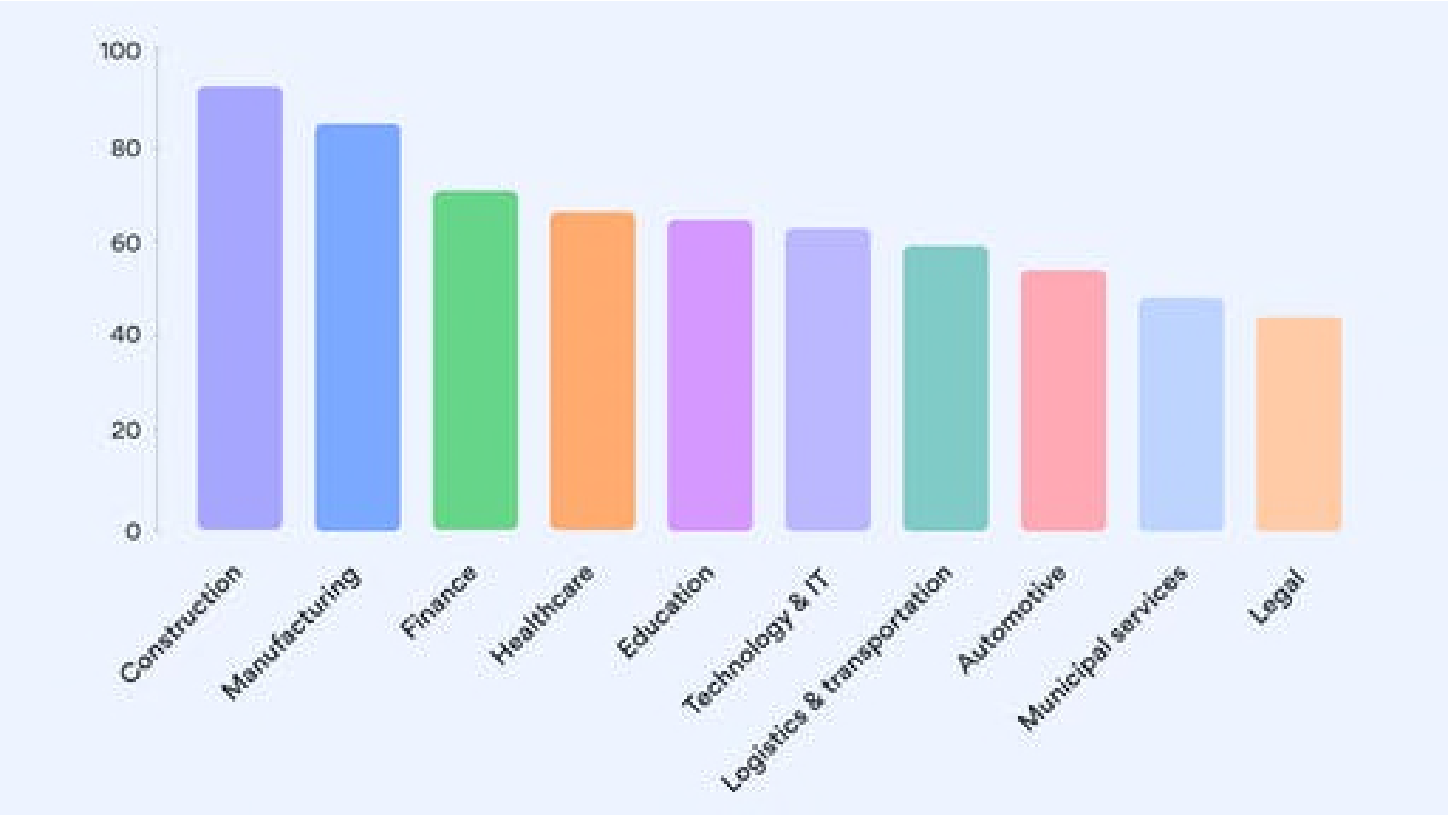
# Industries Targeted Most for Ransomware

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# Initial Recon and Assessment

- Identify scope of incident.
- Determine whether insurance coverage exists.
- Bring in forensic experts.
- Identify exfiltration.
- Decide whether to pay the ransom.
- Explore alternate methods to regain access.

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# Identify Scope of Incident

- What hardware and software assets have been impacted?
- To what extent have internal networks been compromised?
- Determine what data has been compromised with specificity.

# Determine Whether Insurance Coverage Exists

- Is there an active insurance policy that covers cybercrime?
- Does the policy specifically cover ransomware attacks?
- Are there any facts which may cause this particular claim to be denied?

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# Sample Bill

- Disruption to services:  10 – 14 days
- Legal:  $40,000
- Forensics/Remediation:  $170,000-$210,000
- Cost of Ransom:  $600,000
- Fees Associated with Payment:  $25,000-$30,000
- Cost of Notice: $30,000

Taft/

# Bring in Forensic Experts

- Considerations when choosing a forensic firm to aid in incident response.
  - Experience, cost, track record, resources.
- Forensic experts are essential for:
  - Identifying the scope of an incident.
  - Determining what, if any, data has been exfiltrated.
  - Law enforcement?

Taft/

# Identify Exfiltration

- Has data been solely encrypted or has some or all encrypted data also been removed from the network?
- Was data viewable by the intruders without actually being removed from the network?
- Forensic experts are key to identifying exfiltration specifics.

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# Decide Whether to Pay the Ransom

- Not all payments result in receiving a valid decryption key and valid decryption keys may not decrypt a victim's data due to software flaws.
- Ransom payment may result in governmental sanctions.
- Consider reputational harm.
- Payment may encourage copycat attacks.

# Explore Alternate Methods to Regain Access

- Do full backups exist? If so, wipe and start clean. (Backups should be kept offline.)
  - If partial backups exist, is the non-backed up data an acceptable loss?
- Ransomware decryption tools, data recovery software, system restores, etc.

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# Paying the Ransom

- Negotiation.
- OFAC Review
- Purchasing cryptocurrency.
- Facilitating payment.
- Receiving decryption key.
- Decryption timeline.

Taft/

# Negotiation

- Does a medium for negotiation exist?
- Carries risk, cybercriminals may decide to walk away.
- Consider engaging an experienced ransomware negotiator.
- Often cybercriminals will allow a ‘free’ decryption of minor data to prove full decryption is possible upon payment.

Taft/


# Purchasing Cryptocurrency

- Hire experts to facilitate the purchase and transfer of the chosen cryptocurrency.
  - Specialized vendors may be needed to acquire sufficient cryptocurrency in a short timeframe.
- Purchasing cryptocurrency in house.
  - Creating a wallet, determining appropriate fiat currency funding source, accessing an economical exchange.

# Facilitating Payment

- Communicating with the cybercriminals.
- Carefully confirm correct cybercriminal wallet address.
  - Cryptocurrency wallets are extremely complex strings of characters and incorrectly sent cryptocurrency is gone forever, without the possibility of recovery.
- OFAC Review
- Consider hiring an expert.


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# Receiving Decryption Key

- Receiving a decryption key is not guaranteed.
- How and when a decryption key may be sent depends on the ransomware and particular cybercriminals involved.
- Some ransomware quickly and automatically verifies when a ransom has been paid, while other varieties must be manually verified, resulting in a longer delay.

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# Decryption Timeline

- The amount of time required for decryption is variable depending on the specific ransomware, the amount of data to be decrypted, and the technical specifications of the hardware involved.
- Some ransomware recreates decrypted files while leaving encrypted files, requiring additional storage space. This may mean additional hardware must be acquired, adding time to decryption efforts.

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# Post Incident Assessment

- Lessons learned?
- Remedial actions taken?
- Preventative action plan implemented?

# Notice Obligations

- Customers.
- Data Subjects.
- Business Partners.

Taft/

# Notice Obligations: Customers

- Has customer data been exfiltrated?
- Is notice required by law?
  - GDRP(EU), CCPA/CPRA(California), CPA(Colorado), CDPA(Virginia), HIPAA, State Notice laws, contracts, etc.
- Is notice advisable for public relations reasons?
- Should notice be public or tailored to specific customers?
- Methods of providing notice.

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# Notice Obligations: Business Partners

- Is notice required by law?
- Is notice contractually obligated?
- Should a business partner be included in incident response?

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# How to avoid catastrophe

- Require strong, unique passwords and multi-factor authentication
- Train staff to identify signs of phishing
- Implement and enforce periodic data backup and restoration processes
- Adopt zero-trust network access (each access request to digital resources by a member of staff is granted only after identity has been appropriately verified)

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# The Matrix

Legal developments in data, privacy, cybersecurity, and other emerging technology issues

## "Silent Cyber" Continues to Make Noise in State Appellate Courts

By Emily E. Garrison on Dec 14, 2021

Corporate policyholders, insurers and courts continue to grapple with the question of whether traditional "non-cyber" business insurance policies provide coverage for losses from cyberattacks. The most recent decision addressing this "silent cyber" issue came last month in *EMOI Services, LLC v. Owners Insurance Company*, 2021 -Ohio- 3942, 2021 WL 5144828 (Ohio App. 2 Dist., Nov. 5, 2021). In *EMOI Services*, an Ohio Court of Appeals panel reversed a trial court's grant of summary judgment in favor of an insurer that found no coverage for a ransomware attack under a property insurance policy.

The insured, EMOI Services LLC ("EMOI"), was an Ohio-based medical billing company that suffered losses arising out of a ransomware attack. EMOI's insurer, Owners Insurance Company, denied coverage under an "Electronic Equipment" endorsement of EMOI's property policy, arguing in part that because EMOI's software was intangible, it could not satisfy the policy's requirement that the insured suffer "direct physical loss or damage". *Id.* at ¶ 26.

In its decision, the appellate court addressed three issues: First, the appellate court considered whether the insured's software was "media" under the policy's broad definition of that term as "materials on which information is recorded." *Id.* at ¶ 29. The court concluded that "the company's servers constituted materials on which EMOI's information was recorded and thus arguably met the policy's definition of 'media.'" *Id.* at ¶ 37.

Second, the appellate court determined that genuine issues of material fact existed as to whether the insured's software was "damaged" by the hacker's malicious encryption. The trial court had focused on the fact that, after employing the decryption program, EMOI's software again became operational. The appellate court nevertheless concluded that the insured's employees had testified that the database had been damaged and that portions of the software remained damaged even after decryption. *Id.* at ¶ 42.

Third, the appellate court rejected the insurer's argument that the damage to EMOI's software could not constitute "direct physical loss of or damage" to covered property. Rather, the appellate court held that, construing the evidence in EMOI's favor, the evidence supported a conclusion that the encryption damaged EMOI's software and data, and that the damage was not merely aesthetic or amounted to loss of access or use. The court distinguished case law cited by the insurer – including recent cases regarding business interruption losses resulting from COVID-19 – because the policy at issue affirmatively provided coverage for an intangible item: software. The appellate court also cited favorably to a federal decision from the District of Maryland that similarly held that data and software "can experience 'direct physical loss or damage.'" *Id.* at ¶ 53 (*citing Natl. Ink and Stitch, LLC v. State Auto Property and Cas. Ins. Co.*, 435 F.Supp.3d 679 (D. Md. 2020)).

Takeaways

The *EMOI Services* decision demonstrates that cyber-related coverage, specifically including coverage for ransomware attacks, may be found in traditional non-cyber policies.

Policyholders should carefully review and consider their property, liability, crime and other "traditional" policies in the event of a cyber-incident, and provide notice under those non-cyber policies to ensure that all avenues for potential coverage are exhausted.

Policyholders that are currently engaged in litigation with their insurers should consider all appellate options in the event of an adverse ruling, as *EMOI Services* is just one recent example of a lower court's decision on a "silent cyber" issue being overturned. *See, e.g., Landry's, Incorporated v. Insurance Company of the State of Pennsylvania,* 4 F.4th 366 (5th Cir. 2021) (Fifth Circuit reversed summary judgment in favor of a general liability insurer and found a duty to defend Landry's in a data breach lawsuit); *G&G Oil Co. of Indiana, Inc. v. Continental Western Insurance Co.*, 165 N.E.3d 82 (Ind. 2021) (Indiana Supreme Court reversed and remanded a trial court's ruling in favor of a commercial crime insurer in connection with a ransomware incident).

Finally, policyholders in the midst of renewals should consider any cyber-related exclusions that property, liability or other insurers try to add to existing or new policies in light of recent case. Policyholders should confirm, to the extent possible, that there are no "gaps" in cyber-related coverage because of such exclusions.



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DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

# Updated Advisory on Potential Sanctions Risks for Facilitating Ransomware Payments[1]

Date: September 21, 2021

The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is issuing this updated advisory to highlight the sanctions risks associated with ransomware payments in connection with malicious cyber-enabled activities and the proactive steps companies can take to mitigate such risks, including actions that OFAC would consider to be "mitigating factors" in any related enforcement action.[2]

Demand for ransomware payments has increased during the COVID-19 pandemic as cyber actors target online systems that U.S. persons rely on to continue conducting business. Companies that facilitate ransomware payments to cyber actors on behalf of victims, including financial institutions, cyber insurance firms, and companies involved in digital forensics and incident response, not only encourage future ransomware payment demands but also may risk violating OFAC regulations. The U.S. government strongly discourages all private companies and citizens from paying ransom or extortion demands and recommends focusing on strengthening defensive and resilience measures to prevent and protect against ransomware attacks.

This advisory describes the potential sanctions risks associated with making and facilitating ransomware payments and provides information for contacting relevant U.S. government agencies, including OFAC if there is any reason to suspect the cyber actor demanding ransomware payment may be sanctioned or otherwise have a sanctions nexus.[3]

## Background on Ransomware Attacks

Ransomware is a form of malicious software ("malware") designed to block access to a computer system or data, often by encrypting data or programs on information technology systems to extort ransom payments from victims in exchange for decrypting the information and restoring victims' access to their systems or data. In some cases, in addition to the attack, cyber actors threaten to publicly disclose victims' sensitive files. The cyber actors then demand a

[1] This advisory is explanatory only and does not have the force of law. It does not modify statutory authorities, Executive Orders, or regulations. It is not intended to be, nor should it be interpreted as, comprehensive, or as imposing requirements under U.S. law, or otherwise addressing any requirements under applicable law. Please see the legally binding provisions cited for relevant legal authorities.

[2] This advisory updates and supersedes OFAC's *Advisory on Potential Sanctions Risks for Facilitating Ransomware Payments* of October 1, 2020.

[3] This advisory is limited to sanctions risks related to ransomware and is not intended to address issues related to information security practitioners' cyber threat intelligence-gathering efforts more broadly. For guidance related to those activities, see guidance from the U.S. Department of Justice, *Legal Considerations when Gathering Online Cyber Threat Intelligence and Purchasing Data from Illicit Sources* (February 2020), available at https://www.justice.gov/criminal-ccips/page/file/1252341/download.

ransomware payment, usually through virtual currency, in exchange for a key to decrypt the files and restore victims' access to systems or data.

In recent years, ransomware attacks have become more focused, sophisticated, costly, and numerous. According to the Federal Bureau of Investigation (FBI), there was a nearly 21 percent increase in reported ransomware cases and a 225 percent increase in associated losses from 2019 to 2020.[4] Ransomware attacks are carried out against private and governmental entities of all sizes and in all sectors, including organizations operating critical infrastructure, such as hospitals. Often attacks also take place against vulnerable entities such as school districts and smaller businesses, in part due to the attacker's assumption that such victims may have fewer resources to invest in cyber protection and will make quick payment to restore services.

## OFAC Designations of Malicious Cyber Actors

OFAC has designated numerous malicious cyber actors under its cyber-related sanctions program and other sanctions programs, including perpetrators of ransomware attacks and those who facilitate ransomware transactions. For example, starting in 2013, a ransomware variant known as Cryptolocker was used to infect more than 234,000 computers, approximately half of which were in the United States.[5] OFAC designated the developer of Cryptolocker, Evgeniy Mikhailovich Bogachev, in December 2016.[6]

Starting in late 2015 and lasting approximately 34 months, SamSam ransomware was used to target mostly U.S. government institutions and companies, including the City of Atlanta, the Colorado Department of Transportation, and a large healthcare company. In November 2018, OFAC designated two Iranians for providing material support to a malicious cyber activity and identified two virtual currency addresses used to funnel SamSam ransomware proceeds.[7]

In May 2017, a ransomware known as WannaCry 2.0 infected approximately 300,000 computers in at least 150 countries. This attack was linked to the Lazarus Group, a cybercriminal organization sponsored by North Korea. OFAC designated the Lazarus Group and two sub-groups, Bluenoroff and Andariel, in September 2019.[8]

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[4] *Compare* Federal Bureau of Investigation, Internet Crime Complaint Center, *2019 Internet Crime Report*, available at https://pdf.ic3.gov/2019_IC3Report.pdf, *with* Federal Bureau of Investigation, Internet Crime Complaint Center, *2020 Internet Crime Report*, available at https://www.ic3.gov/Media/PDF/AnnualReport/2020_IC3Report.pdf.

[5] Press Release, U.S. Dept. of Justice, U.S. Leads Multi-National Action Against "Gameover Zeus" Botnet and "Cryptolocker" Ransomware, Charges Botnet Administrator (June 2, 2014), available at https://www.justice.gov/opa/pr/us-leads-multi-national-action-against-gameover-zeus-botnet-and-cryptolocker-ransomware.

[6] Press Release, U.S. Dept. of the Treasury, Treasury Sanctions Two Individuals for Malicious Cyber-Enabled Activities (Dec. 29, 2016), available at https://www.treasury.gov/press-center/press-releases/Pages/jl0693.aspx.

[7] Press Release, U.S. Dept. of the Treasury, Treasury Designates Iran-Based Financial Facilitators of Malicious Cyber Activity and for the First Time Identifies Associated Digital Currency Addresses (Nov. 28, 2018), available at https://home.treasury.gov/news/press-releases/sm556.

[8] Press Release, U.S. Dept. of the Treasury, Treasury Sanctions North Korean State-Sponsored Malicious Cyber Groups (Sept. 13, 2019), available at https://home.treasury.gov/news/press-releases/sm774.

Beginning in 2015, Evil Corp, a Russia-based cybercriminal organization, used the Dridex malware to infect computers and harvest login credentials from hundreds of banks and financial institutions in over 40 countries, causing more than $100 million in theft. In December 2019, OFAC designated Evil Corp and its leader, Maksim Yakubets, for their development and distribution of the Dridex malware.[9]

In September 2021, OFAC designated SUEX OTC, S.R.O. ("SUEX"), a virtual currency exchange, for its part in facilitating financial transactions for ransomware actors, involving illicit proceeds from at least eight ransomware variants. Analysis of known SUEX transactions showed that over 40% of SUEX's known transaction history was associated with illicit actors.[10]

OFAC has imposed, and will continue to impose, sanctions on these actors and others who materially assist, sponsor, or provide financial, material, or technological support for these activities.[11]

## Ransomware Payments with a Sanctions Nexus Threaten U.S. National Security Interests

Facilitating a ransomware payment that is demanded as a result of malicious cyber activities may enable criminals and adversaries with a sanctions nexus to profit and advance their illicit aims. For example, ransomware payments made to sanctioned persons or to comprehensively sanctioned jurisdictions could be used to fund activities adverse to the national security and foreign policy objectives of the United States. Such payments not only encourage and enrich malicious actors, but also perpetuate and incentivize additional attacks. Moreover, there is no guarantee that companies will regain access to their data or be free from further attacks themselves. For these reasons, the U.S. government strongly discourages the payment of cyber ransom or extortion demands.

## Facilitating Ransomware Payments on Behalf of a Victim May Violate OFAC Regulations

Under the authority of the International Emergency Economic Powers Act (IEEPA) or the Trading with the Enemy Act (TWEA),[12] U.S. persons are generally prohibited from engaging in transactions, directly or indirectly, with individuals or entities ("persons") on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List), other blocked persons, and those covered by comprehensive country or region embargoes (e.g., Cuba, the Crimea region of

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[9] Press Release, U.S. Dept. of the Treasury, Treasury Sanctions Evil Corp, the Russia-Based Cybercriminal Group Behind Dridex Malware (Dec. 5, 2019), available at https://home.treasury.gov/news/press-releases/sm845.

[10] Press Release, U.S. Dept. of the Treasury, Treasury Takes Robust Actions to Counter Ransomware (Sept. 21, 2021), available at https://home.treasury.gov/news/press-releases/jy0364.

[11] Federal charges have also been brought in connection with each of the aforementioned ransomware schemes. *See*, e.g., Press Release, U.S. Dept. of Justice, Russian National Charged with Decade-Long Series of Hacking and Bank Fraud Offenses Resulting in Tens of Millions in Losses and Second Russian National Charged with Involvement in Deployment of "Bugat" Malware (Dec. 5, 2019), available at https://www.justice.gov/opa/pr/russian-national-charged-decade-long-series-hacking-and-bank-fraud-offenses-resulting-tens; and Press Release U.S. Dept. of Justice, Three North Korean Military Hackers Indicted in Wide-Ranging Scheme to Commit Cyberattacks and Financial Crimes Across the Globe (Feb. 17, 2021), available at https://www.justice.gov/opa/pr/three-north-korean-military-hackers-indicted-wide-ranging-scheme-commit-cyberattacks-and#:~:text=A%20federal%20indictment%20unsealed%20today,and%20companies%2C%20to%20create%20.

[12] 50 U.S.C. §§ 4301–41; 50 U.S.C. §§ 1701–06.

Ukraine, Iran, North Korea, and Syria). Additionally, any transaction that causes a violation under IEEPA, including a transaction by a non-U.S. person that causes a U.S. person to violate any IEEPA-based sanctions prohibitions, is also prohibited. U.S. persons, wherever located, are also generally prohibited from facilitating actions of non-U.S. persons that could not be directly performed by U.S. persons due to U.S. sanctions regulations.

OFAC may impose civil penalties for sanctions violations based on strict liability, meaning that a person subject to U.S. jurisdiction may be held civilly liable even if such person did not know or have reason to know that it was engaging in a transaction that was prohibited under sanctions laws and regulations administered by OFAC. OFAC's Economic Sanctions Enforcement Guidelines (Enforcement Guidelines)[13] provide more information regarding OFAC's enforcement of U.S. economic sanctions, including the factors that OFAC generally considers when determining an appropriate response to an apparent violation. Enforcement responses range from non-public responses, including issuing a No Action Letter or a Cautionary Letter, to public responses, such as civil monetary penalties.

*Sanctions Compliance Program and Defensive/Resilience Measures*

Under OFAC's Enforcement Guidelines, the existence, nature, and adequacy of a sanctions compliance program is a factor that OFAC may consider when determining an appropriate enforcement response to an apparent violation of U.S. sanctions laws or regulations.

As a general matter, OFAC encourages financial institutions and other companies to implement a risk-based compliance program to mitigate exposure to sanctions-related violations.[14] This also applies to companies that engage with victims of ransomware attacks, such as those involved in providing cyber insurance, digital forensics and incident response, and financial services that may involve processing ransom payments (including depository institutions and money services businesses). In particular, the sanctions compliance programs of these companies should account for the risk that a ransomware payment may involve an SDN or blocked person, or a comprehensively embargoed jurisdiction. Companies involved in facilitating ransomware payments on behalf of victims should also consider whether they have regulatory obligations under Financial Crimes Enforcement Network (FinCEN) regulations.[15]

Meaningful steps taken to reduce the risk of extortion by a sanctioned actor through adopting or improving cybersecurity practices, such as those highlighted in the Cybersecurity and Infrastructure Security Agency's (CISA) September 2020 Ransomware Guide,[16] will be

[13] 31 C.F.R. part 501, appx. A.

[14] To assist the public in developing an effective sanctions compliance program, in 2019, OFAC published *A Framework for OFAC Compliance Commitments*, intended to provide organizations with a framework for the five essential components of a risk-based sanctions compliance program. The *Framework* is available at https://home.treasury.gov/system/files/126/framework_ofac_cc.pdf.

[15] *See* FinCEN Guidance, FIN-2020-A006, *Advisory on Ransomware and the Use of the Financial System to Facilitate Ransom Payments*, October 1, 2020, for applicable anti-money laundering obligations related to financial institutions in the ransomware context.

[16] *See* Cybersecurity and Infrastructure Security Agency Guidance, *Ransomware Guide*, September 2020, https://www.cisa.gov/sites/default/files/publications/CISA_MS-ISAC_Ransomware%20Guide_S508C_.pdf.

considered a significant mitigating factor in any OFAC enforcement response.[17] Such steps could include maintaining offline backups of data, developing incident response plans, instituting cybersecurity training, regularly updating antivirus and anti-malware software, and employing authentication protocols, among others.

*Cooperation with OFAC and Law Enforcement*

Another factor that OFAC will consider under the Enforcement Guidelines is the reporting of ransomware attacks to appropriate U.S. government agencies and the nature and extent of a subject person's cooperation with OFAC, law enforcement, and other relevant agencies, including whether an apparent violation of U.S. sanctions is voluntarily self-disclosed. In the case of ransomware payments that may have a sanctions nexus, OFAC will consider a company's self-initiated and complete report of a ransomware attack to law enforcement or other relevant U.S. government agencies, such as CISA or the U.S. Department of the Treasury's Office of Cybersecurity and Critical Infrastructure Protection (OCCIP), made as soon as possible after discovery of an attack, to be a voluntary self-disclosure and a significant mitigating factor in determining an appropriate enforcement response. OFAC will also consider a company's full and ongoing cooperation with law enforcement both during and after a ransomware attack — e.g., providing all relevant information such as technical details, ransom payment demand, and ransom payment instructions as soon as possible — to be a significant mitigating factor.

While the resolution of each potential enforcement matter depends on the specific facts and circumstances, OFAC would be more likely to resolve apparent violations involving ransomware attacks with a non-public response (i.e., a No Action Letter or a Cautionary Letter) when the affected party took the mitigating steps described above, particularly reporting the ransomware attack to law enforcement as soon as possible and providing ongoing cooperation.

## OFAC Licensing Policy

Ransomware payments benefit illicit actors and can undermine the national security and foreign policy objectives of the United States. For this reason, license applications involving ransomware payments demanded as a result of malicious cyber-enabled activities will continue to be reviewed by OFAC on a case-by-case basis with a presumption of denial.

## Victims of Ransomware Attacks Should Contact Relevant Government Agencies

OFAC strongly encourages all victims and those involved with addressing ransomware attacks to report the incident to CISA, their local FBI field office, the FBI Internet Crime Complaint Center, or their local U.S. Secret Service office as soon as possible. Victims should also report ransomware attacks and payments to Treasury's OCCIP and contact OFAC if there is any reason to suspect a potential sanctions nexus with regard to a ransomware payment. As noted, in doing so victims can receive significant mitigation from OFAC when determining an appropriate enforcement response in the event a sanctions nexus is found in connection with a ransomware payment.

[17] *See* the U.S. government's website, https://www.cisa.gov/stopransomware, for additional guidance.

By reporting ransomware attacks as soon as possible, victims may also increase the likelihood of recovering access to their data through other means, such as alternative decryption tools, and in some circumstances may be able to recover some of the ransomware payment. Additionally, reporting ransomware attacks and payments provides critical information needed to track cyber actors, hold them accountable, and prevent or disrupt future attacks.

Contact Information for U.S. Department of Treasury Agencies:

- U.S. Department of the Treasury's Office of Foreign Assets Control
  - Sanctions Compliance and Evaluation Division: ofac_feedback@treasury.gov; (202) 622-2490 / (800) 540-6322
  - Licensing Division: https://licensing.ofac.treas.gov/; (202) 622-2480
- U.S. Department of the Treasury's Office of Cybersecurity and Critical Infrastructure Protection (OCCIP)
  - OCCIP-Coord@treasury.gov; (202) 622-3000
- U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN)
  - FinCEN Regulatory Support Section: frc@fincen.gov

Contact Information for Other Relevant U.S. Government Agencies:

- Federal Bureau of Investigation Cyber Task Force
  - https://www.ic3.gov/default.aspx; www.fbi.gov/contact-us/field
- U.S. Secret Service Cyber Fraud Task Force
  - https://secretservice.gov/contact/field-offices
- Cybersecurity and Infrastructure Security Agency
  - https://us-cert.cisa.gov/forms/report
- Homeland Security Investigations Field Office
  - https://www.ice.gov/contact/hsi

Ransomware Prevention Resources:

- U.S. Government StopRansomWare.gov Website
  - https://www.cisa.gov/stopransomware
- CISA Ransomware Guide
  - https://www.cisa.gov/stopransomware/ransomware-guide

*If you have any questions regarding the scope of any sanctions requirements described in this advisory, please contact OFAC's Sanctions Compliance and Evaluation Division at (800) 540-6322 or (202) 622-2490.*

# ICSC+LAW SYMPOSIUM OH/KY/IN/MI/PA

**Renaissance Columbus Downtown Hotel**

**Columbus, OH**

**Friday, March 18, 2022**

**10:30 – 11:30 am**

## Session 2B: Retail Real Estate Receiverships: What They Are and What They Do For (and To) You

**Panelists**

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# Retail Real Estate Receiverships: What They Are and What They Do For (and To) You

*This session about receiverships of retail real estate and other commercial properties will address what receiverships are, how they are put into place under Federal and State law, and the practical issues affecting owners/borrowers, lenders/servicers, and receivers in the implementation, operation and termination of receiverships.*

## Outline

I. What is a retail real estate receivership?

II. Who is involved in a retail real estate receivership?
- A. Who seeks the appointment of a receiver?
- B. Who approves the appointment of a receiver?
- C. Who is the receiver?

III. How is a receiver appointed?
- A. Under State law
- B. Under Federal law

IV. Why a receivership?

V. Powers of Receiver
- A. Manage
- B. Operate
- C. Sale or Other Disposition

VI. Issues
- A. Order appointing Receiver
- B. Litigation issues
- C. Transition of property to Receiver
- D. Other issues

*This session about receiverships of retail real estate and other commercial properties will address what receiverships are, how they are put into place under Federal and State law, and the practical issues affecting owners/borrowers, lenders/servicers, and receivers in the implementation, operation and termination of receiverships.*

# RETAIL REAL ESTATE RECEIVERSHIPS: WHAT THEY ARE AND WHAT THEY DO FOR (AND TO) YOU

The topic of receiverships is a very broad one with many nuances. This discussion will focus on the appointment of a receiver to preserve retail real estate properties and will highlight what a receiver is, how one gets appointed, the pros and cons of having a receiver appointed, the importance of the court order appointing the receiver, what to expect if you represent a receiver, sale of the receivership property and discharge of the receivership.

## I. WHAT IS A RETAIL REAL ESTATE RECEIVERSHIP?

A receivership is an equitable remedy available to a creditor in state or federal court in which real property and other assets are placed in the custody and control of a third party appointed by the court to operate, manage and, in some cases, sell or otherwise dispose of the property.

A receiver is an officer of the court subject to the court's direction and control. A receiver acts as a custodian, holding possession of (but not title to) property in receivership for purposes of caring for, managing, protecting and operating the property in its possession. While the receiver owes its allegiance to the court, it owes a fiduciary duty to the parties to the receivership action. The main goal of the receiver is to preserve the property and to protect it from waste.

## II. WHO IS INVOLVED IN A RETAIL REAL ESTATE RECEIVERSHIP?

### A. WHO MAY SEEK THE APPOINTMENT OF A RECEIVER AND HOW IS THE RECEIVER APPOINTED?

For purposes of our discussion, a secured creditor can seek the appointment of a receiver by filing a motion to appoint a receiver in a court having jurisdiction over the collateral. Often, this is done concurrently with or immediately following the secured creditor filing an action for mortgage foreclosure, but a secured creditor can seek appointment of a receiver independent of a foreclosure action. In any case, the secured creditor should file a motion for the appointment of a receiver along with a proposed order of court. If the court deems the appointment of a receiver to be warranted, the receiver will then be appointed by court order.

## B. WHO APPROVES AND APPOINTS THE RECEIVER?

While the court ultimately appoints the receiver, the secured creditor/plaintiff in the action typically nominates or suggests the person or entity that it wishes to have appointed as receiver. The proposed order to appoint a receiver should specifically identify the receiver that the secured creditor wishes to have appointed.

## C. WHO MAY BE A RECEIVER?

As a general rule, a receiver may be a person or entity who is **not**: (i) a party to the action; (ii) an attorney involved in the action or who represents a party to the action; or (iii) any other person or entity who has an interest in the outcome of the action.

It is important to understand that the receiver is an officer of the court. The receiver's authority derive from the equitable power of the court and the receiver has a fiduciary duty to the court. However, because the receiver is usually selected by the secured creditor, the receiver typically has to balance its duty to the court with the desires and goals of the secured creditor.

# III. HOW IS A RECEIVER APPOINTED?

A receiver is appointed by the court after an application or motion is filed by a party. Typically, the application or motion is filed in a pending action by the party seeking to preserve the assets at issue. In most retail real estate receiverships, it is the secured creditor (i.e. the mortgage lender) of a defaulting borrower who files a motion for the appointment of a receiver in a pending mortgage foreclosure action. However, it is possible, though unusual, for a party such as a secured creditor to initiate an action solely for purposes of the appointment of a receiver. Regardless of the situation, the specific procedures to be followed, and the criteria to be utilized by the court, in considering an application for the appointment of a receiver will depend on what court the action is pending in. That means that the moving party needs to consider whether the action is or will be filed in federal or state court as well as the state where the action is or will be pending.

## WHAT FACTORS DOES A COURT CONSIDER IN DETERMINING WHETHER A RECEIVER IS WARRANTED?

There is no standard set of rules governing receiverships and state and federal law utilize varying standards with regard to the appointement of a receiver, as well as the powers of a receiver. That said, the Uniform Commercial Real Estate Receivership Act ("UCRERA") was drafted by the Uniform Law Commission to establish a basic set of standard rules for receiverships. As of early 2022, ten (10) states have adopted the UCRERA in whole or substantially similar form. Those states include Michigan. In addition, at least two (2) other states have introduced legislation to adopt the UCRERA (West Virginia and Rhode Island).

Factors typically influencing a Federal Court's decision to appoint a receiver include:

- The existence of a valid claim by the moving party
- Fraudulent conduct on the part of the defendant
- Imminent danger that property may be lost, concealed, injured, diminished in value or squandered
- Inadequacy of available legal remedies
- The probability that the harm to the plaintiff by denial of the appointment will be greater than the injury to the parties opposing the appointment
- The movant's probable success in the action
- The possibility of irreparable injury to the movant's interest in the property

*See, Waag v. Hamm,* 10 F.Supp.2d 1191, 1193 (D.Colo. 1998); *Resolution Trust Corp. v. Fountain Circle Assoc. Ltd. P'ship,* 799 F.Supp. 48, 50-51 (N.D. Ohio 1992).

By way of example, the Supreme Court of Pennsylvania has set forth the following standards and prerequisites for the appointment of a general equity receiver in Pennsylvania:

- The appointment of the receiver must be necessary to save the property from injury or threatened loss or dissipation
- There must not be another safe, expedient, adequate or less drastic remedy at law available
- Although the mere existence of a remedy at law is not enough to prevent the appointment of a receiver, an adequate remedy at law weighs heavily against such an appointment

*See, Northampton National Bank of Easton v. Piscanio,* 379 A.2d 870, 872 (Pa. 1977).

In Pennsylvania, for example, where a secured creditor has requested that a special or limited receiver be appointed with respect to real property, the courts look to clear language in the loan documents authorizing such an appointment. In the absence of such language, an appointment may be made based upon principles of equity. *See, e.g., Metropolitan Life Ins. Co. v. Liberty Center Venture*, 650 A.2d 887 (Pa. Super. 1994) (enforcing receivership clause in mortgage entitling mortgagee to appointment of a receiver after default).

In addition, Pennsylvania law allows for the *ex parte* appointment of a receiver. Pa. R. Civ. Proc. 1533(a) provides that "[a] temporary receiver may be appointed without notice if required by the exigencies of the case." In such a situation, the court may require the applicant to post a bond or other legal tender in an amount fixed by the court to protect against injury caused by an improper or improvident appointment.

Other states, however, may have a receivership statute that sets for the criteria and procedure by which a receiver may be appointed. As noted above, the UCRERA has been adopted in Michigan, so the receivership process in Michigan must comport with the provisions of UCRERA.

**GENERAL VS. "LIMITED" OR "SPECIAL" RECEIVER – WHAT'S THE DIFFERENCE?**

A general receiver is analogous to a bankruptcy trustee under either Chapter 7 or 11 of the Bankruptcy Code in that the receiver controls all of the assets and operates the debtor's/defendant's businesses with the intent of either selling the assets as a going concern or liquidating the assets. A general receiver takes charge of the business entity entirely.

A "special" or "limited" receiver, in contrast, only takes possession of designated assets or businesses of the debtor/defendant leaving the remainder of the debtor's/defendant's assets and businesses in the debtor's/defendant's possession. A receiver who takes charge of mortgaged real estate during a foreclosure action is an example of a special or limited receiver. A limited or special receiver will only control those assets *which are specifically set forth in the order appointing the receiver*. Unless a real estate project is the only property owned by a single purpose entity, the limited or special receiver will be the type of receiver typically sought by a secured creditor seeking to manage or dispose of collateral comprised of commercial real estate assets.

## IV. WHY SEEK THE APPOINTMENT OF A RECEIVER?

In the context of preserving commercial real property, there are a variety of reasons why a secured creditor might seek the appointment of a receiver . . .

The appointment of a receiver can provide some assurance to a secured creditor that the collateral property is preserved and even possibly improved upon. By removing what is typically a defaulting borrower from managing an income-producing commercial property, rent skimming can be eliminated ensuring that income coming into the property can be applied to the mortgage and/or property maintenance. Additionally, the property can be protected from waste (i.e., the unreasonable or improper use or maintenance of property that damages the property and decreases its value) such that value can be maintained to the greatest extent possible.

One of the most significant benefits to a secured creditor is that a receiver can control, manage and sell the real property without the secured creditor having to take title to the property. This allows the secured creditor to avoid potential liability by remaining outside of the chain of title which can be particularly important where the collateral is property that poses greater liability for the owner such as industrial sites. This gives a receivership action a distinct advantage over a foreclosure action in situations involving high risk properties.

While the cost of appointing a receiver is generally not inexpensive, it can be much less expensive than a bankruptcy action or a sale in foreclosure. The receiver's fees should be established in the order of court and will depend largely on the nature of the property and its use. Some receivers may charge an hourly fee for their services, while others will establish a monthly fee and then charge extra fees for management, leasing, marketing, construction management and the like. The fees can be set forth as flat fees, hourly rates, monthly fees or fees based on a percentage of value, such as a 3% construction management fee on projects up to a certain value, for example. Actual

costs incurred by a receiver will typically be reimbursable to the receiver out of the income from the property or directly from the secured creditor. It is noteworthy that a receiver does not collect a commission on the sale of the collateral property. Compare this to a sheriff's sale or marshal's sale where poundage is typically paid. On a high-value property, the cost of poundage can far outweigh the cost of utilizing a receiver to oversee the management and subsequent sale of the collateral property.

Additionally, the receivership process can be faster than the bankruptcy process.

A drawback to the appointment of a receiver is that the rules surrounding receiverships are sometimes unclear, whereas there are well-established rules and precedent in the bankruptcy arena. The lack of clear statutory guidance with respect to receiverships can, however, also be looked upon favorably, as courts are often receptive to suggestions as to procedures to be employed with respect to sales and other administration matters.

## STATE COURT VS. FEDERAL COURT - - SOME CONSIDERATIONS

A secured creditor may seek the appointment of a receiver in state or federal court, provided the underlying jurisdictional requirements have been met.

If the underlying action is filed in federal court, the secured creditor plaintiff must satisfy the requirements of federal subject matter jurisdiction. Since it is unlikely that federal subject matter jurisdiction will be established through the existence of a federal question, diversity of citizenship and the minimum amount in controversy under 28 U.S.C. §1332 must be present to establish federal jurisdiction. The ability to maintain diversity jurisdiction should be considered when determining where to file an action - - the joinder of unknown owners or non-record claimants could destroy diversity of citizenship.

Federal court receiverships are very useful if the real property assets are located in more than one state. 28 U.S.C. §754 provides that "[a] receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof." It should be noted that 28 U.S.C §754 further provides that "[s]uch receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment ***in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district***." (*Emphasis added*). Despite this requirement, a panel of the Third Circuit Court of Appeals held that failure of a receiver to timely file the documents does not divest the court of jurisdiction once the documents are properly filed. *See, S.E.C. v. Equity Serv. Corp.,* 632 F.2d 1092, 1095 (3d Cir. 1980); *but see S.E.C. v. Vision Communications, Inc.,* 74 F.3d 287 (D.C. Cir. 1996) (late filing would not revive the court's jurisdiction and was fatal).

If federal jurisdiction can be established, filing the underlying action in federal court is generally preferred. The federal courts tend to process cases more quickly than the state courts and federal courts provide the flexibility to conduct either a receiver's sale or a marshal's sale. If the marshal doesn't charge poundage, a marshal may be better equipped to conduct a sale where there is a mix of personal and real property or in cases where the receiver does not have extensive experience with the sales process.

## V. POWERS OF THE RECEIVER

Subject to statutory requirements and restrictions, as well as the provisions of the court order appointing the receiver, which will be discussed in more detail below, the receiver of a retail real estate property has broad equitable powers to operate, manage and dispose of the subject property. These powers are intended to exercised in a manner in the best interest of all parties and with full disclosure to the court and the parties involved. The receiver's powers should include the following:

- To hire and fire agents, employees, independent contractors, and consultants, and to pay for their services.
- To hire and pay legal counsel.
- To open bank accounts and to take control of existing bank accounts.
- To demand and receive all payments due to the receivership property, including rents.
- To pay current, and in some cases pre-receivership, bills for the operation and management of the receivership property.
- To obtain and maintain appropriate insurance.
- To enter into leases and other contracts relating to the receivership property, including amending existing leases.
- To maintain, repair and replace the receivership property.
- To enforce existing and subsequent leases and other contracts, including commencing and prosecuting litigation.
- To develop an operating budget and maintain accounting books and records.
- To pay operating expenses with regard to the receivership property.
- To market and sell the receivership property.

## SALE OF THE RECEIVERSHIP ASSETS

Often, the ultimate goal of the secured creditor in seeking the appointment of a receiver to manage commercial real estate is to have the property preserved while it is readied for a sale. This goal may even be incorporated into the order appointing the receiver such that the receiver is directed to expose the property to sale upon, for example, an entry of judgment in mortgage foreclosure with respect to the property.

The rules, to the extent there are any, that will govern the sale of receivership assets will depend on whether the sale is in federal or state court and whether the sale is public or private.

## PUBLIC SALES UNDER FEDERAL LAW

Under 28 U.S.C. §2001(a), real property in the possession of a receiver appointed by a district court "shall be sold at public sale in the district wherein any such receiver was first appointed, at the courthouse of the county, parish, or city situated therein in which the greater part of the property in such district is located, or on the premises or some parcel thereof located in such county, parish, or city, as such court directs, unless the court orders the sale of the property or one or more parcels thereon in one or more ancillary districts." "A public sale of realty or interest therein under any order, judgment or decree of any court of the United States shall not be made without notice published once a week for at least four weeks prior to the sale in at least one newspaper regularly issued and of general circulation in the county, state or judicial district of the United States wherein the realty is situated." 28 U.S.C. §2002. The court may direct that publication be made in other newspapers and it is important to note that the notice must be approved by the court. Specifically, 28 U.S.C. §2002 requires that the notice be "substantially in such form and contain such description of the property by reference or otherwise as the court approves."

Title 28 also governs the sale of personalty and requires that "[a]ny personalty to be sold under any order or decree of any court of the United States shall be sold in accordance with section 2001 of this title, unless the court orders otherwise." 28 U.S.C. §2004.

## PRIVATE SALES UNDER FEDERAL LAW

Under 28 U.S.C. §2001(b), the court may order the sale of assets in a receiver's estate at private sale for cash or other consideration. Specifically, 28 U.S.C. §2001(b) provides that "[a]fter a hearing of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby. Before confirmation of any private sale, the court shall appoint three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale."

## SALES UNDER STATE LAW

Generally, in states without a detailed receivership statute, such as Pennsylvania, the appointment of a receiver is an equitable action subject to the discretion of the court which discretion extends to granting the receiver the right to sell the property and establishing the methods and requirements of the sale. Unlike in federal court receiverships, there is no statutory authority providing guidance

regarding a receiver's sale in such state court receiverships, so prudence dictates either including sale procedures in the receivership order or seeking separate court approval with regard to the sale and related procedures.

## VI. ISSUES ARISING IN RETAIL REAL ESTATE RECEIVERSHIPS

A number of practical issues can arise in connection with and during the pendency of a retail real estate receivership. These issues typically involve the commencement of the receivership and the transition of control of the receivership property to the receiver, the receiver's operation of the receivership, and the conclusion of the receivership. Some of these issues are described below.

### A. THE IMPORTANCE OF THE COURT ORDER APPOINTING THE RECEIVER

Whether you are in federal court or state court, the contents of the court order are going to be of utmost importance to the successful and effective preservation of the real property assets. The order appointing the receiver defines the receiver's powers, setting forth not only the scope of the receiver's authority, but the assets which constitute the receiver's estate. Careful drafting of the proposed order, which should be presented to the court with the secured creditor's motion to appoint a receiver, is critical.

#### THE ASSETS OF THE RECEIVER'S ESTATE

As a general rule, the assets that are included in the receivership order will be limited to those assets encumbered by the secured creditor's interests; a court will typically not appoint a receiver for assets which are not subject to the secured creditor's liens. In the case of real property, the legal description, including tax parcel numbers, for all parcels of real property in which the secured creditor has an interest and which the secured creditor desires to include in the receiver's estate should be specifically set forth in the order.

In addition to including a description of the real property assets to be included in the receiver's estate, personalty used to support the real property should also be included to the extent that such items are included in the secured creditor's collateral. A potential pitfall to be considered in establishing the receivership estate assets is whether all of the personalty needed to manage and/or successfully generate income from the real property is subject to the secured creditor's lien rights. If it is not, appointing a receiver to preserve the real property may require some additional steps by the secured creditor (for example, obtaining licenses, permits and insurance which may not be subject to the lien and/or assignable). In some instances, if personalty is not included in the liened collateral and the secured creditor cannot reasonably obtain an assignment of that personalty or procure a similar asset, the appointment of a receiver may be a fruitless endeavor (consider, for example, a manufacturing facility that utilizes software in a role critical to the manufacturing process, where that software is not readily assignable, available for licensing by the secured creditor or part of the secured creditor's collateral).

## THE RIGHTS OF THE RECEIVER WITH RESPECT TO THE RECEIVERSHIP ASSETS

In addition to establishing the assets to be included in the receiver's estate, the receiver's rights must be thoroughly considered and presented in the proposed order. In order to properly and effectively frame the receiver's rights, the party drafting the proposed order must have a comprehensive understanding of the use and needs of the real property assets that are being included in the receiver's estate, as well as an understanding of the goals of the secured creditor in seeking the appointment of a receiver to manage the estate assets. Will the receiver need to borrow money? Will the receiver oversee the sale, lease or other disposition of assets? Will the receiver need the ability to contract with third parties for goods and services to benefit the estate assets? Will the receiver need the services of attorneys, accountants and other professionals? How is the real property used? What is needed to manage it and keep it operating as a going concern? The secured creditor and its attorneys should carefully consider the receiver's role and they should also discuss the proposed order with the intended receiver to get the intended receiver's input into the order.

While every case and order is different, some common rights that may be granted to a receiver that has been appointed to preserve commercial real property assets might include:

- The right to collect rents, income or other amounts (due and unpaid and to become due in the future) from tenants of the property
- The right to have possession of the property (including real property, personal property and any other property which is subject to the lien)
- The right to make payments with respect to the property, including payments for outstanding obligations to suppliers and vendors
- The right to continue the services of any current employees, agents or other personnel with respect to the property
- The right to operate, manage and conserve the property, including:
    - The right to secure tenants and execute leases in the name of the receiver
    - The right to collect rents, issues, accounts receivables, insurance claim proceeds, real estate tax refunds, utility deposits, security deposits, earnest money deposits and profits from the property
    - The right to maintain insurance in the name of the receiver with respect to the property
    - The right to employ third parties to assist the receiver in executing the duties of the receivership (for example, attorneys, accountants, construction managers, property managers, leasing agents, environmental consultants, title companies, custodians, maintenance workers, contractors, etc.)
    - The right to pay taxes which may have been or may be levied against the property
    - The right to establish bank accounts
    - The right to access records related to the property

- The right to make repairs, declarations, renewals, replacements, alterations, additions and improvements in connection with the property (consider having caps as to the value of such items that are in the receiver's sole discretion and provide for items in excess of the caps to require prior approval of the secured creditor)
- The right to terminate or enter into vendor or other contracts pertaining to the property
- The right to procure or maintain utility services to the property
- The right to institute, prosecute, defend and/or settle legal proceedings related to the property
- The right to take such other actions as may be reasonably necessary to conserve the property in accordance with the loan documents or as authorized by the court (this is a catchall provision that will give the receiver some additional ability to take actions that might not otherwise be specifically enumerated in the order)

**OTHER ITEMS TO ADDRESS IN THE ORDER**

In addition to delineating the assets to be included in the receiver's estate and the rights of the receiver, at a minimum, the receivership order should also address:

- Why the receivership is needed
- How the receiver will be compensated
- The obligations of the receiver to file inventories, status reports, budgets and other reports regarding the receivership assets and business operations

**ONE MORE VERY PRACTICAL THING TO INCLUDE IN THE ORDER . . .**

Don't forget to require the defendant/debtor to turn over the keys (and anything else the receiver will need to gain access to the real estate and personalty)!

## B. TRANSITION ISSUES

The transition from the current owner of retail real estate that has been placed into receivership, typically a defaulting mortgage borrower, is the seed of many of the issues arising in a retail real estate receivership. These issues include:

- Pending lease negotiations, including new leases and extensions and other modifications of existing leases.
- Litigation and other disputes involving existing leases, including leases in default.
- Litigation and other disputes involving tenants at multiple properties, in receiverships where the debtor/property owner is part of an organization that owns multiple properties, some of which that are not in receivership.
- Service contracts and other operating contracts, including those for properties where the debtor/property owner is part of an organization that owns multiple properties and is party

to contracts entered into on a portfolio-wide basis, but where some of the properties are not in receivership.
- Employees, including the timing and manner of the transition and communications with the employees.
- Management of the receivership property.

## C. TAX FILINGS AND RECORDS

## D. PROPERTY TAX ASSESSMENT APPEALS

Issues arise the receivership property is involved in a pending property tax assessment appeal that involves periods prior to the receivership, during the receivership, and possibly periods after the end of the receivership. The periods prior to the receivership may even date back to periods prior to the default that resulted in the foreclosure action in which the receiver was appointed. Regardless of the specific periods, the receiver needs to be sure that it is fully informed of the status of the property tax assessment appeal and that it promptly takes control of the appeal moving forward. At the same time, the receiver needs to be cognizant that a resolution of the appeal will require discussions with the lender and the debtor to determine the proper distribution of any refunds realized as a result of the appeal.

## E. DURATION OF THE RECEIVERSHIP AND DISCHARGE OF THE RECEIVERSHIP

How does the receivership end? What happens when the receivership ends?

The term of the receivership is generally established by the order appointing the receiver, provided that the order appointing the receiver is drafted properly. As a practical matter, the receivership will end upon the sale of the property or the termination of the underlying litigation on some other basis (i.e. settlement, dismissal, etc.). However, the manner in which the receivership terminates needs to be carefully crafted to protect all involved parties, not the least of which is the receiver (often the last party considered in a receivership action or proceeding). As noted above, after the sale of the property by the receiver, the secured creditor must request that the court confirm the sale. Assuming the confirmation of the receiver's sale by the court, the receivership needs to be terminated. Often, the secured creditor will include a request that the court terminate the receivership in the request for confirmation of the sale. If the secured creditor does not do so, then either the receiver or the secured creditor will have to file a motion with the court to terminate the receiver. Even if the court order appointing the receiver has self-operative language to terminate the receivership, the best practice is to have a separate order terminating the receivership so that there is a clear release of the receiver's obligations.

In that regard, the court order terminating the receivership should establish an effective date for the termination of the receivership. The court can use the date of the order, a date certain in the future, or a certain number of days after the entry of the order. Regardless of the date selected by the court, the termination date of the receivership triggers certain other matters that will need to be

attended to. In particular, the receiver acts as an officer of the court and, presumably, has had an obligation to file periodic financial reports with the court and to share those reports with the interested parties. Upon termination of the receivership, the receiver will have to file a final financial report that covers the period that ends as of the termination of the receivership. Because the receiver cannot, prior to the termination date, generate a final report effective as of the termination date, the court order terminating the receivership should provide the receiver with a specified period of time after termination of the receivership to file a final report. However, except for the filing of the final report, as of the termination date, the receiver's obligations should expressly end, the receiver should be released of any further liability, and any security (i.e., a bond) posted by the receiver should be released.

In short, the receivership ends when the court order appointing the receiver says that it ends, unless the court enters a separate order terminating the receivership. When the receivership terminates, the receiver must file a final report with the court, but the receiver is nonetheless immediately released of any further obligation or liability with regard to the receivership property and the receiver's security is released.

# ICSC+LAW SYMPOSIUM OH/KY/IN/MI/PA

**Renaissance Columbus Downtown Hotel**

**Columbus, OH**

**Friday, March 18, 2022**

**11:45 am – 12:45 pm**

## Session 3A: Best Practices for Lease Amendments to Achieve Desired Outcomes in the Current Commercial Real Estate Climate

**Panelists**

**MARGARET DEARDEN PETERSEN**
Principal
Petersen Law PLLC
Ann Arbor, MI

**BRIAN MCALLISTER**
Sr. Director, Leasing Counsel
Washington Prime Group
Columbus, OH

**BEST PRACTICES FOR LEASE AMENDMENTS:**
**ACHIEVING DESIRED OUTCOMES IN THE CURRENT COMMERCIAL REAL ESTATE CLIMATE.**

**GENERAL GUIDELINES FOR DRAFTING AND NEGOTIATING LEASE AMENDMENTS:**

1. **Extract as much information from the client as possible**
2. **Form of the lease amendment – Tenant's or the Landlord's?**
3. **Preparing to draft (or review) a lease amendment**
4. **Drafting (or reviewing) the lease amendment**
5. **Wrapping up the lease amendment**

**DRAFTING AMENDMENTS DURING AND FOLLOWING THE COVID PANDEMIC**

1. **Lease Issues caused by Pandemic**
2. **Consequences facing Landlords from such Lease issues**
3. **Lease Clauses that need to be reviewed and possibly modified:**
4. **Use of Amendments to resolve Pandemic related issues and help both parties succeed:**
5. **Options for Amendments**

***Bottom Line: Landlord and Tenant are in this together to help each other to be successful!***

**APPENDIX**
**SAMPLE CLAUSES**

Defined Terms. Unless otherwise defined in this Amendment, all capitalized or non-capitalized terms (either used or defined in the Lease) used herein shall have the same meaning as such terms are given or used in the Lease.

Confidentiality. Landlord and Tenant shall keep confidential the terms of this Amendment ("Confidential Information") and not release or disseminate any of the Confidential Information to any third party, other than (i) to their respective attorneys, accountants, brokers, board members, and officers, and then only to the extent that such attorneys, accountants, brokers, board members, or corporate officers expressly agree to be bound by the terms of the confidentiality provisions of this Amendment, or (ii) where disclosure is required by applicable laws or regulations. This obligation of confidentiality shall survive the termination of the Amendment or the Lease.

Lease Guarantor's Consent: [GUARANTOR, a [STATE] corporation / LLC, the Guarantor of the Lease pursuant to a Lease Guaranty Agreement dated [DATE], approves of, consents to and joins in the execution of this Amendment and reaffirms for Landlord each and every agreement, covenant and obligation set forth in such Lease Guaranty Agreement.

Lease Term; Renewal Option. The Term of the Lease, which is currently scheduled to expire on [DATE], is hereby extended to expire on [DATE] (the "Expiration Date"). The Renewal Option described in [SECTION] of the [LEASE] or [AMENDMENT # __ ] is hereby deleted in its entirety.

Lease Term; Option Periods. The Lease term, which is currently scheduled to expire on January 31, 20xx, is hereby extended to expire on January 31, 20xx (the "Expiration Date"). Thereafter, the first of the three Option Periods described in Article 4 of the Lease will be for the period February 1, 20xx through January 31, 2xx, and if Tenant elects to exercise the first Option Period, then Tenant shall do so by July 31, 20xx; the second Option Period will be for the period February 1, 20xx through January 31, 20xx (exercise by July 31, 20xx); and the third Option Period will be for the period February 1, 20xx through January 31, 20xx (exercise by July 31, 20xx).

Mortgagee Consent. The Shopping Center is subject to a mortgage to which the Lease and this Amendment is subordinate. This Amendment is subject to, and shall be effective only upon receipt of, the mortgagee's written consent to Landlord entering into this Amendment, as evidenced by the below mortgagee consent or such other form of mortgagee consent as may be executed by the mortgagee.

Mortgagee Consent Not Required. Landlord represents and warrants that the Shopping Center is not subject to any mortgage or deed of trust that requires any mortgagee to consent to Landlord entering into this Amendment.

No Novation. It is the express intent of Landlord and Tenant that this Amendment constitutes an extension and continuation of the Lease, as amended hereby, and does not constitute a novation.

Counterparts; Electronic Signatures. This Amendment may be executed in counterparts, which taken together shall constitute one instrument, notwithstanding the fact that all signatures are not contained on the same copy. Signatures transmitted by email in portable document format and signatures electronically signed in accordance with the Uniform Electronic Transaction Act (UETA) or the substantive equivalent of the UETA, as adopted in the [State / Commonwealth] of _____, and with the United States ESIGN Act shall have the same effect as the delivery of original signatures and shall be binding upon and enforceable against the parties hereto as if such transmittal were an original executed counterpart.

Amendment to Memorandum of Lease. That certain Memorandum of Lease, dated as of _____, _____, has been filed and recorded as Instrument No. _____, in the Public Records of _____ County, _____ (the "Memorandum of Lease"). Tenant and Landlord desire to modify the Memorandum of Lease. Simultaneously with the execution of this Amendment, Landlord shall execute, acknowledge and deliver to Tenant the Amendment to Memorandum of Lease attached hereto as Exhibit A. The Amendment to Memorandum of Lease may be recorded by Tenant (at Tenant's expense) in the Public Records of _____ County, _____, with directions that it be returned to Tenant.

Remaining Renewal Option(s). …Furthermore, Tenant shall retain its _____ (____) renewal options of five (5) years each under Section ____ of the Lease, with the first renewal option to commence, if exercised by Tenant, on _____, 20____. Any exercise by Tenant of a renewal option shall be at the Annual Minimum Rent and otherwise in accordance with the terms of Section ____ of the Lease.

No Option Remaining. … Landlord and Tenant hereby confirm that Tenant has no options to extend the Lease Term following the expiration of the Extended Term.

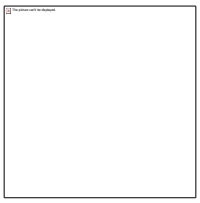
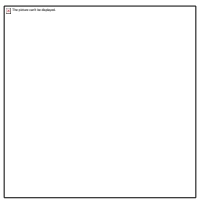
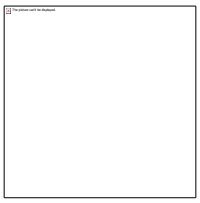
Abatement Only Notwithstanding any provisions contained in the Lease which may be to the contrary, for the period commencing _____ and continuing through and including _____ ("Abatement Period"), payment by Tenant of rents due under the Lease in the amount of $_____ ("Abated Rent") shall be abated by Landlord in equal monthly installments of $_____. The Abated Rent shall not be subject to repayment by Tenant except as specifically set forth below. Landlord reserves the right to apply the Abated Rent to any item of rent as set forth in the Lease in Landlord's sole discretion. During the Abatement Period, all amounts of Minimum Annual Rent, Percentage Rent and additional rent shall continue to be due and payable from Tenant to Landlord in accordance with the terms and conditions as set forth in the Lease. In the event of (i) any non-payment of Minimum Annual Rent, Percentage Rent or additional rent from the date hereof through the Lease Term, or (ii) Tenant's failure to remain open and operating in the Premises through the Lease Term of the Lease or to otherwise perform any of Tenant's obligations under the Lease, all Abated Rent shall immediately become due and payable to Landlord from Tenant and the full rental obligations as set forth in the Lease shall be reinstated for the Lease Term hereof.

Deferment Only. Notwithstanding any provisions contained in the Lease which may be to the contrary, for the period commencing _____and continuing through and including _____ ("Deferment Period"), payment by Tenant of rents due under the Lease in the amount of $_____ ("Deferred Amount") shall be deferred by Landlord in equal monthly installments of $_____. During the Deferment Period, all amounts of Minimum Annual Rent, Percentage Rent and additional rent shall continue to be due and payable from Tenant to Landlord in accordance with the terms and conditions as set forth in the Lease. Tenant shall repay to Landlord the Deferred Amount in _____ consecutive monthly installments of $_____ commencing _____ and continuing through and including _____ ("Repayment Period"). In the event of (i) any non-payment of Minimum Annual Rent, Percentage Rent or additional rent from the date hereof through the Lease Term, (ii) any non-payment of the Deferred Amount during the Repayment Period, or (iii) Tenant's failure to remain open and operating in the Premises through the Lease Term of the Lease or to otherwise perform any of Tenant's obligations under the Lease, all Deferred Amounts shall immediately become due and payable to Landlord from Tenant and the full rental obligations as set forth in the Lease shall be reinstated for the Lease Term hereof.

Deferment and Abatement. Notwithstanding any provisions contained in the Lease which may be to the contrary, for the period commencing _____ and continuing through and including _____ ("Deferment Period"), payment by Tenant of rents due under the Lease in the amount of $_____ ("Deferred Amount") shall be deferred by Landlord in equal monthly installments of $_____. Landlord agrees to abate an additional $_____ (the "Abated Rent") during the Deferment Period, and the Abated Rent shall not be subject to repayment by Tenant if the Deferred Amount is paid to Landlord. Landlord reserves the right to apply the Abated Rent to any item of rent as set forth in the Lease in Landlord's sole discretion. During the Deferment Period, all amounts of Minimum Annual Rent, Percentage Rent and additional rent shall continue to be due and payable from Tenant to Landlord in accordance with the terms and conditions as set forth in the Lease. Tenant shall repay to Landlord the Deferred Amount in _____ consecutive monthly installments of $_____ commencing _____ and continuing through and including _____ ("Repayment Period"). In the event of (i) any non-payment of Minimum Annual Rent, Percentage Rent or additional rent from the date hereof through the Lease Term, (ii) any non-payment of the Deferred Amount during the Repayment Period, or (iii) Tenant's failure to remain open and operating in the Premises through the Lease Term of the Lease or to otherwise perform any of Tenant's obligations under the Lease, all Deferred Amounts and the Abated Rent shall immediately become due and payable to Landlord from Tenant and the full rental obligations as set forth in the Lease shall be reinstated for the Lease Term hereof.

**BEST PRACTICES FOR LEASE AMENDMENTS:**
**ACHIEVING DESIRED OUTCOMES IN THE CURRENT COMMERCIAL REAL ESTATE CLIMATE**

Typically the "life" of a commercial lease is not static: Following lease execution a lease will be "touched" multiple times by later lease amendments, including rent commencement and other critical dates amendments or certificates, and notices, such as to option exercises, Landlord notices of ownership changes, and the parties' changes of notice or rent payment addresses. The Covid 19 pandemic has increased the volume of lease amendments, all of which require immediate action and execution to resolve issues and conflicts within a lease This best practices seminar will provide a general overview of lease amendment drafting "how to's" to ensure accuracy and efficiency, including lessons learned in drafting lease amendments to assist those tenants and Landlords whose businesses have been harshly impacted by the pandemic.

**GENERAL GUIDELINES FOR DRAFTING AND NEGOTIATING LEASE AMENDMENTS:**

**1. Extract as much information from the client as possible, such as –**

(a) Is there a letter of intent, other written deal outline, and/or course of email correspondence that provides the business terms?

(b) Does the client have a real estate committee approval? If yes, ask for a copy (if the client will provide it) and match the REC terms to the information provided by the client to confirm that the information is consistent with the approval.

(c) What is your client's leverage? Which party is more motivated to complete this lease amendment? What's the big picture? Is the lease amendment part of a "package" of amendments or a "one off"?

(d) What is the timeline to complete the amendment? Is the tenant bumping up against a deadline such as an outside option exercise date in the lease or the lease expiration date?

**2. Form of the lease amendment – Tenant's or the Landlord's?**

(a) Which party is to prepare the lease amendment? If your client is responsible for generating the amendment, does the client have a preferred lease amendment form?

(b) Have in your (virtual) form file one or more commercial lease amendment forms with optional clauses for, e.g., lease term extension or reduction, base/minimum rent modifications, landlord and/or tenant right to terminate the lease early, improvement allowances. Also

include a provision for each of party to update or confirm their current notice address(es), and for the parties to eSign the document (important in this now virtual world).

**3. Preparing to draft (or review) a lease amendment –**

(a) Obtain from the client copies of the original lease and all prior lease amendments, estoppel certificates, and SNDAs. Include copies of notices to / from your client, in particular previous option exercise, change of parties (e.g., notice of a new landlord following sale of the property), and change of address notices.

(b) Assuming the lease file documents have been provided electronically (such as PDF copies), save all documents to a "Lease Documents" folder for the matter and then order the documents chronologically. A simple trick to do this is to add "01-", "02-", "03-", etc., at the beginning of each document's filename. If provided in hard copy, order them chronologically in your lease documents file.

(c) Once in order, read / skim through the lease documents (taking notes) to identify the lease provisions that need to be "touched" in amending the lease, including provisions that the parties may not have considered for the amendment. For example, if the lease amendment includes a base or minimum rent reduction, but the lease also includes a percentage rent clause, which may not have been considered by the parties if the tenant's current gross sales are well below the percentage rent breakpoint, then check whether the parties intend to reduce the break due to the base rent reduction, especially if the lease calculates a natural break.

(d) If amending a retail lease that shows the entire shopping center, check the site plan exhibit – does it need updating?

(e) Ask the client if their policy is to review and update anything else in the lease that might not be the subject of the landlord's and tenant's business partners' negotiation (e.g., amending the force majeure clause), or if the balance of the lease other than the specific items to be amended is to be left alone.

**4. Drafting (or reviewing) the lease amendment –**

The above preparation is key! For the drafter, do not jump into the lease amendment drafting right away – following the above steps in preparing to draft will save time, help to eliminate mistakes, and make the actual drafting process go more quickly and smoothly. In sum, know what you need to write and be familiar with the background before diving into the lease amendment – it will be a much easier process if you do so.

Drafting (and review) guidance, from the top:

(a) Check that the stated Landlord and Tenant entities are correct since they may have changed from the date of original lease execution (look for ownership changes in the lease file notices). Check the secretary of state website for the "other party's" organizing state to confirm that the entity is listed as being in existence. Obtaining a certificate of good standing is likely unnecessary, but consider doing so if the lease amendment is "significant", e.g.,

includes a large allowance, a long term extension, overall significant rent, or similar considerations.

(b) List the lease and all later amendments, letter agreements, and notices that "touch" the lease term (e.g., option exercise notices) in the first recital as comprising the "Lease" – this is a good way both to make sure everyone is on the same page and to flag any missing documents.

(c) In drafting, use the same defined terms that are in the lease. Repeat: *use the same defined terms that are in the lease.* Using different defined terms in the lease amendment from those that are in the original lease document will cause confusion – do not be that guy.

(d) Refer to the lease or previous lease amendments for similar provisions that need to be drafted into the lease amendment. First, no need to reinvent a wheel if it's a sturdy wheel. Second, especially if a pertinent clause or paragraph is pulled from the client's own previous template document, then use the client's preferred language. One example concerns lease amendments in which the landlord will provide to the tenant a "refresh" or "remodel" allowance, in which event refer to the original lease for the parties' original build out allowance language and, unless it's really terrible language, use that language as the basis for the lease amendment refresh allowance language.

(e) Address unexercised options: If the lease amendment includes a provision to extend the lease term and if the lease includes a yet unexercised option (or options) to extend, then check with the client whether the term extension to be documented in the lease amendment is effectively an option exercise or, if not, whether any remaining option is to survive and remain available following the current term extension. If so, then also check whether the lease stated option rent remains unchanged or if it is to be modified as well. Either way, whether an option (or options) remains or there are no further options, then include a statement as to such in the lease amendment to avoid any later confusion.

(f) If representing the tenant and the lease file includes an SNDA (Subordination, Non-Disturbance, and Attornment Agreement), then find out from the landlord whether the loan to which the SNDA is tied is still "alive" and not yet paid off. If so, and because an SNDA almost always provides that the lender is not bound by any later lease amendment to which the lender hasn't approved, then, to avoid the possibility of the lease amendment "disappearing" at a later foreclosure, require the landlord to obtain the lender's written consent to the lease amendment. A written lender's consent may be in a "consented to" paragraph with lender's signature at the end of the amendment, or in any other written form the lender prefers, e.g., a separate letter or even an email. Bear in mind that the landlord "representing and warranting" that it has obtained all necessary consents will be of little if any value later during a foreclosure (when the landlord, who has the benefit of a lease exculpation clause, exits the scene with no assets) if the rep / warranty turns out to have been inaccurate.

(g) If there is a recorded memorandum or short form of lease (MOL), then check whether any lease term extension to be documented in the lease amendment will extend beyond the total term (i.e., initial term and any options) documented in the MOL. If yes, then consider

preparing an amendment to the MOL for the parties to sign together with the lease amendment, with the MOL amendment to document the new term extension (and any additional option periods), and then record the MOL amendment.

(h) Include a broker's provision as to whether a broker is involved in the lease amendment and, if so, which party is responsible for the broker's commission.

(i) Always update or confirm the Notices address for each party, including any required cc's. A lease amendment is a good place to "capture" current address information, even if a change of notice address was previously sent to the other party, since notices of address changes may go astray or otherwise not be kept in the lease documents file.

**5. Wrapping up the lease amendment –**

(a) Include a provision that expressly confirms that the lease amendment may be executed via eSignatures, which (not surprisingly) have become ubiquitous with the move to remote / virtual work (eSignatures such as DocuSign or AdobeSign, not printed, signed, scanned, and faxed signatures). The rare exceptions to eSignatures should be limited to lease amendments that, by governing law, must be notarized and when remote online notarizing (RON) isn't practical or available. As with any document that is routed for eSignature, make sure to date the document (or ensure that the document is dated) following full execution.

In sum, lease amendments are often an interesting and fun break from long haul larger lease and other real estate transactions. Amendments are often not "cookie cutter" form documents and require creative and thoughtful drafting. As such, take time to prepare and then enjoy the drafting and negotiation process!

**DRAFTING AMENDMENTS DURING AND FOLLOWING THE COVID PANDEMIC**

The COVID pandemic and the impacts it has had on the commercial real estate industry, have created considerable issues for landlords and tenants. Many governors in the country implemented “shelter-in-place” mandates, ordered that all non-essential businesses close and when permitted to re-open, have imposed restrictive rules for commercial operations on Landlords and tenants. These restrictions have caused commercial landlords and tenants to be challenged to meet contractual obligations.

**1. Lease Issues caused by Pandemic**

(a) Tenants with little ability to generate revenue, become unable to pay rent and charges under their lease, and risk lease default.

(b) Due to risk of exposure and ability to retain personnel, tenants have been unable to staff and operate businesses, even with reduced hours.

(c) Co-Tenancy violations because of Tenants closing for business or defaulting under their lease

(d) Tenant violating continuous occupancy requirements because of inability to operate in Premises.

(e) Landlord must review its existing loan documents, SNDA Agreements. Most loan documents allow amendments to leases that are not Major Tenants (occupying 10,000 square feet of contiguous space).

(f) If have a number of deals with specific tenant, consider negotiating a package of amendments to accomplish all needed changes to all leases.

**2. Consequences facing Landlords from such Lease issues**

(a) Landlords have to face issue of whether to excuse tenant's performance, enter into lease amendments or pursue defaults and judicial remedies under their leases and claims of a force majeure situation.

(b) Because most commercial and retail leases obligate the tenant to continue to pay Landlord rent and charges and performance obligations even during a force majeure event, tenants fail to make timely payments.

(c) Landlord remains responsible to make ongoing payments to lenders and debtors. Therefore, landlord must have tenant continue to pay rents and charges due under their lease.

(d) Tenants struggling to stay in business in general and bankruptcies caused by loss of revenue during such issues.

(e) Landlord has concerns that tenants will default and close for business or try to get out of obligations of their lease.

(f) Landlord must make sure negotiations are with individual tenant only, may need confidentiality agreement.

**3. Lease Clauses that need to be reviewed and possibly modified:**

(a) Minimum Rent/ Percentage Rent/Gross Rent. Rent holiday- Deferred payment for short period (1-3 months, smaller payments over remainder of Term)

(b) Additional charges

(c) Term. Reduce or increase

(d) Continuous operation clause- Rescind tenant default for failure to operate or permit short term closure but rent remains due or reduced to permit tenant to get operational again.

(e) Assignment/ Subletting. Permit tenant to assign or sublet to a stronger operator.

(f) Termination- remove existing or add Landlord termination right if find new tenant, or for any reason

(g) Premises contraction/ expansion. Permit tenant to operate out of less square footage and reduce rents and charges or permit larger square footage to permit combined new operation model by tenant that would be more feasible.

(h) Force Majeure

(i) Security Deposit. Consider permitting Landlord to apply the existing security deposit toward upcoming or past due rents

**4. Use of Amendments to resolve Pandemic related issues and help both parties succeed:**

(a) Landlord and Tenant need to agree to new rents and terms under their leases to move forward in business relationship.

(b) Deferment of rent in order for Landlord to still collect the rents and for Tenant to defer financial obligations until financially viable.

(c) Abatement of outstanding rents and charges when Tenant is unable to make such payments and remain operational. Proposed increase in term as consideration for such abatement.

(d) Combination of deferment and abatement of outstanding past due balances. Abatement of a portion and deferment of a portion to allow financial recovery and continued operation.

(e) Chance to recover bad clauses, clean up charges. In exchange for changes to lease, Landlord can correct clauses and charges that are causing issues and to remove clauses that would be impacted by continuing operation and tenancy issues.

**5. Options for Amendments**

(a) Reduce rent during time frame of closure, and possibly thereafter to allow Tenant to financially recover and continue operations.

(b) Alternative Rent – Permit Tenant to pay reduced rent or percentage rent in lieu of Minimum Rent and Percentage Rent of items or services sold from premises

(c) Defer all or a portion of past due amounts to a later date with progress payments starting at later date.

(d) Abatement of past due amounts for impact period, increased term of leases by same amount of time or with increased rent later in the term.

(e) Landlord can require a termination right be added to lease or suspend or remove a co-tenancy clause from the lease in exchange for rent relief or abatement.

(f) Landlord can be given a right by tenant to look for a replacement for the Tenant and have a thirty (30) day right (or other negotiated period of time) to terminate the Tenant's lease.

***Bottom Line: Landlord and Tenant are in this together to help each other to be successful!***

**APPENDIX**
**SAMPLE CLAUSES**

Defined Terms. Unless otherwise defined in this Amendment, all capitalized or non-capitalized terms (either used or defined in the Lease) used herein shall have the same meaning as such terms are given or used in the Lease.

Confidentiality. Landlord and Tenant shall keep confidential the terms of this Amendment ("Confidential Information") and not release or disseminate any of the Confidential Information to any third party, other than (i) to their respective attorneys, accountants, brokers, board members, and officers, and then only to the extent that such attorneys, accountants, brokers, board members, or corporate officers expressly agree to be bound by the terms of the confidentiality provisions of this Amendment, or (ii) where disclosure is required by applicable laws or regulations. This obligation of confidentiality shall survive the termination of the Amendment or the Lease.

Lease Guarantor's Consent: [GUARANTOR, a [STATE] corporation / LLC, the Guarantor of the Lease pursuant to a Lease Guaranty Agreement dated [DATE], approves of, consents to and joins in the execution of this Amendment and reaffirms for Landlord each and every agreement, covenant and obligation set forth in such Lease Guaranty Agreement.

Lease Term; Renewal Option. The Term of the Lease, which is currently scheduled to expire on [DATE], is hereby extended to expire on [DATE] (the "Expiration Date"). The Renewal Option described in [SECTION] of the [LEASE] or [AMENDMENT # __ ] is hereby deleted in its entirety.

Lease Term; Option Periods. The Lease term, which is currently scheduled to expire on January 31, 20xx, is hereby extended to expire on January 31, 20xx (the "Expiration Date"). Thereafter, the first of the three Option Periods described in Article 4 of the Lease will be for the period February 1, 20xx through January 31, 2xx, and if Tenant elects to exercise the first Option Period, then Tenant shall do so by July 31, 20xx; the second Option Period will be for the period February 1, 20xx through January 31, 20xx (exercise by July 31, 20xx); and the third Option Period will be for the period February 1, 20xx through January 31, 20xx (exercise by July 31, 20xx).

Mortgagee Consent. The Shopping Center is subject to a mortgage to which the Lease and this Amendment is subordinate. This Amendment is subject to, and shall be effective only upon receipt of, the mortgagee's written consent to Landlord entering into this Amendment, as evidenced by the below mortgagee consent or such other form of mortgagee consent as may be executed by the mortgagee.

Mortgagee Consent Not Required. Landlord represents and warrants that the Shopping Center is not subject to any mortgage or deed of trust that requires any mortgagee to consent to Landlord entering into this Amendment.

No Novation. It is the express intent of Landlord and Tenant that this Amendment constitutes an extension and continuation of the Lease, as amended hereby, and does not constitute a novation.

Counterparts; Electronic Signatures. This Amendment may be executed in counterparts, which taken together shall constitute one instrument, notwithstanding the fact that all signatures are not contained on the same copy. Signatures transmitted by email in portable document format and signatures electronically signed in accordance with the Uniform Electronic Transaction Act (UETA) or the substantive equivalent of the UETA,

as adopted in the [State / Commonwealth] of _____, and with the United States ESIGN Act shall have the same effect as the delivery of original signatures and shall be binding upon and enforceable against the parties hereto as if such transmittal were an original executed counterpart.

Amendment to Memorandum of Lease. That certain Memorandum of Lease, dated as of _____, _____, has been filed and recorded as Instrument No. _____, in the Public Records of _____ County, _____ (the "Memorandum of Lease"). Tenant and Landlord desire to modify the Memorandum of Lease. Simultaneously with the execution of this Amendment, Landlord shall execute, acknowledge and deliver to Tenant the Amendment to Memorandum of Lease attached hereto as Exhibit A. The Amendment to Memorandum of Lease may be recorded by Tenant (at Tenant's expense) in the Public Records of _____ County, _____, with directions that it be returned to Tenant.

Remaining Renewal Option(s). …Furthermore, Tenant shall retain its _____ (____) renewal options of five (5) years each under Section ____ of the Lease, with the first renewal option to commence, if exercised by Tenant, on _____, 20____. Any exercise by Tenant of a renewal option shall be at the Annual Minimum Rent and otherwise in accordance with the terms of Section ____ of the Lease.

No Option Remaining. … Landlord and Tenant hereby confirm that Tenant has no options to extend the Lease Term following the expiration of the Extended Term.

Abatement Only Notwithstanding any provisions contained in the Lease which may be to the contrary, for the period commencing _____ and continuing through and including _____ ("Abatement Period"), payment by Tenant of rents due under the Lease in the amount of $_____ ("Abated Rent") shall be abated by Landlord in equal monthly installments of $_____. The Abated Rent shall not be subject to repayment by Tenant except as specifically set forth below. Landlord reserves the right to apply the Abated Rent to any item of rent as set forth in the Lease in Landlord's sole discretion. During the Abatement Period, all amounts of Minimum Annual Rent, Percentage Rent and additional rent shall continue to be due and payable from Tenant to Landlord in accordance with the terms and conditions as set forth in the Lease. In the event of (i) any non-payment of Minimum Annual Rent, Percentage Rent or additional rent from the date hereof through the Lease Term, or (ii) Tenant's failure to remain open and operating in the Premises through the Lease Term of the Lease or to otherwise perform any of Tenant's obligations under the Lease, all Abated Rent shall immediately become due and payable to Landlord from Tenant and the full rental obligations as set forth in the Lease shall be reinstated for the Lease Term hereof.

Deferment Only. Notwithstanding any provisions contained in the Lease which may be to the contrary, for the period commencing _____and continuing through and including _____ ("Deferment Period"), payment by Tenant of rents due under the Lease in the amount of $_____ ("Deferred Amount") shall be deferred by Landlord in equal monthly installments of $_____. During the Deferment Period, all amounts of Minimum Annual Rent, Percentage Rent and additional rent shall continue to be due and payable from Tenant to Landlord in accordance with the terms and conditions as set forth in the Lease. Tenant shall repay to Landlord the Deferred Amount in _____ consecutive monthly installments of $_____ commencing _____ and continuing through and including _____ ("Repayment Period"). In the event of (i) any non-payment of Minimum Annual Rent, Percentage Rent or additional rent from the date hereof through the Lease Term, (ii) any non-payment of the Deferred Amount during the Repayment Period, or (iii) Tenant's failure to remain open and operating in the Premises through the Lease Term of the Lease or to otherwise perform any of Tenant's obligations under the Lease, all Deferred Amounts

shall immediately become due and payable to Landlord from Tenant and the full rental obligations as set forth in the Lease shall be reinstated for the Lease Term hereof.

Deferment and Abatement. Notwithstanding any provisions contained in the Lease which may be to the contrary, for the period commencing _____ and continuing through and including _____ ("Deferment Period"), payment by Tenant of rents due under the Lease in the amount of $_____ ("Deferred Amount") shall be deferred by Landlord in equal monthly installments of $_____. Landlord agrees to abate an additional $_____ (the "Abated Rent") during the Deferment Period, and the Abated Rent shall not be subject to repayment by Tenant if the Deferred Amount is paid to Landlord. Landlord reserves the right to apply the Abated Rent to any item of rent as set forth in the Lease in Landlord's sole discretion. During the Deferment Period, all amounts of Minimum Annual Rent, Percentage Rent and additional rent shall continue to be due and payable from Tenant to Landlord in accordance with the terms and conditions as set forth in the Lease. Tenant shall repay to Landlord the Deferred Amount in _____ consecutive monthly installments of $_____ commencing _____ and continuing through and including _____ ("Repayment Period"). In the event of (i) any non-payment of Minimum Annual Rent, Percentage Rent or additional rent from the date hereof through the Lease Term, (ii) any non-payment of the Deferred Amount during the Repayment Period, or (iii) Tenant's failure to remain open and operating in the Premises through the Lease Term of the Lease or to otherwise perform any of Tenant's obligations under the Lease, all Deferred Amounts and the Abated Rent shall immediately become due and payable to Landlord from Tenant and the full rental obligations as set forth in the Lease shall be reinstated for the Lease Term hereof.

# ICSC+LAW SYMPOSIUM OH/KY/IN/MI/PA

**Renaissance Columbus Downtown Hotel**

**Columbus, OH**

**Friday, March 18, 2022**

**11:45 am – 12:45 pm**

## Session 3B: Fundamentals of Leasing - COVID-19 is Force(ing) Majeure Changes in Retail Leasing

**Panelists**

**Leah LaFramboise**
**Frost Brown Todd LLC**
**Pittsburgh, PA**

**Tandy C. Patrick**
**Dentons Bingham Greenebaum LLP**
**Louisville and Lexington, KY**

Outline

During this session, the speakers will address fundamental leasing topics, including both Landlord and Tenant's perspectives, with a special focus on how COVID-19 has affected these leasing issues.

1. COVID-related lease issues

    a. Court decisions regarding interpretation of existing lease provisions vis-à-vis COVID-19

    b. Revised lease provisions: Force Majeure; Rent Deferral/ Abatement; Time of Essence

    c. Drafting tips

2. SNDA's and Tenant Estoppels

3. Common Areas

4. Use Clause

5. Assignment/Subletting

6. Exclusives

7. Continuous Operation/Tenant's Right to Go Dark

8. Tenant Improvements/Alterations

9. Construction Work Letters

10. Signage

11. Default: Remedies upon default by either Landlord or Tenant

12. Optional lease termination rights/issues upon expiration of lease (early termination; co-tenancy requirements)

## 1. COVID-RELATED LEASE ISSUES

1(a): Court decisions regarding COVID

(i) *Store SPE LA Fitness v. Fitness Int'l, LLC*, US District Court for the Central District of California (June 30, 2021)

- Involves LA Fitness leases in KY and TN; Court applied KY law
- Tenant's position: excused from paying rent during government-mandated closures based on force majeure provisions in leases
- Court: Tenant was not "prevented" from paying rent during COVID ("inability to operate fitness centers does not amount to pandemic causing an inability to pay rent"; "mere decrease in revenue does not amount to impossibility or impracticability of performance"; "temporary government closure of fitness centers when the properties were leased for at least 20 years does not amount to the kind of complete frustration of purpose required for the doctrine to apply"; "temporary closure orders does not amount to a failure of consideration"; "KY government did not 'take' anything, there was simply a temporary regulation that limited operations")

(ii) *A/R Retail LLC v. Hugo Boss Retail, Inc*., 149 N.Y.S. 3d 808 (May 10, 2021)

- Hugo Boss store in luxury mall in NYC (Shops at Columbus Circle)
- Court noted that both Landlord and Tenant were "sophisticated commercial entities" who agreed to terms of the Lease; Lease did not provide for termination of Lease or abatement of rent if obligations were impacted by government restrictions
- Court: "if mass rescission of commercial leases was permitted, property owners would incur all of the risk of the pandemic, since property owners face their own unrelenting expenses and economic burdens"
- Occupancy and hours of the Mall remain limited

(iii) *The GAP Inc. v. Ponte Gadea New York, LLC,* ___ F.Supp.3d____ (March 8, 2021)

- Manhattan stores
- GAP claimed that impact of COVID-19 should release Tenant from obligations of the Lease based on the following legal doctrines: casualty; frustration of purpose; impossibility of performance; rescission due to failure of consideration; failure to address pandemic amounts to mutual mistake
- Court denied all, ruled in favor of Landlord

(iv) *In re: Cinemex USA Real Estate Holdings, Inc*., 67 B.R. 693 (January 27, 2021)

- Bankruptcy Court (Miami); 41 movie theatres
- Court said force majeure clause in leases relieved movie theatre debtor from obligation to pay rent during times when movie theatres were shut down by Fl. Governor, and debtor did not have to repay rent attributable to such period; lease term extended for amount of time equal to time that theatre was closed
- "The burden on businesses that rely on the public such as theaters, restaurants, bars, hotels and the travel industry, as well as their landlords, have been hit particularly hard".

(v) *267 Dev. LLC v. Brooklyn Babies & Toddlers LLC,* Supreme Court of New York (March 24, 2021)

- Court: "shutdown of Tenant's business has precluded it from performing its contractual obligations. The government shutdown was unforeseeable and could not have been built into the lease. The Court finds that under the circumstances, performance under the lease was made impossible".

(vi) *1600 Walnut Corp. v. Cole Haan Co.,* US District Court for the Eastern District of PA (March 30, 2021)

- Cole Haan permanently vacated in March 2020 and did not reopen when Philadelphia businesses were permitted to reopen in early June 2020
- Court: noted that Force majeure clause in Lease says force majeure does not relieve Tenant from obligation to pay rent
- Court said that COVID was a force majeure event, so common law doctrines of frustration of purpose, impossibility/impracticality of performance, and failure of consideration are not applicable

(vii) *1877 Webster Ave. v. Tremont Cntr LLC*, Supreme Court of New York (May 19, 2021)

- Lease of night club in the Bronx; lease limited use to a "first class night club and for no other purpose"
- Court agreed that COVID and Governmental mandates might cause the lease to be worthless to the tenant as it was deprived of the beneficial use of the premises due to narrow scope of use clause

(viii) Additional Decisions:

- *AGW Sono Partners, LLC v. Soho*, Superior Court of Connecticut (March 8, 2021)

- *Fives 160th LLC v. Qing Zhao*, Supreme Court of New York (April 6, 2021)
- *HWA 1290 Iii v. GKNY 1*, Supreme Court of New York (May 12, 2021)
- *Lampo Grp., LLC v. Marriott Hotel Servs*., US District Court for the Middle District of TN (August 9, 2021)
- *Livonia v. Burn Fitness-3, LLC*, Sixth Judicial Circuit Court of Michigan (February 25, 2021)
- *Regal Cinemas, Inc. v. Town of Culpeper*, US District Court for the Western District of VA (July 14, 2021)
- *Shadowwood Square, Ltd. V. R. C. Cobb, Inc.*, 15th Judicial Circuit of FL, Palm Beach County (April 1, 2021)
- *Tanger Mgmt., LLC v. Haggar Direct, Inc.*, US District Court for the Western District of Texas (May 11, 2021)

1(b): *Revision and/or inclusion of Force Majeure clause - sample lease provisions*

New definitions of Force Majeure in commercial leases:

(i) governmental prohibitions or regulations or administrative delays that exceed the ordinary and foreseeable requirements for obtaining building permits, certificates of occupancy, inspections or their equivalents; inability to obtain materials, epidemics or pandemics identified by the World Health Organization, U.S. Centers for Disease Control and Prevention (CDC), or any similar state governmental body or any and all other extraordinary causes (but not including financial inability).

(ii) pandemic, epidemic, disease, illness, or other public health emergencies, along with the collateral effects and consequences thereof,

(iii) In the event that, during the Term, there occurs any (a) war, invasion, rebellion, insurrection, riot or mob violence, (b) act of terrorism or act of public enemy, (c) newly enacted law, rule, order or regulation of any governmental agency, authority or instrumentality, (d) act of God, (e) earthquake, hurricane, tornado, flood, fire, accident or other casualty, (f) failure of utilities, telecommunications, public transportation or other critical infrastructure due to cyberattack or other cyber event, (g) epidemic, pandemic or quarantine restriction, (h) governmental preemption in connection with a national, regional, state or municipal emergency or act of civil or military authority (including evacuation order), (i) other event, circumstance or cause (whether similar or dissimilar to those events, circumstances or causes set forth in clauses (a) through (h) above) beyond the reasonable control of Tenant, or (j) if anticipated, is too strong to be controlled, such as an epidemic or pandemic that require individual isolation, quarantine or quarantine-like restrictions, such as COVID-19

(iv) is caused directly by the on-going effects of the coronavirus (COVID-19) pandemic beyond Tenant's reasonable control, including, but not limited to, delays in obtaining labor, materials, and/or the certificate of occupancy for the Premises

- Force Majeure. As used in this Lease, the term "Force Majeure" means unforeseen and extraordinary delays caused by events over which the party claiming Force Majeure has no control, including shortages of materials, natural resources or labor; fire; natural catastrophe; labor strikes; civil commotion; riots; war; acts of God and extraordinary weather; governmental prohibitions or regulations or administrative delays that exceed the ordinary and foreseeable requirements for obtaining building permits, certificates of occupancy, inspections or their equivalents; inability to obtain materials, epidemics or pandemics identified by the World Health Organization, U.S. Centers for Disease Control and Prevention (CDC), or any similar state governmental body or any and all other extraordinary causes (but not including financial inability). If an event of Force Majeure occurs and such Force Majeure event directly causes an extraordinary delay in the performance of any obligation or satisfaction of any condition of this Lease, (a) neither party shall have liability to the other for non-performance or non-satisfaction of the affected provision, and (b) neither party shall be in default under this Lease for failure to

perform such affected obligation or satisfy such affected condition within the timeframe originally provided. If an event of Force Majeure occurs, except as otherwise expressly provided in this Lease, the period of time Landlord or Tenant has for performance as provided in this Lease shall be extended one day for each day performance is delayed by such event of Force Majeure. The provisions of this Section shall apply to each and every provision of this Lease, regardless of whether any specific provision makes reference to Force Majeure delays.

- Force Majeure. Except as otherwise expressly provided in this Lease or in the Work Letter, if the performance of any act required by this Lease to be performed by either Landlord or Tenant is prevented or delayed by reason of any act of God, including but not limited to, tornado, hurricane, earthquake, high-wind storm damage, wildfires, flood, excessive snowfall or rain, pandemic, epidemic, disease, illness, or other public health emergencies, along with the collateral effects and consequences thereof, strike, lockout, labor trouble, acts of war, terrorism, inability to secure materials, restrictive governmental laws, regulations, decrees, executive orders, public health orders, emergency orders, and ordinances, or any other cause (except financial inability) not the fault of the party required to perform the act, the time for performance of the act will be extended for a period equivalent to the period of delay and performance of the act during the period of delay will be excused. However, nothing in this Section shall excuse the performance of any act rendered difficult or impossible solely because of the financial condition of the party required to perform the act.

- Force Majeure. In the event that, during the Term, there occurs any (a) war, invasion, rebellion, insurrection, riot or mob violence, (b) act of terrorism or act of public enemy, (c) newly enacted law, rule, order or regulation of any governmental agency, authority or instrumentality, (d) act of God, (e) earthquake, hurricane, tornado, flood, fire, accident or other casualty, (f) failure of utilities, telecommunications, public transportation or other critical infrastructure due to cyberattack or other cyber event, (g) epidemic, pandemic or quarantine restriction, (h) governmental preemption in connection with a national, regional, state or municipal emergency or act of civil or military authority (including evacuation order), (i) other event, circumstance or cause (whether similar or dissimilar to those events, circumstances or causes set forth in clauses (a) through (h) above) beyond the reasonable control of Tenant, or (j) if anticipated, is too strong to be controlled, such as an epidemic or pandemic that require individual isolation, quarantine or quarantine-like restrictions, such as COVID-19, and in each such case only if the same did not result from any act or omission of such party or its employees, agents or contractors (any of the foregoing, whether alone or in combination, a "Force Majeure Event", it being understood and agreed, however, that neither any physical casualty to the Premises (or any portion thereof) addressed in Article 20, nor any condemnation of the Premises (or any portion thereof) addressed in Article 21, shall be deemed to constitute a Force Majeure Event, it being the intent of Landlord and Tenant that the provisions of such Section(s) shall control the rights and obligations of the parties in such circumstances), and as a direct or indirect result of such Force Majeure Event, the Premises are required to be closed or the permitted use for

which the Tenant leased the Premises is materially and adversely limited by a governmental, quasi-governmental or regulatory board or authority "Loss Trigger", then Tenant's obligations under this Lease to pay any installment of Rent shall be abated (without interest or late charge thereon), and the then current Term of this Lease extended (at the then current Rent rate), by the number of months during which such Force Majeure Event continues (it being understood that such Force Majeure Event shall be deemed to have ceased as of the end of any period in which the limitation of the permitted use of the Premises is lifted, (the satisfaction of such condition, the "Force Majeure Cessation"). In the event the Loss Trigger continues for a period less than sixty (60) days, then Tenant's obligations under this Lease to pay any installment of Base Rent shall be abated (without interest or late charge thereon), Tenant shall remain obligated to remit additional rent, and the parties agree the term of this Lease shall be extended for the same period of the Loss Trigger. In the event the Loss Trigger continues for a period in excess of sixty (60) days but not to exceed one hundred twenty (120) days, then Tenant's obligations under this Lease to pay any installment of Monthly Rent shall be deferred (without interest or late charge thereon), Tenant shall remain obligated to remit additional rent, and the deferred Monthly Rent shall be remitted by Tenant to Landlord on the first (1st) day of the month after the Force Majeure Cessation and continuing thereafter in twelve (12) equal installments, payable on the first (1st) day of the month with each rent payment due from Tenant; provided, however, if the remaining term of the Lease is less than twelve (12) months, the remittance shall occur in equal installments over the remainder of the Term of the Lease until such deferred rent is paid in full. Notwithstanding anything in this section to the contrary, in the event the Loss Trigger continues for a period in excess of one hundred twenty (120) days, Tenant shall be required to recommence payment of Monthly Rent installments after the expiration of such one hundred twenty (120) day period.

- ALTERNATIVE BASE RENT: In the event any Force Majeure Event, act by Landlord or act of any governmental authority having jurisdiction over Tenant's use of the Premises restricts or otherwise limits Tenant's business operations in the Premises : (i) Tenant's Base Rent shall be reduced by twenty five percent (25%) if Tenant is not restricted from opening and/or operating its drive-through; or (b) Tenant's Base Rent shall be reduced by fifty percent (50%) if Tenant is entirely restricted from opening and operating its business in the Premises, including Tenant's drive-through (either, as applicable, "Alternate Rent"), but only for the time period that Tenant's drive-through or full business operations (as applicable) is restricted or limited by such Force Majeure Event, act by Landlord, or governmental restriction or limitation ("Alternate Rent Period"). Notwithstanding the foregoing, the then current Expiration Date shall be extended one day for each day in which Tenant pays Alternate Rent hereunder. The parties shall enter into an amendment to extend the final Lease Year of the Term by the number of days in the Alternate Rent Period at the same Base Rent rate for the final Lease Year of the Term, and such term extension shall not be effective until a lease amendment extending the Term by the number of days in the Alternate Rent Period is executed by the duly authorized signatories of the parties. Upon the cessation of such Force

Majeure Event, Tenant shall promptly execute and deliver to Landlord the aforesaid lease amendment extending the Term as set forth above; thereafter, such lease amendment shall be promptly countersigned by Landlord and remitted to Tenant. Tenant shall provide Landlord written notice of its election to apply the foregoing rent adjustments for the Alternate Rent Period.

- Force Majeure. In the event that either party hereto is delayed or hindered in or prevented from the performance of any act required hereunder (other than any obligation of Tenant to pay Rent and other monetary obligations as described in this Lease, which are specifically required to be paid per the terms of this Lease regardless of the occurrence and/or continuance of any of the following) by reason of pandemic virus, strikes, lock-outs, labor troubles, inability to procure materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, war, military or usurped power, sabotage, terrorism, bioterrorism, unusually severe weather, acts of God, fire or other casualty or other reason (but excluding financial inability) of a like nature beyond the reasonable control of the party delayed in performing work or doing acts required under the terms of this Lease, then performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of the delay.

- FORCE MAJEURE: (1) Any prevention, delay or stoppage due to strikes, lockouts, labor disputes, acts of nature, inability to obtain labor or materials or reasonable substitute therefor, governmental restrictions, regulations or controls, enemy or hostile governmental action, riot, civil commotion, fire or other casualty, Pandemic and Epidemics (as defined in Section 32.2 below) or other reason beyond the reasonable control of the party obligated for performance (financial inability excepted) (collectively, any "Force Majeure Event"), shall excuse the performance by such party for a period equal to any such prevention, delay or stoppage, except as otherwise stated in this Lease to the contrary. However, except as expressly set forth in Section 32.2 below, a Force Majeure Event shall not delay or extend the Rent Commencement Date or excuse the payment of any monetary obligation under this Lease.

  (2) Landlord and Tenant acknowledge, understand and agree that, due to situations with worldwide pandemics and/or epidemics, including but not limited to, the COVID-19 pandemic (collectively "Pandemics and/or Epidemics") and Federal, State and/or local governmental regulations, procedures and enforcement relating thereto, including but not limited to, orders for individuals to "shelter in place," "stay at home" and/or otherwise quarantine, for restaurants to close for business or be limited to take-out or delivery only, or for government offices to be closed or operations or services provided materially limited (collectively, "Pandemic and/or Epidemic Regulations"), Tenant's ability to obtain its licenses, permits and approvals necessary to perform Tenant's Work, thereafter perform and complete Tenant's Work, and/or open and operate for the Permitted Use in accordance with this Lease may be delayed, interrupted or otherwise affected. Accordingly,

notwithstanding anything to the contrary contained in this Lease, the following terms and conditions shall apply:

A. If prior to the Rent Commencement Date, Tenant is unable to obtain (or is actually delayed in obtaining) its necessary licenses, permits and approvals to commence Tenant's Work and/or thereafter is unable to perform and complete (or is delayed in performing and completing) Tenant's Work directly resulting from Pandemics and/or Epidemics or Pandemics and/or Epidemics Regulations such that Tenant is unable to open for business from the Premises on or before the Rent Commencement Date, the Build Out Period (as defined in Section 1.1) shall be delayed on a day-for-day basis for each day of such delay, provided that Tenant provides written notice to Landlord promptly of the commencement or occurrence of such delay (and the reasonable particulars of such delay) and thereafter documents and updates Landlord of any such delay(s).

B. If following the Rent Commencement Date, Tenant is unable to operate for business in any capacity (i.e., no dine-in, take-out or delivery is permitted) due to governmental restrictions imposed due to Pandemics and/or Epidemics or Pandemics and/or Epidemics Regulations (a "Complete Closure"), Tenant's obligation to pay Base Rent shall be abated on a day-for-day basis for each such day of Compete Closure, provided that Tenant provides written notice to Landlord promptly of the commencement or occurrence of such delay (and the reasonable particulars of such delay) and thereafter documents and updates Landlord of any such delay(s). Notwithstanding the foregoing to the contrary, Tenant shall continue to pay all Taxes during any such period(s) of Complete Closure.

C. If following the Rent Commencement Date, Tenant is unable to operate for business for dine-in service (i.e., only take-out or delivery is permitted) due to Pandemics and/or Epidemics or Pandemics and/or Epidemics Regulations ("Limited Operation"), Tenant's obligation to pay Base Rent shall be reduced by fifty percent (50%) on a day-for-day basis for each such day of Limited Operation, provided that Tenant provides written notice to Landlord promptly of the commencement or occurrence of such delay (and the reasonable particulars of such delay) and thereafter documents and updates Landlord of any such delay(s). Notwithstanding the foregoing to the contrary, Tenant shall continue to pay all Taxes during any such period(s) of Limited Operation.

- FORCE MAJEURE: Neither Landlord nor Tenant shall be required to perform any term, agreement, condition or covenant in this Lease (other than the obligations of Tenant to pay Rent as provided herein) so long as such performance is delayed or prevented by "Force Majeure", which shall mean acts of God, pandemics, epidemics, strikes, injunctions, lockouts, material or labor restrictions by any governmental authority, any labor or material shortages, civil riots, floods, fire, theft, public enemy, insurrection, war, court order, requisition or order of

governmental body or authority, or delays in receiving building or construction permits from the applicable governing authority, and any other cause not reasonably within the control of Landlord or Tenant and which by the exercise of due diligence Landlord or Tenant is unable, wholly or in part, to prevent or overcome. Neither Landlord nor any mortgagee shall be liable or responsible to Tenant for any loss or damage to any property or person occasioned by any Force Majeure, or for any damage or inconvenience which may arise through repair or alteration of any part of the Project as a result of any Force Majeure.

- In the event Tenant experiences a delay in the construction of Tenant's Work, and such delay (A) occurs after delivery of the Premises and issuance of permits, (B) actually delays Tenant's scheduled completion date for Tenant's Work (which date shall be provided to Landlord after delivery of the Premises and issuance of the permits in accordance with paragraph (ii) above, (C) is caused directly by the on-going effects of the coronavirus (COVID-19) pandemic beyond Tenant's reasonable control, including, but not limited to, delays in obtaining labor, materials, and/or the certificate of occupancy for the Premises, and (D) is not caused by Tenant's failure to exercise reasonable diligence in pursuing Tenant's Work to completion, then the Rent Commencement Date shall be delayed in equal measure, not to exceed ninety (90) days. Tenant shall give Landlord written notice of the beginning and resolution of any such delay it experiences in pursuing the completion of Tenant's Work, shall provide any supporting documentation and information that Landlord shall reasonably request in connection with such delay, and shall exercise reasonable diligence in mitigating any such delay.

- Force Majeure: If either Landlord or Tenant is prevented, delayed, or stopped from performing any obligation required under the Lease due to cause(s) beyond the reasonable control of the affected party, including but not limited to strike; labor dispute; lockout; industry-wide inability to procure materials; restrictive law, regulation, action, mandate or declaration by a governmental entity or public health organization (e.g., gas rationing, a stay-at-home or a shelter-in-place order, an order or guidance to cease certain operations, or a national or regional emergency); mass riot; war; military power; sabotage; warfare (e.g., chemical, biological, radiological, or nuclear warfare); terrorism; fire or other casualty; flooding; Severe Weather; an extraordinary and material act of God (e.g., tornado, hurricane or earthquake); breach in cybersecurity; or an actual or threatened public health or safety emergency or crisis (including, without limitation, epidemic, pandemic, famine, disease, plague, quarantine, utility-related safety measure like rolling blackouts, or other significant health or safety risk), but excluding inadequacy of insurance proceeds; litigation; financial inability; lack of suitable financing and delays of the delayed party's contractor or failure to obtain approvals or permits unless otherwise caused by an event described above (individually and collectively, "Force Majeure"), then the performance of such affected party shall be excused for a period equal to any such prevention, delay or stoppage. "Severe Weather" means weather that a reasonable person would find unusual at the time of the scheduling of the activity for the period in question within the vicinity of the Premises.

Notwithstanding the foregoing, if due to an event of Force Majeure or imminent occurrence thereof, Landlord or Tenant is legally prohibited or in the exercise of its prudent and reasonable business judgment is unable or prohibited from operating the Shopping Center at full capacity or the Premises as a retail store open to the public at full capacity, as the case may be, then such party's performance shall be excused for a period equal to the period of such prohibition or inability and Minimum Rent and Other Charges shall abate commencing upon the earlier of: (i) the closure date of the Shopping Center and/or the Premises; or (ii) the date upon which operation at less than full capacity occurs at the Shopping Center and/or at the Premises continuing until the date of the Shopping Center's reopening at full capacity to the general public ("Force Majeure Rent Abatement"). Nothing herein shall operate to extend the Term of the Lease. For the avoidance of doubt, the COVID-19 pandemic and any restrictive law, regulation, action or declaration by a governmental entity or public health organization in response thereto (even though it may be existing as of the Effective Date) shall be deemed an event of Force Majeure. Additionally, the terms as set forth in this Section shall be subject to the terms and provisions of Article ___ (i.e., in the event the Shopping Center, including the Premises, is damaged or destroyed due to an Insurable Casualty or Uninsurable Casualty as defined in Article ___ then the terms of Article ____ shall prevail and control).

- Alternate Rent Provision: Rent Deferral/Abatement

In the event of any governmental emergency shelter in place or similar orders or governmentally mandated shut down causes Tenant to temporarily cease operations and prevents Tenant's ability to open and operate the Premises in the ordinary course of Tenant's business (the "Closure Period") and which causes [a reduction in Tenant's gross sales for any such month of closure by ___ percent (__%) or more in comparison to the average of the ___ (_) most recent full calendar months in which the Tenant was open for business/Tenant's monthly gross sales to be less than $ ____], then, (i) so long as Tenant is not otherwise in default under this Lease; and (ii) if any governmental assistance programs have been created to specifically assist Tenant during the Closure Period that are applicable to Tenant's business and Tenant qualifies for same, and Tenant has applied for assistance under any such program, then _ percent (_%) of the monthly Base Rent during such Closure Period shall be [deferred] ("Deferred Rent")/abated] and Tenant shall pay only ___percent (__%) of the monthly Base Rent in lieu of full Base Rent each month of the Closure Period until [one month after] such restrictions or limitations are lifted or expire. Nevertheless, Tenant shall continue to p when and as due, all items of Additional Rent. Tenant will use good-faith efforts to maximize its gross sales during and immediately after the Closure Period. [All Deferred Rent deferred pursuant to this Section shall be amortized over _____ (_) equal installments, and paid by Tenant on a monthly basis, in addition to all other Rent payments due under this Lease commencing with the Rent payment which is due ___ (__) months after the date such orders are lifted; provided, however, such amounts shall be paid in full at the end of the then current Term if same expires prior to the expiration of such ____ (__) month period and the Tenant does not exercise its right to an Extension Term (or if no such Extension Term exists).] In addition, should Tenant default under the terms of this Lease beyond any applicable notice and cure periods, all unpaid Deferred Rent shall become immediately due and payable.

Tenant agrees that it shall [use commercially reasonable efforts to] re-open the Premises an recommence operations in the Premises, fully fixture, inventoried and staffed, no later than days after such restrictions or limitations are lifted or expire. Further, Tenant shall provide certified statements of the gross sales for the Closure Period and the ___ month period prior thereto. The rights enumerated herein are personal to Tenant and may not be transferred to any successor or assignee of Tenant. The obligations herein shall survive the expiration or termination of the Lease.

[OPTIONAL PROVISION] In the event the Closure Period continues for more than ___ (__) days, [or if Tenant's gross sales within months after the Closure Period do not exceed $_____,] then [either Landlord or] Tenant may terminate this Lease by giving [the other/Landlord] at least thirty (30) days written notice. Tenant may nullify Landlord's election to terminate the Lease electing, by written notice within thirty (30) days after the receipt of Landlord's notice of termination, to resume paying full Base Rent and commence paying Deferred Rent as provided above. Landlord may nullify Tenant's election to terminate the Lease in the event such restrictions or limitations are lifted or expire within thirty (30) day after Landlord receives Tenant's written election to terminate.

- Tenant may still be required to pay CAM/pass through items
- Amortization period for deferred payments

- TIME IS OF THE ESSENCE

The above notwithstanding, in the event that either party is unable to perform their respective obligations hereunder as a result of a quarantine, governmental emergency order, governmentally mandated shut down or cessation of services due to, or relating to, the COVID-19 outbreak, or any other pandemic, viral outbreak or health related shutdown, then id party's time for performance shall be adjusted to the extent said quarantine, governmental emergency order or governmentally mandated shut down prohibited said party's ability to perform hereunder, and all timelines for performance shall be extended until no artier than fifteen (15) business days after such quarantine, governmental emergency order or governmentally mandated shut down is terminated.

1(c): Drafting Consideration for Future Leases

- Landlords should specifically exclude non-payment of rent from scope of Force Majeure clause and address separately
- Argument that lease is "void" because of COVID likely does not work
- Force Majeure clauses will be narrowly construed
- "Frustration of Purpose" doctrine may be unavailable if lease contains a force majeure clause
- Narrow use clause may be advantageous to Tenant ("frustration of purpose")

**2. SNDA'S AND TENANT ESTOPPELS** – *Sample Provisions*

Simultaneously with execution of this Lease, Landlord shall deliver to Tenant a recordable subordination, nondisturbance and attornment agreement in the form of Exhibit __ (the "SNDA"), duly executed by Landlord and each holder of a mortgage, deed of trust, ground or master lease, sale leaseback transaction or other security instrument encumbering the Premises (an "Encumbrance") on or before the Effective Date, which SNDA provides that, in the event of a foreclosure, sale under a power of sale, ground or master lease termination or transfer in lieu of any of the foregoing or the exercise of any other remedy pursuant to any such Encumbrance (a "Foreclosure"), then (A) Tenant's use, possession and enjoyment of the Premises shall not be disturbed and this Lease shall continue in full force and effect so long as no Event of Default on the part of Tenant has occurred, and (B) this Lease shall automatically and unconditionally become a direct lease between any successor to Landlord's interest, as landlord, and Tenant as if such successor were the landlord originally named hereunder. Landlord represents and warrants that the Premises is not subject to any Encumbrance as of the Effective Date other than _____.

* * *

Tenant shall, prior to taking occupancy of the Premises, and thereafter within ten (10) days following receipt of a written request from Landlord execute an estoppel certificate and/or subordination instrument upon completion by Landlord of items set forth on Exhibit ___ as Landlord's Work or setting forth with particularity those items requested, including without limitation, Tenant's acceptance of the Premises. If Tenant fails to execute and deliver to Landlord the estoppel certificate and/or subordination instrument within the ten (10) day period, as the case may be, or Tenant fails to execute any instrument required by Section __, then Tenant immediately shall tender payment to Landlord in an amount equal to One Hundred and No/100 Dollars ($100.00) for each day after the ten (10) day period that Tenant delays in the execution and delivery of the estoppel certificate and/or subordination instrument, and, at Landlord's option, such failure shall constitute an event of default pursuant to Section ___. Tenant acknowledges and agrees that in the event Tenant requests an estoppel certificate from Landlord, if such estoppel certificate is based on Tenant's form, Tenant shall reimburse Landlord for Landlord's attorney fees paid in connection with such request. In addition, if Tenant requests a nondisturbance agreement from Landlord, Tenant shall reimburse Landlord for Landlord's attorney fees paid in connection with such request, regardless of whose form is utilized in connection therewith.

**3. COMMON AREAS** – *Sample Provisions*

Tenant and Tenant's Agents, customers and invitees shall have all rights appurtenant to the Premises and a non-exclusive right, in common with the other occupants of the Shopping Center and with the public, for the purpose of access over and across as well as the use of all areas for the common use of the occupants of the Shopping Center, including, without limitation, the sidewalks, driveways, loading docks, delivery areas and parking areas on the Shopping Center (collectively, the "Common Areas").

* * * *

All "Common Areas" (as defined hereinafter) made available by Landlord in or about the Shopping Center shall be subject to the exclusive control and management of Landlord, expressly reserving to Landlord, without limitation, the right to erect and install within the Common Areas, kiosks, planters, pools, sculptures, freestanding buildings, additional stories to the buildings, or otherwise. Landlord reserves the right to operate, equip, light and maintain Common Areas in such manner as Landlord may from time to time determine; to police the same; to change the areas, level, location and arrangement of the parking areas and other facilities forming a part of the Common Areas; to designate parking areas for Tenant and other occupants of the Shopping Center and their employees, agents, subtenants, concessionaires and licensees; to establish, modify and enforce reasonable rules and regulations with respect to the Common Areas and the Shopping Center and the use to be made thereof; and to grant individual tenants the right to conduct sales in the Common Areas. Landlord shall operate, equip, light and maintain the Common Areas in such manner as Landlord may from time to time determine. If the size, location or arrangement of the Common Areas or the type of facilities at any time forming a part thereof be changed or diminished, Landlord shall not be subject to any liability therefor, nor shall Tenant be entitled to any compensation or diminution or abatement of Rent therefor, nor shall such change or diminution of such areas be deemed a constructive or actual eviction.

"Common Areas" shall mean all areas, facilities, equipment, signs and special services made available by Landlord for the non-exclusive use of tenants and occupants of the Shopping Center, and their respective employees, agents, subtenants, concessionaires, licensees, customers and invitees, including (without limitation) sidewalks, parking areas, access roads (other than public roads), driveways, landscaped areas, truck serviceways, tunnels, loading docks, pedestrian malls (enclosed or open), roof (provided, that Tenant and its agents shall have no access to the roof except as may be provided in Section __ below), courts, stairs, ramps, elevators, escalators, comfort and first aid stations, public washrooms, community hall or auditorium, and parcel pickup stations, as initially constructed or at any time be modified.

The right of Tenant to the use of the Common Areas shall be subject to the rights of Landlord and of all other tenants of Landlord using the same in common with Landlord. Tenant shall not access the roof of the Shopping Center without Landlord's written permission, and Tenant shall pay any and all costs associated with any damage caused during access to the roof by Tenant or its agents, contractors or employees. Tenant agrees to cause its employees, agents, subtenants, concessionaires and licensees to park in areas designated by Landlord and to pay a fine of $____ per violation per day. Tenant shall, to Landlord's satisfaction, keep the loading facilities, sidewalks and Common Areas immediately adjoining the Premises free from trash, litter or

obstructions created or permitted by Tenant or resulting from Tenant's operations, and shall permit the parking areas to be used only for normal parking and ingress and egress by the customers, patrons, and service suppliers, to and from the Premises.

**4. USE CLAUSE** – *Sample Provisions*

"Permitted Use" means the sale of _____ and, at Tenant's option, such other uses as are consistent with any of Tenant's other stores operating under the same tradename used by Tenant at the Premises.

* * *

Tenant shall use the Premises subject to and in accordance with any and all rules, regulations, laws, ordinances, statutes and requirements of all governmental authorities, and Landlord's insurance carrier. Tenant shall use the Premises solely as provided for in Section ____ and shall operate its business only under its agreed-upon trade name and for no other purpose without the prior written consent of Landlord. Tenant shall utilize at least seventy-five percent (75%) of the Premises as and for the permitted use described in Section ___. Tenant's use of the Premises and the Common Areas shall be subject at all times during the Term to reasonable rules and regulations now and hereafter adopted by Landlord not in conflict with any of the express provisions herein.

**5. ASSIGNMENT AND SUBLETTING** – *Sample Provisions*

A. Tenant may assign this Lease or any interest therein or sublet the Premises or any portion thereof, without Landlord's consent, in any of the following transactions ("Permitted Transactions"): (1) to a Related Party; (2) in connection with a transfer of five (5) or more of Tenant's stores (a "Multi Store Transaction"); and (3) to a concessionaire, franchisee or licensee for the operation of any portion of the business to be conducted at the Premises, provided that no concessionaire or licensee shall occupy more than twenty five percent (25%) of the GLA of the Premises or have a separate exterior entrance.

B. "Related Party" means: (1) an Affiliate of Tenant; or (2) a successor to Tenant by merger or consolidation or acquisition of substantially all of the assets or stock of Tenant or an Affiliate thereof.

C. "Affiliate" of Tenant means an entity that controls, is controlled by, or is under common control with Tenant. "Affiliate" of Landlord means an entity that controls, is controlled by, or is under common control with Landlord.

* * *

(a) Tenant shall not assign, transfer or sublease all or any part of its interest in the Premises without Landlord's written consent, which will not be unreasonably withheld. For purposes of this Lease, the sale or transfer of more than fifty percent (50%) of the ownership interests of Tenant, or any change by Tenant in the form of its legal organization, shall be deemed an assignment that requires Landlord's prior written consent. Landlord may consider, in addition to any other statutory or common law tests in respect to withholding of consent, as relevant in determining whether to give its consent the following factors, it being acknowledged and agreed to by Tenant that such factors are deemed to be reasonable grounds for Landlord to use to determine whether to grant its consent and that such determination shall be at Landlord's sole discretion: (i) financial strength of the proposed sublessee/assignee must be at least equal to that of the existing Tenant; (ii) business reputation of the proposed sublessee/assignee must be in accordance with generally acceptable commercial standards; (iii) the ability of the proposed sublease/assignee to generate Percentage Rent, if applicable, must be at least equal to that of the existing Tenant; (iv) use of the Premises by the proposed sublessee/assignee must be identical to the use permitted by this Lease; (v) managerial and operational skills of the proposed sublessee/assignee must be at least equal to those of the existing Tenant; (vi) use of the Premises by the proposed sublessee/assignee will not violate or create any potential violation of any laws, rules, regulations or ordinances; (vii) any such transfer will not detrimentally affect the Shopping Center or Landlord's interest therein; (viii) any such transfer will continue to provide a fair balance of customer traffic and attraction to the Shopping Center and a proper tenant mix in the Shopping Center; and (ix) use of the Premises will not violate any other agreements affecting the Premises, Landlord or other tenants of the Building. Tenant shall reimburse Landlord for its attorney fees in reviewing any request for assignment or subletting, as well as any requests pertaining to estoppel certificates, franchise agreement review, fixture filing releases, or other issues pertaining to this Lease. In the event of any permitted assignment or subletting, Landlord shall be entitled to receive fifty percent (50%) of all sums accruing to Tenant as the result of such assignment or subletting in

excess of the Rent (including the Minimum Annual Rent, the Percentage Rent, the Operation Costs and the Replacement Reserve) then being paid by Tenant under this Lease.

(b) Notwithstanding any permitted transfer, assignment, subletting or encumbrance, Tenant and all Guarantors shall at all times remain fully responsible and liable for the payment of Rent and for compliance with all of Tenant's other obligations under this Lease. The giving of Landlord's consent to a transfer, assignment, subletting or encumbrance shall not be deemed to permit any subsequent transfer, assignment, subletting or encumbrance without Landlord's written consent. Any assignment or subletting without Landlord's consent shall be void, and shall constitute an Event of Default hereunder which, at the option of Landlord shall result in the termination of this Lease or exercise of Landlord's other remedies hereunder. The terms of such consent shall be binding upon any person holding by, under or through Tenant. Any transfer of this Lease from the Tenant by merger, consolidation, transfer of assets, or liquidation shall constitute an assignment for purposes of this Lease. In the event that Tenant hereunder is a corporation, an unincorporated association, or a partnership, the transfer, assignment, or hypothecation of any stock or interest in such corporation, association or partnership in the aggregate in excess of forty-nine percent (49%) shall be deemed an assignment within the meaning of this Section ___ and shall require Landlord's consent. Any permitted transfer, assignment, subletting or encumbrance shall be subject to all the terms, conditions of this Lease, and the term of any such subletting shall expire on or prior to the date of termination of this Lease; provided, however, that any renewal or other options contained in this Lease shall not continue and shall be null and void as of the effective date of such permitted assignment or transfer; and provided further, that Landlord shall have the right to recapture any and all amounts paid to Tenant representing a tenant improvement allowance for such renewal(s). Upon any "Event of Default" as herein defined, if the Premises or any part thereof have been further transferred, assigned or sublet, Landlord, in addition to any other remedies herein provided or provided by law, may at its option collect directly from such transferee, assignee or subtenant all rents becoming due to Tenant and apply such rent against any sums due to Landlord from Tenant hereunder. No such collection shall constitute a novation or a release of Tenant from the further performance of Tenant's obligations hereunder.

(c) Notwithstanding the foregoing provisions, provided Tenant shall not then be in default hereunder, in the event Tenant is a publicly traded company, this Lease may be assigned at any time without the consent of Landlord (but upon at least thirty (30) days prior written notice to Landlord) to any corporation or other entity into which or with which Tenant may be merged or consolidated, or to any corporation which shall purchase all or substantially all of the assets of Tenant, provided, and on conditions that:

(i) such successor shall have acquired all or at least ninety- five percent (95%) of the assets, and assumed all of the liabilities, of the assignor, and shall have total assets and total net worth (certified to by an independent certified public accountant) at least equal to the total of the assets and total net worth, respectively, as of a date twelve (12) months prior to the date of the assignment, of the assignor:

(ii) the assignee shall at all times use the Premises only for the purposes set forth in this lease; and

(iii) the transaction shall be made for a good faith operating business purpose, and not to evade compliance with the preceding provisions of this Section ___.

(d) In lieu of Landlord approving or denying Tenant's request for permission to assign this Lease or sublet the Premises, Landlord shall have the right to terminate this Lease and recapture the Premises by giving Tenant written notice within fifteen (15) days of Tenant's request. Tenant shall have the right to nullify Landlord's termination and recapture by giving Landlord written notice within fifteen (15) days of receipt of Landlord's notice and by continuing its occupancy and original use of the Premises.

(e) Landlord shall have the right to assign any of its rights and obligations under this Lease, whereupon Landlord shall be relieved of, and such assignee shall succeed to and be liable for, all obligations of Landlord hereunder. Landlord shall further have the right, at Landlord's option, to take over any and all subleases or any part thereof upon an Event of Default and succeed to all rights and privileges and any sums held by Tenant under said subleases.

**6. EXCLUSIVES** – *Sample Provision*

So long as Tenant is open and operating as a _____ (subject to periods of closure due to fire, casualty, force majeure or periodic remodeling or for any other reason if such closure does not exceed one hundred eight (180) consecutive days), Landlord and its affiliates and their successors and assigns agree that they shall not lease to, sell to, or permit any person or entity, within the Shopping Center, to be used or occupied by, a tenant or other party which would permit any restaurant whose primary business is the sale of _____ (the "Tenant Exclusive"). A tenant's primary business shall be deemed to be the sale of _____ if proceeds from the sale of _____ comprise more than 15% of the annual gross sales of the applicable tenant from such premises.

Landlord hereby warrants and represents that no existing lease, occupancy or other agreement for space in the Shopping Center allows a use which would conflict with the exclusive use rights set forth herein, except as otherwise disclosed on Exhibit _. In the event that any existing tenant or occupant of the Shopping Center proposes to change its use of the premises, then, to the extent Landlord's consent or approval is required for any such change in use, Landlord shall not consent to any such change in use if such change would violate the exclusive rights of Tenant hereunder, unless (i) Landlord is not permitted pursuant to the terms of such lease or occupancy agreement to enforce Tenant's lights hereunder in connection with such change in use, or (ii) Landlord's failure to approve or consent to a change in use would be unreasonable under the terms of any such lease, occupancy or other agreement for which Landlord's consent is required to be reasonable.

It is understood that this exclusive shall not apply to any tenant (including any assignee, sublessee or other transferee thereof) pursuant to a lease existing as of the date of this Lease or any replacement of such existing tenant (including any assignee, sublessee or other transferee thereof) for substantially the same permitted use, whether such replacement tenant shall occupy the same or different premises. It is further understood that other tenants (including any assignees, sublessees or other transferees thereof) in the Landlord's Building may sell one or more of the exclusive item(s) described above as an incidental part of its business (for purposes hereof, "incidental part" means fifteen percent (15%) or less of such tenant's sales), and permission heretofore or hereafter granted by Landlord to conduct such incidental sales shall not be deemed to violate this covenant. It is further understood that should Tenant fail to reach its Percentage Rent breakpoint in any Lease Year after the First Lease Year, then this exclusive shall automatically terminate without the requirement of any notice and be of no further force or effect. This exclusive shall automatically terminate without the requirement of any notice and be of no further force or effect (i) should Tenant assign its interest in and to this Lease, (ii) if the use of the Premises is changed and, as a result of such change, the exclusive item(s) described above are no longer the primary business of Tenant at the Premises, (iii) if Tenant ceases operations from the Premises, whether or not such cessation of operations is permitted by this Lease, or (iv) upon the occurrence of any Event of Default by Tenant under this Lease.

Notwithstanding anything to the contrary set forth above, Landlord reserves the right to lease (or consent to the use of) any space in the Landlord's Building without imposing any restriction on the use of such space to any tenant whose principal business at the time the lease is made (or consent is given) is that of a department store, junior department store, variety store,

grocery store, drug store, or to any tenant initially leasing more than 5,000 square feet of GLA (including any assignees, sublessees or other transferees thereof) or to any tenant or occupant of any outparcel (including any assignees, sublessees or other transferees thereof) located in or adjacent to the Shopping Center, it being understood that Landlord shall not be obligated to restrict the use of any of such space in any manner whatsoever.

In the event of a violation of this section by Landlord, Tenant shall provide written notice of such violation to Landlord (the "Restriction Violation Notice"). If Landlord fails to cure such violation within sixty (60) days (or if such violation cannot reasonably be cured within sixty (60) days, then such longer time as may be reasonably necessary) after Landlord's receipt of the Restriction Violation Notice, then as Tenant's sole remedies: (i) Tenant's obligation to pay Minimum Rent shall be abated as long as the violation continues (subject to the last sentence of this section), by an amount equal to fifty percent (50%) of the monthly Minimum Rent; and (ii) if the violation has not been corrected within three hundred sixty-five (365) days after Landlord's receipt of the Restriction Violation Notice, Tenant shall, within ten (10) days of the expiration of such 365-day period, elect to either (i) terminate the Lease by written notice given to Landlord or (ii) waive such violation and resume the payment of full Minimum Rent. Tenant's failure to timely terminate the Lease shall be deemed Tenant's irrevocable election to waive such violation and resume the full payment of Minimum Rent.

Notwithstanding anything to the contrary in this Article, (i) if Tenant's exclusive shall be violated by another tenant because said tenant is operating in its premises in violation of its permitted use as set forth in such tenant's lease ("Rogue Tenant"), then Landlord shall not be deemed to have violated Tenant's exclusive and Tenant shall not have the right to any remedy against Landlord, so long as Landlord is diligently and continually taking reasonable steps to stop the offending activity by such Rogue Tenant; and (ii) Landlord shall not be obligated to maintain or enforce Tenant's exclusive use rights under this Article to the extent the same would cause a violation of any applicable anti-trust law.

**7. CONTINUOUS OPERATION/TENANT'S RIGHT TO GO DARK** – *Sample Provision*

Tenant shall open the Premises for business on the Commencement Date and shall operate one hundred percent (100%) of the Premises during the entire period of the Term for the use and under the name set forth in this Lease or such other name as Landlord may first approve in writing, shall carry at all times in the Premises a stock of merchandise of such size, character and quality as shall be reasonably designed to produce the maximum return to Landlord and Tenant, and shall otherwise use its best efforts to maximize Gross Sales. Tenant shall operate its store in the Premises for the days and hours per week as set forth in Section ____.

If Tenant: (i) fails to operate as provided herein, (ii) discontinues operation of the Premises for the use set forth in Section ___, or (iii) conducts its operations in any manner which may reduce the Gross Sales, then Landlord shall have the right to (a) terminate this Lease without further liability, (b) increase the Minimum Annual Rent and other sums payable under this Lease by 1.5 times for each and every day Tenant fails to operate as provided herein, or (c) seek and exercise any other remedy available to Landlord.

**8. Tenant Improvements/Alterations** – *Sample Provision*

A. Tenant may at any time during the Term, at its own expense, make any alterations or improvements (collectively, "Alterations") to the interior of the Premises which are nonstructural in nature. With Landlord's approval, which approval shall not be unreasonably withheld, delayed or conditioned, Tenant may at any time during the Term, at its own expense, make any Alterations to the exterior of the Premises, regardless of whether structural or nonstructural in nature, and any Alterations to the interior of the Premises which are structural in nature. Tenant, at its own expense, may also erect, install and remove at any time during the Term any Tenant's Personal Property.

B. All Alterations shall be performed in a workmanlike manner in conformity with Legal Requirements and shall not endanger the structural integrity of the Premises. For Alterations that require Landlord's approval, Tenant shall comply with any Design Criteria, except to the extent the Design Criteria are inconsistent with Tenant's typical store design, increase Tenant's obligations, decrease Tenant's rights or are otherwise unreasonable. Tenant shall have the right to select the contractors and subcontractors of its choice for Tenant's work, including Alterations, and Landlord shall have no right to review or approve Tenant's contractors or subcontractors. Tenant and Tenant's Agents (including its general contractor and subcontractors) shall not be required to post any type of security or performance bond or other security in connection with Alterations or other work at the Shopping Center. Tenant and Tenant's Agents shall not be required to pay or reimburse Landlord or Landlord's Agents for any backcharges, fees, expenses or other costs in connection with the review or approval of Tenant's work, including Alterations, or any plans relating thereto.

* * *

Tenant shall not alter, renovate or improve the Premises; unless it has obtained the prior written approval of Landlord of the plans and specifications therefor and has satisfied all bonding, insurance and other contractor requirements of Landlord. No changes, alterations or improvements affecting the exterior of the Premises, the structure of the building, any alterations costing more than $50,000.00 or visible from the exterior shall be made by Tenant. Tenant shall not paint the inside surface of the plate glass storefront windows of the Premises or otherwise obscure visibility into the Premises. Any work done by Tenant under this Section ___ shall not interfere with the use by other tenants of such other tenants' premises in the Shopping Center.

## 9. CONSTRUCTION WORK LETTERS

**10. SIGNAGE** – *Sample Provisions*

A. Tenant shall have the exclusive right to install the maximum signage allowed by Legal Requirements and approved by Landlord on the exterior of the Premises. Tenant shall also have the right, at Tenant's cost, to install ____ (__) blade sign(s) upon the exterior of the store. Tenant shall be named (i) on one (1) directional or trail blazer sign in the Shopping Center, and (ii) on all tenant map directories installed by Landlord.

Tenant shall have the right, from time to time without Landlord's approval, to change its exterior signs, including its panels on any pylon or monument signs, provided that the area of the new sign is no larger than the area of the sign which it replaces, the method of construction and attachment is substantially the same as used for Tenant's initial signage, and such signs are consistent with Tenant's standard signage program and professionally prepared. Tenant shall have the exclusive right to install any signs on the interior facade of any windows and elsewhere within the Premises, including any video or digital media displays, without Landlord's approval, provided such signs are consistent with Tenant's standard signage program and professionally prepared. Tenant shall have the exclusive right to place any signage or marketing graphics on any scaffolding or barricades obstructing Tenant's storefront or signs. All signage installed by Tenant shall comply with applicable Legal Requirements.

B. Tenant shall have the right to install an identification panel on each side of the pylon sign located at the_____, and each side of the pylon or monument sign located at _____ and any other pylon or monument sign at or adjacent to the Shopping Center identifying more than one (1) occupant of the Shopping Center. Tenant's panels shall be equal to or larger than all other panels on such sign, and shall be located no lower than the second position from the top of such sign (i.e., in the current (as of the date of this Lease) Nike position). Tenant shall be responsible for the cost to manufacture and install its identification panels but shall have no other obligation to pay for the construction of such sign. Landlord shall repair and maintain such sign, including utilities and lightbulbs behind the occupant identification panels, but each occupant shall maintain its own identification panel.

* * *

Tenant shall purchase, install, operate, maintain and remove its facade sign pursuant to the Sign Criteria set forth in the tenant handbook ("Tenant Handbook") attached hereto and made a part of as Exhibit __, as such Tenant Handbook may be modified by Landlord from time to time. Landlord may erect and maintain such suitable signs as it in its sole discretion may deem appropriate to advertise the Shopping Center. Tenant may erect and maintain only such sign(s) as Landlord may approve and which are in accordance with the Tenant Handbook. Landlord shall be entitled to remove any unapproved signs of Tenant, and Tenant shall reimburse Landlord for the charges incurred in connection therewith immediately upon demand by Landlord plus 10% overhead and profit. Landlord shall be allowed to retain Tenant's signage until reimbursed by Tenant for the costs of removing the signage. In the event of two (2) or more violations of the Sign Criteria by Tenant in any calendar year, Landlord shall have the right to declare an "Event of Default" by Tenant hereunder as described in Section __ below.

**11. DEFAULT** – *Sample Lease Provisions*

Default by Tenant

A. An "Event of Default" by Tenant means:

1. the failure by Tenant to pay Rent due under this Lease (as set forth in this Lease) within ten (10) days (or, with respect to Other Charges, such greater period as otherwise expressly provided in this Lease) after Tenant's receipt of written notice from Landlord that the same is overdue;

2. the failure by Tenant to perform or observe any other term or condition of this Lease within one (1) month after Tenant's receipt of written notice thereof from Landlord; provided however that if the nature of such failure is such that it cannot reasonably be cured within such 1 month period (an "Excused Delay"), then Tenant shall have such additional time as is reasonably required to cure such failure provided Tenant commences to cure such failure within such 1 month period and proceeds to prosecute such cure with diligence and continuity;

3. the appointment of a receiver or trustee to take possession of substantially all of the assets of Tenant located at the Premises and where possession is not restored to Tenant within three (3) months;

4. a general assignment by Tenant for the benefit of creditors; or

5. the occurrence of any proceeding commenced by or against Tenant under any insolvency or bankruptcy act and where, in the case of involuntary actions filed against Tenant, the same are not discharged within three (3) months after the date of commencement.

B. If Tenant assigns this Lease and is not released of all liabilities under this Lease pursuant to Article , Tenant's liability under this Lease as assignor guarantor shall not extend to obligations greater than those contained in this Lease upon the date of such assignment. Landlord shall provide concurrent notification to assignor guarantor of all failures of performance on the part of the assignee in possession which, with the passage of time, could ripen into an Event of Default (the "Guarantor's Notice"), but in any event within one (1) month after such failure of performance occurs. Following the assignee in possession's failure to cure the default within all applicable cure periods after receipt of the requisite notice (the "Default Notice"), assignor guarantor shall be accorded an additional period of ten (10) days after receipt of the Default Notice (subject to Excused Delays and Force Majeure) in which to cure such failures. Notwithstanding anything to the contrary in this Lease, the assignor-guarantor shall have no liability for failures of performance that occurred more than two (2) months prior to assignor-guarantor's receipt of the Guarantor's Notice therefor.

Remedies of Landlord

A. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS LEASE OR APPLICABLE LAWS, LANDLORD SHALL HAVE NO RIGHT TO RECOVER CONSEQUENTIAL OR PUNITIVE DAMAGES FROM TENANT, OR TO CHANGE THE LOCKS OF OR DISCONNECT UTILITY SERVICES TO THE PREMISES, AND LANDLORD

(AFTER CONSULTING WITH COUNSEL OF LANDLORD'S CHOICE) HEREBY EXPRESSLY, KNOWINGLY AND VOLUNTARILY WAIVES ANY SUCH RIGHT. If Tenant shall receive written notice from Landlord of any alleged default of Tenant under this Lease, and if Tenant shall notify Landlord, within ten (10) days (if an alleged monetary default notice) and thirty (30) days (if an alleged nonmonetary default notice) after receipt of such written notice from Landlord, that it disputes Landlord's contention that such an alleged default has occurred, then Landlord and Tenant shall promptly negotiate such matter, and Tenant shall not be deemed to be in default under this Lease with respect to such disputed matter unless a court with proper jurisdiction shall have ruled that Tenant's actions constituted a default hereunder, and Tenant shall not have cured such default within thirty (30) days following receipt from Landlord of a copy of such judgment entered by such court with proper jurisdiction. Subject to the preceding sentence, if Tenant fails to cure any default within the applicable grace period, then Landlord may, subject to Legal Requirements, by at least five (5) days' prior written notice to Tenant:

1. declare this Lease terminated, in which event this Lease shall terminate with the same force and effect as though the date set forth in the notice of termination were the date originally set forth herein for the expiration of the Term, and Tenant shall vacate and surrender the Premises but shall remain liable (subject to the limitations set forth in this Section) for all obligations arising during the balance of the Term;

2. without terminating this Lease, terminate Tenant's right to possession of the Premises; or

3. without terminating Tenant's right to possession of the Premises, continue this Lease in full force and effect.

B. Notwithstanding the foregoing and regardless of Landlord's election to pursue any of the remedies described above or such other remedies as are allowed at law, Landlord's remedy or recovery for the collection of Rent past due or to become due under this Lease shall be limited exclusively to either of the following: (1) without reentry into the Premises, Landlord may institute suit from time to time for the recovery of past due Rent, or (2) Landlord may reenter the Premises pursuant to process of law and dispossess Tenant and all other occupants therefrom and remove and store all property therein in a public warehouse or elsewhere at the cost and for the account of Tenant, and Landlord may institute suit from time to time for the recovery of past due Rent. In the event Landlord terminates this Lease, Tenant's liability for Future Rent (as well as any damages specifically in lieu of or representing such Future Rent) shall cease except to the extent and manner provided for in Section _____. Notwithstanding the foregoing, if (i) a court decrees an Event of Default by Tenant and Landlord terminates this Lease as a result thereof in accordance with applicable Legal Requirements, and (ii) following such initial court decree Tenant is in material default of its obligation to pay Rent when due and a court decrees an additional Event of Default as a result thereof, and (iii) following such second court decree Tenant is again in material default of its obligation to pay Rent when due and a court decrees an additional Event of Default as a result thereof, then Landlord may recover from Tenant the balance of the Rent payable by Tenant for the remainder of the Term, less the fair market rental value of the Premises for such period, each discounted to present value using a discount rate of the Federal Reserve Bank of _____at the time of the award plus one percent (1%) per annum.

C. Upon an Event of Default by Tenant, Landlord may make such reasonable alterations and repairs as may be necessary in order to relet the Premises, and shall use its best efforts to relet the Premises or any part thereof for such term (which may be for a term extending beyond the Term) and at such rental and upon such other terms and conditions as Landlord may deem advisable. Upon each reletting all rentals and other sums received by Landlord therefrom shall be applied in the following order:

1. to the payment of any indebtedness other than Rent due hereunder;

2. to the payment of any costs and expenses of such reletting including reasonable brokerage fees and costs of such alterations and repairs (collectively, "Other Damages");

3. to the payment of Rent past due and unpaid; and

4. the residue, if any, shall be held by Landlord and applied in payment of future Rent, which shall continue to accrue upon the days that the same would otherwise have become due and payable hereunder if no Event of Default had occurred.

D. If such rentals and other sums received from such reletting during any month are less than Rent to be paid during that month by Tenant hereunder, Tenant shall pay such deficiency to Landlord. Any such deficiency shall be calculated and paid monthly. If such rentals and sums shall be more than Rent, Tenant shall have no right to the excess but shall be entitled to a credit in the amount of such excess against Rent to become due in the future. Landlord shall use reasonable efforts to mitigate damages and relet the Premises. Landlord's statutory or common law lien and right of distraint, if any, are hereby waived.

E. If this Lease is terminated, whether voluntarily or by reason of an Event of Default by Tenant or if Landlord re enters into possession of the Premises by reason of an Event of Default by Tenant with or without termination of this Lease, Tenant's interest in all existing subleases shall be deemed assigned to and assumed by Landlord and such subleases shall become direct leases between Landlord and the subtenants thereunder.

Default by Landlord

Landlord shall be in default of this Lease if Landlord fails to perform any of its obligations under this Lease within ten (10) days (or such greater period as otherwise expressly provided in this Lease) after receipt of written notice from Tenant specifying such failure in the case of monetary obligations owed by Landlord to Tenant or one (1) month after receipt of written notice from Tenant specifying such failure in the case of non-monetary obligations, provided however that if the nature of such default is such that it cannot reasonably be cured within such period, then, upon notice to Tenant, Landlord shall have such additional time as is reasonably required to cure such default provided that Landlord commences to cure the default within such period and proceeds to complete such cure with diligence and continuity. If Landlord fails to perform its obligations as set forth above or in the event of an Emergency, Tenant may, at its option, in addition to any other remedies at law or equity, incur any expense necessary to perform the obligations of Landlord specified in such notice on Landlord's behalf (but Landlord shall remain responsible for such work), in which event Landlord shall reimburse Tenant for the actual costs incurred by Tenant

within thirty (30) days after receipt of an invoice therefor. If Landlord fails to pay such costs within thirty (30) days after receipt of an invoice therefor, then in addition to all other rights and remedies that Tenant may have against Landlord (but without duplication in recovering the amounts due Tenant), Tenant shall be entitled to deduct the unpaid and overdue amount of such costs from the Rent otherwise becoming due hereunder, together with interest on the unpaid balance thereof at the Default Rate from the date originally due. An "Emergency" means the threat of immediate injury or damage to persons or property or the immediate imposition of a civil or criminal fine or penalty.

* * * *

Default by Tenant.

(a) Event of Default. All of the following shall constitute an "Event of Default" hereunder:

(i) Tenant fails to (A) make any payment of money pursuant to this Lease, and such monetary default continues to exist in full or in part at the expiration of ten (10) days after the due date thereof, or (B) perform any other term, covenant, condition, provision or agreement of this Lease (including, without limitation, a violation of the Sign Criteria attached as Exhibit hereto), and such non-monetary default continues to exist at the expiration of thirty (30) days after the date of written notice from Landlord to Tenant; provided, however, that if any such non-monetary default cannot reasonably be cured within the thirty (30) day period, then the same shall not constitute a default hereunder if Tenant promptly commences the curing of such non-monetary default and such non-monetary default is cured within a reasonable period as determined by Landlord after the expiration of the original thirty (30) day period;

(ii) Tenant fails to make any payment of money pursuant to this Lease within ten (10) days following the due date thereof, or in the event of more than one non-monetary default, and such failure occurs either in two (2) out of three (3) consecutive months, or in any three (3) out of twelve (12) consecutive months;

(iii) Tenant ceases business operations as described in Section , and/or the Premises are abandoned, vacated, or destroyed by Tenant, its employees or agents;

(iv) Tenant performs (or causes to be performed) any unauthorized construction at the Premises, permits any deviations not approved by Landlord in Tenant's Work from the Plans and Specifications, or Landlord discovers defective workmanship and/or materials which are not corrected within ten (10) days after written notice thereof;

(v) Tenant or Tenant's contractor fails to cause any lien to be bonded off or released in accordance with the provisions of Section below;

(vi) there exists any material written representation or warranty contained herein or any material written representation to Landlord concerning the financial condition or credit standing of either Tenant or any "Guarantor" hereunder proves to be false or misleading; unless Tenant is a publicly traded company, in which case this subsection (v) shall not apply, any assignment or subletting of this Lease in violation of Section ; or

(vii) in the event that Tenant becomes bankrupt, insolvent or files any debtor proceeding, takes or has taken against Tenant any petition of bankruptcy; takes action or has action taken against Tenant for the appointment of a receiver for all or a portion of Tenant's assets, files a petition for a corporate reorganization; makes an assignment for the benefit of creditors, or if in any other manner Tenant's interest hereunder shall pass to another by operation of law (any or all of the occurrences in this Section shall be deemed a default on account of bankruptcy for the purposes hereof and such default on account of bankruptcy shall apply to and include any Guarantor of this Lease), then Tenant shall be in default hereunder and Landlord may, at its option and without further notice to Tenant, terminate this Lease or exercise any other right or remedy for a default by Tenant hereunder. If Landlord shall not be permitted to terminate this Lease as hereinabove provided because of the provisions of Title 11 of the United States Code relating to Bankruptcy, as amended ("Bankruptcy Code"), then Tenant as a debtor in possession or any trustee for Tenant agrees promptly, within no more than fifteen (15) days upon request by Landlord to the Bankruptcy Court, to assume or reject this Lease and Tenant on behalf of itself, and any trustee agrees not to seek or request any extension or adjournment of any application to assume or reject this Lease by Landlord with such Court. In such event, Tenant or any trustee for Tenant may only assume this Lease if (A) it cures or provides adequate assurance that the trustees will promptly cure any default hereunder, (B) compensates or provides adequate assurance that Tenant will promptly compensate Landlord for any actual pecuniary loss to Landlord resulting from Tenant's defaults, and (C) provides adequate assurance of performance during the fully stated term hereof of all of the terms, covenants, and provisions of this Lease to be performed by Tenant. In no event after the assumption of this Lease shall any then-existing default remain uncured for a period in excess of the earlier of ten (10) days or the time period set forth herein. Adequate assurance of performance of this Lease as set forth hereinabove shall include, without limitation, adequate assurance (1) of the source of Rent reserved hereunder, (2) that any Percentage Rent due hereunder will not decline from the levels anticipated, and (3) the assumption of this Lease will not breach any provision hereunder. In the event of a filing of a petition under the Bankruptcy Code, Landlord shall have no obligation to provide Tenant with any services or utilities as herein required, unless Tenant shall have paid and be current in all payments of Operating Costs, utilities or other charges therefor.

Remedies. Upon the occurrence of any Event of Default, Landlord shall be entitled to (i) apply the Security Deposit specified in Section ; (ii) re-enter the Premises and remove all persons and all or any property therefrom, and repossess the Premises, together with all additions, alterations and improvements (in connection therewith, Tenant agrees that if it or its lenders fails to remove any items of personal property within any applicable grace period, Tenant shall be deemed to have waived and forfeited all of its rights with respect to its personal property and Landlord may sell, remove or otherwise dispose of Tenant's personal property in any manner Landlord sees fit, (iii) repair, alter, remodel and/or change the character of the Premises as it may deem fit, (iv) relet at any time all or any part(s) of the Premises, (v) terminate this Lease and/or Tenant's right of possession immediately or at any time thereafter; provided that such termination shall not release Tenant from any of its obligations contained in this Lease and/or Tenant's right of possession, including without limitation, those for the balance of the Term then in effect at the time of such default; or (vi) cure the default and assess against Tenant the cost of curing the default, together with an administrative charge of ten percent (10%) thereof and "Costs of Reletting" (as defined hereinafter) as additional Rent, which shall be paid to Landlord within five (5) days after Tenant's receipt of a bill therefor; or (vii) collect all sums past due hereunder and accelerate all current and

future Rent and other monetary obligations making them immediately due and payable; or (viii) modify the Term of this Lease to a tenancy terminable at any time thereafter by Landlord upon not fewer than thirty (30) days' notice to Tenant; all of which remedies shall be cumulative with each other upon Landlord's election thereof and all other remedies available to Landlord at law or in equity. The exercise by Landlord of any right granted in the sentence immediately preceding shall not relieve Tenant from the obligation to make all Rent payments, and to fulfill all other covenants required by this Lease, at the time and in the manner provided herein. Tenant shall pay Landlord the Costs of Reletting upon demand by Landlord. Any excess Rent or amounts received by Landlord from reletting the Premises as a result of the default of Tenant shall remain the sole property of Landlord. Landlord shall not be required to relet the Premises or otherwise mitigate or minimize Tenant's loss as a result of Tenant's default.

"Costs of Reletting" shall mean any and all reasonable costs and expenses incurred by Landlord for any repairs, changes, alterations and improvements to the Premises, brokerage commissions, attorney's fees, advertising, any customary free rent periods or credits, tenant improvement allowances, take-over lease obligations and other customary, necessary or appropriate economic incentives required to enter leases with replacement tenant(s), and costs of collecting rent from such replacement tenant(s).

Landlord's failure to take advantage of any default or breach of covenant on the part of Tenant shall not be construed as a waiver thereof, nor shall any custom or practice which may grow up between the parties in the course of administering this Lease be construed to waive or to lessen the right of Landlord to insist upon the performance by Tenant of any term, covenant or condition hereof, or to exercise any rights given it on account of any such default. A waiver by Landlord of a particular breach or default shall not be deemed to be a waiver of the same or any other subsequent breach or default. The acceptance of Rent hereunder shall not be, or be construed, a waiver of any breach or any term, covenant or condition of this Lease. No act or omission by Landlord, its employees or agents during the Term shall be deemed an acceptance of a surrender of the Premises, and no agreement to accept such a surrender shall be valid unless it is in writing and signed by Landlord.

Default by Landlord. Landlord shall in no event be charged with default in the performance of its obligations under this Lease, unless and until Landlord shall have received written notice from Tenant specifying wherein Landlord has failed to perform any obligation hereunder, and Landlord shall have failed to perform such obligation, or remedy such default, within thirty (30) days (or such additional time as is reasonably required to correct any such default) after Landlord's receipt of such written notice from Tenant. Such curative period shall be extended by the amount of time Landlord is delayed in its efforts due to a force majeure. Notwithstanding the foregoing, in no event shall Tenant be entitled to offset Rent hereunder based on Landlord's default.

## 12. OPTIONAL LEASE TERMINATION RIGHTS

# ICSC+LAW SYMPOSIUM OH/KY/IN/MI/PA

**Renaissance Columbus Downtown Hotel**

**Columbus, OH**

**Friday, March 18, 2022**

**2:30 – 3:30 pm**

## Session 4A: Turning Sunshine Into Dollars; Issues with Monetizing Exterior Common Spaces

**Panelists**

**Marcy Hamilton**

**Meyer, Unkovic & Scott LLP**

**Kevin McKeegan**

**Meyer, Unkovic & Scott LLP**

**Jack F. Scalo**

**Scalo Solar Solutions**

# Monetizing Exterior Common Spaces
# Issues with Solar Power Systems and EV Charging Stations

Marcy E. Hamilton, Esq.
Kevin F. McKeegan, Esq.
Azhiare G. Kirk, Esq.
Diana C. Bruce, Esq.
Meyer, Unkovic & Scott LLP
ICSC+ - OKIMP March 18, 2022

## I. Introduction

Renewable energy accounted for most of the new electricity generating capacity in the United States in 2021.[1] Solar accounted for the largest share at 39%, with wind at 31%, and with natural gas, batteries, and nuclear energy as honorable mentions.[2] Continued development of renewable energy sources, especially solar, is driving many retail property owners to consider incorporating solar projects into their facilities. As recently noted in the *Washington Post*, "Expansive, flat and abundant, the rooftops of big-box stores in the United States could produce enough solar energy to meet half their electricity needs...".[3] At the same time as many retail property owners are considering the implications of using solar power in their projects, they must also consider whether accommodations need to be made at their properties for electric vehicle ("EV") charging stations.

## II. Solar Energy

Solar energy has soared in popularity and accessibility in recent years. Better technology has played a role, for example, the cost of solar panels has dropped nearly 70% since 2014.[4] Additionally, incentives to install solar facilities exist in Pennsylvania and other states.[5] It is therefore no surprise that the retail property owners are identifying solar energy as an efficient and affordable next step towards sustainability.

Shopping centers present an attractive solar opportunity with their large flat roofs.[6] The Environment America Research & Policy Center estimates that utilizing superstores' solar

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[1] Suparna Ray et al., *Renewables Account for Most New U.S. Electricity Generating Capacity in 2021*, U.S. ENERGY INFORMATION ADMINISTRATION (Jan. 11, 2021), https://www.eia.gov/todayinenergy/detail.php?id=46416.

[2] *Id*.

[3] Washington Post, January 22, 2022, *Superstores can meet half their electricity needs with rooftop solar, says new report*

[4] Solar Energy Technologies Office, *Solar Energy in the United States*, OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, https://www.energy.gov/eere/solar/solar-energy-united-states (last visited Feb. 2, 2022).

[5] *Pennsylvania Programs*, DSIRE, https://programs.dsireusa.org/system/program/pa (last visited Feb. 6, 2022).

[6] Bryn Huxley-Reicher et al., *Solar on Superstores: Big Roofs, Big Potential for Renewable Energy*, ENVIRONMENT AMERICA RESEARCH & POLICY CENTER 2 (2022), https://environmentamerica.org/sites/environment/files/AME-Solar-on-Superstores-1_20_22.pdf.

potential could reduce global pollution by over 52 million metric tons of $CO_2$ annually.[7] Large companies such as Apple, Walmart, Amazon, and Target have already tapped into solar energy with their installations accounting for over 11% of the nationwide total commercial solar capacity as of 2019.[8]

### A. Contracts with Third-Party Companies

#### 1. Solar Leases

Several avenues have developed to harness this solar potential, the first being a solar land lease. A solar land lease is a contract between a property owner and solar energy development company whereby the property owner leases land to the solar power developer to install a commercial solar farm.[9] Lessors receive no electricity under solar leases, but instead receive monthly payments from the lessee for the leased property.[10] Solar leases are often long, typically 20 or 30 years.[11]

Typical issues that arise in solar leases include questions regarding who obtains permits and who removes the equipment from the property at the end of the lease.[12] Any existing encumbrances on property, such as easement agreements, should also be discovered and considered before entering into a solar lease.[13] More important for retail property owners considering a solar lease is that property owners with solar leases do not qualify for the federal

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[7] *Id*.

[8] *Solar Means Business*, SOLAR ENERGY INDUSTRIES ASSOCIATION, https://solarmeansbusiness.com/ (last visited Feb. 3, 2022); *Solar Industry Research Data: Solar Industry Growing at a Record Pace*, SOLAR ENERGY INDUSTRIES ASSOCIATION, https://www.seia.org/solar-industry-research-data (last visited Feb. 3, 2022); *see also* Bryn Huxley-Reicher et al., *Solar on Superstores: Big Roofs, Big Potential for Renewable Energy*, ENVIRONMENT AMERICA RESEARCH & POLICY CENTER 3 (2022), https://environmentamerica.org/sites/environment/files/AME-Solar-on-Superstores-1_20_22.pdf.

[9] *Solar Land Lease Agreements for Landowners: Frequently Asked Questions*, PENNSYLVANIA PUBLIC UTILITY COMMISSION 1, https://www.puc.pa.gov/Electric/pdf/Renewable/FS-Solar_Land_Lease_Agreements_FAQ.pdf (last visited Feb. 3, 2022).

[10] *Id*.

[11] *Id*.

[12] *Id*.

[13] *Id*.

solar tax credit because they do not own the solar panels on their property.[14] Further, solar renewable energy credits ("SRECs") are likely unavailable, as they usually exist only for owners of systems.[15]

### 2. Solar Power Purchase Agreements

Solar leases are not the only model for solar projects. Solar Power Purchase Agreements ("SPPAs") offer an additional avenue for shopping centers to maximize solar energy. SPPAs are a type of third-party financing where a third-party developer owns and maintains the solar power system on an owner's property, and the property owner purchases the system's energy output.[16] The United States Environmental Protection Agency ("EPA") has succinctly described an SPPA as an arrangement where, "the solar energy system offsets the customer's electric utility bill, and the developer (of the system) sells the power generated to the customer at a fixed rate, typically lower than the local utility."[17]

The same considerations for tax incentives and credits applies to SPPAs as applies to solar leases, as the property owner does not actually own the system generating the solar power.[18] Thus, while this is a valid solar energy option for shopping centers to save on their energy bills, they

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[14] *Solar Investment Tax Credit (ITC)*, SOLAR ENERGY INDUSTRIES ASSOCIATION, https://www.seia.org/initiatives/solar-investment-tax-credit-itc (last visited Feb. 4, 2022); Solar Energy Technologies Office, *Homeowner's Guide to the Federal Tax Credit for Solar Photovoltaics*, OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, https://www.energy.gov/eere/solar/homeowners-guide-federal-tax-credit-solar-photovoltaics (last visited Feb. 3, 2022); *see also A Buyer's Guide to the 26% Federal Solar Tax Credit in 2022*, SOLARREVIEWS, https://www.solarreviews.com/blog/federal-solar-tax-credit (last visited Feb. 3, 2022).

[15] *Solar Alternative Energy Credits Pennsylvania*, DESIRE, https://programs.dsireusa.org/system/program/detail/5682/solar-alternative-energy-credits (last updated May 5, 2015); *see also State Solar Renewable Energy Certificate Markets*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/repowertoolbox/state-solar-renewable-energy-certificate-markets (last visited Feb. 4, 2022) (showing that Pennsylvania allows SRECs).

[16] *Understanding Third-Party Ownership Financing Structures for Renewable Energy*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/repowertoolbox/understanding-third-party-ownership-financing-structures-renewable-energy#:~:text=A%20solar%20power%20purchase%20agreement,services%20provider%20for%20a%20predetermined (last visited Feb. 4, 2022).

[17] *Id*.

[18] Solar Energy Technologies Office, *Homeowner's Guide to the Federal Tax Credit for Solar Photovoltaics*, OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, https://www.energy.gov/eere/solar/homeowners-guide-federal-tax-credit-solar-photovoltaics (last visited Feb. 3, 2022)

cannot claim tax benefits. SRECs may also be unavailable, as they are most often owned by the developer.[19]

### 3. Direct Ownership of Solar Technology

As opposed to both the solar lease and SPPA model, many retail owners may look to purchase and own solar power systems on their properties. This "direct ownership" model enables the owner to use the electrical power generated by the system however the owner desires; typically to power all or part of a building's needs. For example, a western Pennsylvania furniture store chain recently installed a solar array on its distribution facility expecting this will generate about 70% of the power needs at the building.[20]

At least as important, property owners considering direct ownership of solar facilities should remember that they may be eligible for the federal solar investment tax credit ("Solar ITC"). The Solar ITC is part of several energy investment tax credits available under IRC Section 48. The Solar ITC is a dollar-for-dollar credit against federal income tax liabilities based on the amount invested in "eligible property," such as solar panels, as well as installation costs and similar expenses. The Solar ITC stands at 26% for projects that begin construction in 2022 and are placed in service before 2026. The Solar ITC is scheduled to drop to 23% in 2023 and 10% thereafter, in each case with a requirement that the project go into service before December 21, 2025.

As important as the Solar ITC are the accelerated depreciation rules applicable to solar power installations. Depreciation for solar projects is calculated by first subtracting one-half of the Solar ITC from the tax basis of the system. Solar systems placed in service in 2022 are eligible for accelerated depreciation at the rate of 100%. The rate drops by 20% percent each year until 2027. Property owners should also remember that unused Solar ITC's can be carried back one year or forward for twenty years. Finally, owners without significant tax liabilities may be able to structure tax equity financing transactions, typically by way of a sale-leaseback of the system to a tax equity investor. [21]

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[19] *Solar Power Purchase Agreements*, SOLAR ENERGY INDUSTRIES ASSOCIATION, https://www.seia.org/research-resources/solar-power-purchase-agreements (last visited Feb. 10, 2022).

[20] Pittsburgh Tribune, November 10, 2021, *Levin installs 1-megawatt solar array atop Smithton distribution facility*

[21] See, U.S. Department of Energy, Office of Energy Efficiency & Renewable Energy, "Guide to the Federal Investment Tax Credit for Commercial Solar Photovoltaics." January 2021.

### B. Zoning Considerations

While solar popularity is rising, zoning codes may not always make solar power easy to implement. According to the National Renewable Energy Laboratory, zoning codes may be underinclusive in identifying solar energy systems, thus excluding new technologies in this up-and-coming industry.[22] Broadening these definitions will best serve evolving solar technology. Additionally, many zoning codes may limit equipment, visibility, and general aesthetics, which will restrict solar panel usage.[23] However, solar photovoltaics (PV) models are generally less reflective than windows, lessening the chance of catching a passerby's eye or looking unsightly.[24] Exempting solar energy systems from such requirements will encourage development.[25]

Zoning codes also may not mention solar energy systems at all. Such a gap creates challenges to property owners because it either requires them to negotiate changes to zoning codes with municipalities or leaves them open to potential litigation over a land use not explicitly defined nor allowed in their local laws.[26] This "conspicuous silence" provides one more barrier towards implementing solar technology.[27]

## III. Electric Vehicle ("EV") Charging Stations

Electric vehicle charging stations are being installed at commercial spaces throughout the country at an increasing rate. The U.S. Department of Energy's 2014 Vehicle Technologies Marker Report stated there were 10,700 charging stations in the United States.[28] As of 2022, that number has increased to over 46,000.[29]

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[22] Megan Day, *Best Practices in Zoning for Solar*, THE NATIONAL RENEWABLE ENERGY LABORATORY, U.S. DEP'T OF ENERGY, OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY (Apr. 21, 2017), https://www.nrel.gov/state-local-tribal/blog/posts/best-practices-in-zoning-for-solar.html.

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *Planning for Solar Energy Briefing Papers*, AMERICAN PLANNING ASSOCIATION 4 (2013), https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/research/solar/briefingpapers/pdf/solarpaperscompendium.pdf.

[28] *2015 Vehicle Technologies Market Report*, U.S. DEP'T OF ENERGY, OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY,http://cta.ornl.gov/vtmarketreport/index.shtml.

[29] *Alternate Fueling Station Locator*, U.S. DEP'T OF ENERGY, OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY, https://afdc.energy.gov/stations/#/find/nearest?country=US&fuel=ELEC&ev_levels=all.

EV charging stations can be public or private, though around 85 percent of stations are public.[30] There are three different levels depending upon the "speed of charge": Level 1, Level 2, and Level 3. Level 1 is most common for residential use whereas Level 2 is standard for commercial parking spaces.[31] Level 3 is typically used for high volume customers, commercial charging stations and rest stops.[32]

Shopping center retailers have reported that the benefits of EV charging stations, including longer shopping times and retailer branding being glorified as environmentally conscious, have outweighed the costs of installation.[33] While beneficial, there are several considerations retailers should consider as they prepare to install EV charging infrastructure.

### A. Business Model and Risk Implications

There are two common business models employed by charging services providers, each with their own implications. First, retailers may choose the owner-operator business model where the site host will purchase EV charging equipment from a charging service provider and then work with a different contractor to perform construction and installation.[34] Alternatively, site hosts can contract with a third-party owner-operator whereby the third-party provider installs, operates, and may own the charging station.[35]

Shopping center owners and landlords should consider the risks involved with either business model. While being the owner-operator of a charging station allows for more control over the pricing and customer experience, it also comes with the responsibility for station

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[30] Brian W. Blaesser and Sorell E. Negro, *Retailer Primer on Electric Vehicle Charging Stations: Retail Primer Update*, INNOVATING COMMERCE SERVING COMMUNITIES, https://www.icsc.com/newsletters/article/electric-vehicle-charging-stationsretail-primer-update.

[31] Allison Ruedig, *Your Guide To Commercial Electric Vehicle Charging Stations: Installation, Costs And More*, GREENLANCER (Sept. 16, 2021), https://www.greenlancer.com/post/guide-commercial-electric-vehicle-charging-stations.

[32] *Id*.

[33] Brian W. Blaesser and Sorell E. Negro, *Retailer Primer on Electric Vehicle Charging Stations: Retail Primer Update*, INNOVATING COMMERCE SERVING COMMUNITIES, https://www.icsc.com/newsletters/article/electric-vehicle-charging-stationsretail-primer-update.

[34] Charles Satterfield and Nick Nigro, *Public EV Charging Business Models for Retail Site Hosts*, ATLAS PUBLIC POLICY, https://atlaspolicy.com/wp-content/uploads/2020/04/Public-EV-Charging-Business-Models-for-Retail-Site-Hosts.pdf.

[35] *Id*.

maintenance and operational costs.[36] The owner-operator will also be responsible for issues with the charging station, though charging services providers offer warranties that may cover the repair and replacement of parts and assistance with common issues encountered with coordinating with utilities.[37]

While limiting the hosts' exposure to operational costs and maintenance issues, the third-party model host has less control over the customer experience and fees.[38] If choosing the owner-operator model, owners should consider which manufacturer provides the best protection in their standard warranty and the responsibilities associated with maintaining and operating the station. Failure to adequately vet the manufacture providing the charging station or the contractor installing the station could cause legal ramifications for shopping center owners and developers.

When entering into provider service agreements, hosts should clearly define the responsibilities of each party, including the responsibilities of obtaining the required permits of local governments, including permitting for signage and advertising.[39] The agreement should also consider the term of the contract, each party's respective liabilities and insurance coverage and information on revenue sharing.[40]

Bearing all these considerations in mind, most property owners use a "license" with a third-party provider for the installation and operation of the charging stations. A sample license agreement is included at the end of these materials. There are several practical considerations that shopping center owners should address in these license agreements:

- EV stations are more or less permanent structures so construction work is required for their installation, including boring into the ground and/or digging up the parking lot to connect to the utilities.

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[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] *See e.g*., Brian W. Blaesser and Sorell E. Negro, *Retailer Primer on Electric Vehicle Charging Stations: Part II*, RETAIL LAW STRATEGIST (Fall 2012) at pp. 4-6.

[40] *Id*.

- If done in concert with a tenant, the EV operator will connect generally to that tenant's utility box, some state regulations though may not permit this.

- Many EV station developers make money through advertising on electric signs above the charging stations, the shopping center owner will want to negotiate restrictions on that advertising to avoid conflicts with its own tenants. [41]

**B. Zoning**

Before installing charging stations, shopping center owners should review local ordinances to ensure that EVSE is permitted under existing regulations.[42]

In many municipalities, a charging station is treated as accessory to the primary use of a property.[43] In those situations, installation of EVSE may trigger only a limited zoning review.[44] Even when considered as a primary use, Level 1 and 2 Electrical vehicle stations are often permitted in most zoning districts. However, local ordinances may restrict the zoning districts or require additional permitting for Level 3 stations.[45]

Shopping center owners should pay particular consideration to construction permitting requirements for installing the infrastructure to support EVSE. As with any electrical installation, EV charging infrastructure is governed by various federal, state, and local building codes and requirements.[46] EVSE installations require building permits, and costs will vary by municipality. Often times, the permit application will require review and approval by multiple city divisions such as planning, engineering and fire.[47]

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[41] We wish to thank Jennifer Ioli, Esquire of Sherin and Lodgen LLP in Boston, MA for giving us permission to include the sample license agreement with these materials.

[42] *Id.*

[43] *See* Claire Cooke and Brian Ross, *Summary of Best Practices in Electric Vehicle Ordinances*, GREAT PLAINS INSTITUTE (June 2019), https://www.betterenergy.org/wp-content/uploads/2019/06/GPI_EV_Ordinance_Summary_web.pdf.

[44] *Permitting Fact Sheet for Workplace Charging*, PLUG IN AMERICA, (March 2021), https://pluginamerica.org/wp-content/uploads/2021/03/Permitting-Fact-Sheet-for-Workplace-Charging_March-2021.pdf.

[45] *Id.*

[46] *Code Requirements For Installing EVSE*, PG&E, https://www.pge.com/includes/docs/pdfs/about/environment/pge/electricvehicles/ev5pt3.pdf.

[47] *Id*.

### C. Tax Credits

Tax credits for installing EV charging stations are available in a variety of forms. Until December 2021, the Federal Alternative Fuel Vehicle Refueling Property Tax Credit offset up to 30% of a charging station's total purchase and installation cost, up to $30,000.[48] While this credit expired, it has been predicted that the credit will be extended and may increase.

At least 47 states, Washington D.C. and many utility companies incentivize EV charging station installations with certain EVSE programs.[49] In Pennsylvania, the state will fund selected DC fast charging projects along transportation corridors over a 5-year period.[50] Pennsylvania is also allocating $9.2 million of its Volkswagen Environmental Mitigation Trust Funds to fund rebates for publicly accessible Level 2 chargers installed in certain locations.[51]

A project location can receive rebates for up to 12 total public stations.[52] Eligible applicants are any organizations (including private businesses) that own or operate an "eligible locations." Private property (e.g., a shopping center parking lot) qualifies if it is reasonably expected to be visited by the public during the hours of public availability.[53] According to Pennsylvania's guidelines, if a site provides at least 80 hours per week of availability to the public without restriction, and it is reasonably expected to be visited by the public during those hours then it may qualify for a maximum rebate of $4,000 per plug or a maximum percentage of total project cost of 70%, whichever is less.[54]

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[48] *Alternative Fuel Infrastructure Tax Credit*, U.S. DEP'T OF ENERGY, https://afdc.energy.gov/laws/10513.

[49] Kristy Hartman and Laura Shields, *State Policies Promoting Hybrid and Electric Vehicles*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Aug. 20, 2021), https://www.ncsl.org/research/energy/state-electric-vehicle-incentives-state-chart.aspx.

[50] *Level 2 Electric Vehicle (EV) Charging Rebate Program*, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, https://files.dep.state.pa.us/Air/Volkswagen/Level2EVRebateProgramGuidelines.pdf

[51] *Id*.

[52] *Id*.

[53] *Level 2 Electric Vehicle (EV) Charging Rebate Program*, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION 8, https://files.dep.state.pa.us/Air/Volkswagen/Level2EVRebateProgramGuidelines.pdf

[54] *Id*. at 4.

Pennsylvania's program also allows for a $3,000 rebate per plug or 50% of total costs, whichever is less, for projects with fewer than 80 hours of public access, projects with no public access, and projects that use non-networked EVSE.[55]

## D. New EV Infrastructure Investment

The Biden-Harris Administration has established an Electric Vehicle Charging Action Plan (the "Plan") within the Bipartisan Infrastructure Law ("BIL").[56] The Plan describes a "path to a convenient and equitable network of 500,000 chargers (to) make EVs accessible to all Americans for both local and long-distance trips."[57]

The BIL dedicates $5 billion in funding to accomplish this goal, with 10% set aside each year for the Secretary to provide grants to states to broaden the network and fill in the gaps.[58] On February 10, 2022, the Department of Transportation released a statement allocating the $5 billion amongst the states for the National Electric Vehicle Infrastructure ("NEVI") Formula Program.[59] For the fiscal year of 2022, Pennsylvania may receive over $25 million pending US DOT's approval of Pennsylvania's plan.[60] States have until August 1, 2022 to submit their plans for review and approval.[61]

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[55] *Id*. at 4-5.

[56] *See FACT SHEET: The Biden-Harris Electric Vehicle Charging Action Plan*, THE WHITE HOUSE (Dec. 31, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/13/fact-sheet-the-biden-harris-electric-vehicle-charging-action-plan/.

[57] *Id*.

[58] *Id*.

[59] *President Biden, USDOT and USDOE Announce $5 Billion over Five Years for National EV Charging Network, Made Possible by Bipartisan Infrastructure Law*, U.S. DEP'T OF TRANSPORTATION FEDERAL HIGHWAY ADMINISTRATION (Feb. 10, 2022), https://highways.dot.gov/newsroom/president-biden-usdot-and-usdoe-announce-5-billion-over-five-years-national-ev-charging.

[60] *Id*. This funding was distributed on a formula basis, where each state receives a share of program funding equal to its share in the combined amount that the Federal Highway Administration distributes in federal aid highway appointments. *National Electric Vehicle Infrastructure Formula Program: Bipartisan Infrastructure Law – Program Guidance*, FEDERAL HIGHWAY ADMINISTRATION 9 (Feb. 10, 2022), https://www.fhwa.dot.gov/environment/alternative_fuel_corridors/nominations/90d_nevi_formula_program_guidance.pdf.

[61] *National Electric Vehicle Infrastructure Formula Program: Bipartisan Infrastructure Law – Program Guidance*, FEDERAL HIGHWAY ADMINISTRATION 13 (Feb. 10, 2022), https://www.fhwa.dot.gov/environment/alternative_fuel_corridors/nominations/90d_nevi_formula_program_guidance.pdf.

This legislation is largely focused on interstate highways with the goal to install fast chargers, located no more than one mile from an interstate route, every 50 miles along the nation's interstate highways. Each charger must have four ports so four vehicles can be charged simultaneously."[62]

Once the designated corridors are built out, however, a state may then use the funds on "any public road or in other publicly accessible locations that are open to the general public or to authorized commercial motor vehicle operators from more than one company."[63] The guidance defines publicly accessible locations as public parking facilities, parking at public buildings, and even private parking facilities available for public use.[64] This indicates that public parking areas in shopping centers are likely to be a target area for EV charging infrastructure particularly because the federal guidance states that states may contract with private parties to acquire, install, and operate a publicly accessible IV charging infrastructure.[65]

The BIL also sets aside $2.5 billion for a competitive grant program that will strategically deploy EV charging infrastructure and support innovative approaches to support rural charging, improve air quality, and increase access to EV charging in disadvantaged communities.[66] The White House states that the $5 billion and $2.5 billion allotments represent "the largest-ever U.S. investment in EV charging and will be a transformative down payment on the transition to a zero-emission future."[67] As these regulations are new, the government indicates that more updates are forthcoming. For now, the impact on shopping centers may be minimal, but this guidance will have an impac

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[62] Laura Legere, *Federal Funds Flow to Pa. to Build Electric Vehicle Charging Network on Interstates*, PITTSBURGH POST-GAZETTE (Feb. 10, 2022), https://www.post-gazette.com/business/powersource/2022/02/10/electric-vehicle-charging-interstate-highway-Pennsylvania-federal-funding/stories/202202100121; *National Electric Vehicle Infrastructure Formula Program: Bipartisan Infrastructure Law – Program Guidance*, FEDERAL HIGHWAY ADMINISTRATION 11-12 (Feb. 10, 2022), https://www.fhwa.dot.gov/environment/alternative_fuel_corridors/nominations/90d_nevi_formula_program_guidance.pdf.

[63] *Id*. at 11.

[64] *Id*.

[65] *Id*. at 12.

[66] *See FACT SHEET: The Biden-Harris Electric Vehicle Charging Action Plan*, THE WHITE HOUSE (Dec. 31, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/13/fact-sheet-the-biden-harris-electric-vehicle-charging-action-plan/.

[67] *Id*.

# SAMPLE EV CHARGING STATION LICENSE AGREEMENT

## LICENSE AGREEMENT

THIS **LICENSE AGREEMENT** ("***Agreement***"), dated as of _____ (the *"**Effective Date**"*), is between _____ ("***Licensee***") and _____ ("**Licensor**").

Licensor is the owner of the property located at _____ (the "***Property***").

Licensor has agreed to permit Licensee to install electric vehicle supply equipment ("***EVSE***") charging stations at the Property to support the adoption of electric vehicles, to help reduce vehicle emissions and otherwise promote a cleaner environment, and to attract individuals and economic activity to the Property.

Licensee is engaged in the business of designing, provisioning and operating EVSE Charging Stations. Licensee desires to provide and operate EVSE Charging Stations at the Property, and to make the electricity available through those EVSE Charging Stations to individuals charging electric vehicles on the terms and conditions provided below.

Licensor is willing to grant a license for those parking spaces and adjacent areas shown on Exhibit A attached ("***EV Charging Sites***") to Licensee to install, provision, maintain and operate the number and type of EVSE Charging Stations for electric vehicles stated on Exhibit A, on the terms and conditions provided below.

Now, therefore, for good, valuable and sufficient consideration that the Parties each acknowledge receiving, the Parties agree as follows:

1) **License of EV Charging Sites**. Licensor grants Licensee the non-exclusive right to occupy and use the EV Charging Sites, subject to the terms and conditions of this Agreement. Subject to the terms and conditions of this Agreement and Licensor's prior approval of all plans and specifications for the initial EVSE Charging Stations and Related Equipment as well as any subsequent modifications to same, Licensor grants Licensee the right to install, operate, use and maintain devices at the EV Charging Sites that deliver electricity to charge electric vehicles ("***EVSE Charging Stations***") and related equipment and appurtenances to support the installation, operation, use and maintenance of EVSE Charging Stations at the EV Charging Sites ("***Related Equipment"***), and to otherwise use the EV Charging Sites, operate EVSE Charging Stations and Related Equipment, and provide for the use of the EV Charging Sites and EVSE Charging Stations and Related Equipment as provided in this Agreement.

2) **Licensee's Rights and Obligations**.

   a) *Permits and Approvals*. Licensee, at Licensee's sole cost and expense, will obtain and furnish to Licensor copies of any approvals or permits required for the installation and operation of the EVSE Charging Stations and Related Equipment, provided, however, that to the extent an approval or right of access to any property owned or controlled by Licensor is necessary to install, provision, operate, use or maintain the EVSE Charging Stations at the EV Charging Sites, Licensor hereby

grants such an approval or right of access. Licensee shall provide evidence of the receipt of such approvals or permits to Licensor concerning the EVSE Charging Stations or Related Equipment at the EV Charging Site.

b) *Installations*. Subject to the plans and specifications approved by Licensor in advance and prior notice to Licensor on the exact dates that any work will be performed, Licensee and its contractors may perform those activities reasonably necessary using good construction practices within the areas marked "Staging" on Exhibit A to install, provision, use and maintain the EVSE Charging Stations and Related Equipment at Licensee's sole cost and expense. Licensee may not perform any construction activities between October 1 and December 31 each year without Licensor's prior written approval in Licensor's sole and absolute discretion. Licensee acknowledges and agrees that all driveways in the Property will not be obstructed or blocked at any time due to its construction activities and must remain fully open and operational as it is necessary that such road be open at all times to allow for deliveries and access by all tenants of the Property. All work performed by Licensee shall be done in a diligent manner so that same is completed within a reasonable period of time to minimize any interference with the operation of the Property after commencement thereof, subject to such delays as may arise due to causes within the usual definition of force majeure.

Licensor makes no representations or warranties with respect to the condition of the Property and it shall be Licensee's responsibility to satisfy itself as to the actual surface and subsurface conditions existing at the Property. Actual conditions may differ from those shown on the plans.

In the event that the exercise of the rights granted herein to Licensee results in the disturbance of the surface of any lands, and/or any improvements thereon on the Property, said disturbance shall be repaired, and the surface of such property and any improvements thereon shall be restored to the extent reasonably practical to their condition existing prior to the exercise of such rights to the reasonable satisfaction of Licensor at Licensee's sole cost and expense. For example, in the event any opening is made in the ground in connection with any of the purposes permitted hereunder, said opening shall be backfilled and resurfaced with the same type of material and to as nearly as possible the same condition as existed when said opening was made, and Licensee shall restore landscaping, as nearly as possible to its original condition, including resodding any grass or landscaping which was removed upon entry.

Upon completion of any such work, Licensee shall provide to Licensor a revised "As-Built" Plan showing the exact locations of the EVSE Charging Stations and Related Equipment including any conduits. Licensee may annotate the plan attached to its permit application to show any "As-Built" changes to the plan approved by Licensor.

Prior to construction, Licensee shall be responsible for providing the appropriate clearance from any existing utility authorities or prior grantees benefitting from easements.

c) *Inspection, Maintenance and Monitoring*. Following installation of the EVSE Charging Stations and Related Equipment, Licensee will inspect the EVSE Charging Stations and Related Equipment on an at least quarterly basis, and reasonably maintain the EVSE Charging Stations and Related Equipment in good operating condition at all times. Licensee shall be responsible for the prompt repair and restoration of any portions of the Property, including parking lots and drive aisles that were disturbed or affected by the installation of the EVSE Charging Stations and Related Equipment, however, at no time may Licensee block any drive aisles during its installation of the EVSE Charging Stations and Related Equipment without Licensor's prior written approval in Licensor's sole and absolute discretion. Licensee may monitor the use, condition and security of EVSE Charging Stations, EV Charging Sites, and Sponsorship Displays (defined below) via electronic, video and other means, subject to Licensor's prior written approval.

d) *Third-party incentives and proceeds*. Licensee has the exclusive right to apply for, receive, collect, and retain (a) all consideration associated with Sponsorship Displays and Sponsors (defined below) and (b) all incentives available in connection with or related to the EVSE Charging Stations, including, but not limited to, any tax credits, carbon credits, grants, monies, consideration, support or benefits provided by or available from or through any federal, state or other third party. Notwithstanding the foregoing, Licensee shall not be entitled to any credits, discounts or benefits arising in connection with the Property and any real property taxes or assessments, which shall accrue for the benefit of Licensor. Each Party, at no cost to the non-applying Party, will execute documents in reasonably acceptable form supporting, and otherwise reasonably cooperate with the other Parties in connection with, the application for any of the foregoing.

e) *Non-Exclusive*. The rights granted to Licensee hereunder shall be non-exclusive and Licensor reserves the right to grant similar licenses or rights to other providers of EVSE charging stations or similar services at the Property.

f) *Electricity*. Licensee shall be responsible to obtain all electricity required for the installation, operation and maintenance of the EVSE Charging Stations and Related Equipment from separately metered electric service at the Property and at Licensee's sole cost. Licensor shall not be responsible in any event for any deficiency or failure in the electricity supply or for any utility costs incurred as a result of the installation, operation and maintenance of the EVSE Charging Stations and Related Equipment.

g) *Sign Operation*. Licensor acknowledges that the EVSE Charging Stations will show rotating digital media but some may not have any audio or flashing, flickering, blinking, or flood lights as part of the EVSE Charging Stations and Related Equipment.

3) **Licensor's Rights and Obligations**.

a) *Title to Sites and Equipment.* Except as expressly provided in this Agreement, (i) Licensee has no other right, title or interest in or to the EV Charging Sites or the Property, all of which remain with Licensor; and (ii) Licensor has no right, title or interest in, to or deriving from any EVSE Charging Station or Related Equipment,

the use of any EVSE Charging Station or Related Equipment, or the data associated with or derived from any of the foregoing, all of which remain with Licensee. Licensor shall have no responsibility for policing or monitoring the use of the EV Charging Sites.

b) *Relocation.* Licensor reserves the right to require Licensee, at Licensee's cost, to relocate the EVSE Charging Stations to another location within the Property in reasonable proximity to the Leased Premises upon not less than sixty (60) days prior written notice to Licensee.

c) *Maintenance of Property*. Licensor will maintain the Property in a Class A manner.

d) *Service Interruptions.* Except in the event of an emergency, Licensor agrees to provide Licensee with no less than ten (10) days' written notice before undertaking any significant activity that can reasonably be expected to impede the use or visibility of EVSE Charging Stations for more than five (5) business days. Such activity may include renovations to the EV Charging Sites, the Property, or rights-of-way or facilities surrounding EVSE Charging Stations; storage or movement of materials in conjunction with Licensor construction or other activities; snow removal; or other activity that may cover or obstruct a Sponsorship Display.

e) *Additional Payments*. Licensor acknowledges and agrees that it is not entitled to, and may not request or receive any payment or other consideration from, any person arising out of or related to the installation, provisioning, operation, use or maintenance of EVSE Charging Stations or Sponsorship Displays.

4) **Term of Agreement**. The term of this Agreement starts on the Effective Date and, unless otherwise terminated beforehand, continues through the tenth anniversary of the Effective Date.

5) **Termination of Agreement**.

a) *By Licensee*. Licensee has the right to terminate this Agreement in whole or with respect to any particular EVSE Charging Station or EV Charging Site on thirty (30) days prior written notice to Licensor if:

i) One or more EVSE Charging Stations are substantially damaged or destroyed;

ii) The EV Charging Sites or the area surrounding or public space nearby the EV Charging Sites is renovated or maintained in a manner such that the quality appeal of that location to third parties, such as users of EVSE Charging Stations, is significantly diminished;

iii) All applicable approvals, permits, and consents cannot be obtained within one hundred eighty (180) days of the Effective Date;

iv) Applicable laws, regulations or local restrictions prohibit, require the removal of or materially restrict Sponsorship Displays. A "***Sponsorship Display***" is content of, concerning or provided by any person (a "***Sponsor***") that enters into an agreement for the display of Sponsorship Display(s) on EVSE Charging Stations at the EV Charging Sites which content is capable of being posted or displayed on an EVSE Charging Station for a limited

period, through physical, electronic or other means, including, but not limited to, text, logos, graphics, images, animation, video, diagrams, and other content in any color and any form except as otherwise prohibited in Section 2 g above ;

v) Applicable laws, regulations or local restrictions no longer permit or unreasonably condition the installation, provisioning, use or operation of EVSE Charging Stations;

vi) Licensee is prevented from providing or having sufficient electrical power to operate the EV Charging Stations or illuminate a Sponsorship Display;

vii) Conditions at the Property unduly hamper or render maintenance of EVSE Charging Stations unsafe;

viii) The condition in Section 20 is met; or

ix) Licensor fails to comply with any other provision of this Agreement, and such failure is not cured within thirty (30) days following receipt of written notice from Licensee.

b) *By Licensor.* Licensor has the right to terminate this Agreement in whole or with respect to any particular EVSE Charging Station or EV Charging Site upon sixty (60) days' written notice to Licensee for any reason and at any time in Licensor's sole discretion, and upon thirty (30) days' written notice to Licensee if:

i) Licensee fails to replace any EVSE Charging Station that is substantially damaged or destroyed within ninety (90) days after the date the EVSE Charging Stations was damaged or destroyed, subject to delays covered by Section 21;

ii) All applicable approvals, permits, and consents cannot be obtained within one hundred eighty (180) days of the Effective Date;

iii) Applicable laws, regulations or local restrictions no longer permit or unreasonably condition the installation, provisioning, use or operation of EVSE Charging Stations; or

iv) Licensee fails to comply with any other provision of this Agreement, and such failure is not cured within thirty (30) days following receipt of notice from Licensor.

c) *Equipment Removal*. Upon expiration or termination of this Agreement, Licensee will, and Licensor hereby grants Licensee permission to, remove all EVSE Charging Stations and Related Equipment from the EV Charging Sites within thirty (30) days. Notwithstanding the foregoing, Licensee has no obligation to remove any Related Equipment that is underground or normally inaccessible.

6) **Taxes**. Licensee is responsible for paying all taxes in anyway arising as a result of this Agreement, including those attributable to its activities under this Agreement, any property interests in the EV Charging Sites granted it in this Agreement, and any taxes on the EVSE Charging Stations and Related Equipment and personal property of any kind owned, installed or used by Licensee in or upon the Property.

7) **Insurance**. Each Party is to procure and keep in force during the Agreement's term, at the Party's own cost and expense, Commercial General Liability Insurance in a single limit of not less than $1,000,000 per occurrence and $3,000,000 in the aggregate, and providing at a minimum bodily injury liability, property damage liability, personal liability and contractual liability coverage. Licensee's commercial general liability insurance is to include as additional insureds, on a primary and non-contributing basis _____. Licensee also is to carry insurance against fire, extended coverage, vandalism and malicious mischief, as may be included in a standard extended coverage endorsement from time to time, insuring Licensee's EVSE Charging Stations and Related Equipment. The policies shall provide that it will not be terminated by the insurer except after thirty (30) days prior notice to each Licensor or at the termination of the License. Prior to accessing the Property, Licensee shall provide to Licensor certificates of insurance in a format reasonably satisfactory to Licensor for the duration of the License which shall contain a waiver of subrogation clause waiving the right to assert a claim, cost, suit, liability and demand against _____ for loss or damage required to be covered by the above insurance requirements.

8) **Indemnification**. Each Party is obligated to defend, indemnify and hold harmless the other Party, its successors and/or assigns and its affiliates, and its and their respective officers, directors, agents and employees from and against any and all liability, claims, damages, losses, suits, demands, judgments, costs and/or fees, fines and penalties(including, without limitation, reasonable attorneys' and experts' fees) to the extent arising out of or relating to the negligence or misconduct of the Indemnifying Party, its officers, directors, agents or employees.

9) **Limitation of Liability**. EXCEPT WITH RESPECT TO A PARTY'S OBLIGATIONS UNDER SECTION 8 (INDEMNIFICATION), NO PARTY SHALL BE LIABLE FOR, AND EACH PARTY HEREBY WAIVES AND RELEASES ANY CLAIMS AGAINST THE OTHER PARTIES FOR, ANY SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES, INCLUDING, WITHOUT LIMITATION, LOST REVENUES, LOST PROFIT OR LOSS OF PROSPECTIVE ECONOMIC ADVANTAGE, ARISING OUT OF OR RELATED TO THIS AGREEMENT.

10) **Warranty and Disclaimer**. Each Party represents and warrants that it has all rights and power necessary to enter into and provide the rights granted under this Agreement. Except as expressly stated in this Agreement, all EVSE Charging Stations, rights and services, and all EVSE Charging Sites provided under this Agreement are provided AS IS, AS AVAILABLE and WITH ALL FAULTS. WITHOUT LIMITING THE FOREGOING, EACH PARTY DISCLAIMS ANY AND ALL REPRESENTATIONS OR WARRANTIES NOT EXPRESSLY STATED IN THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF SUITABILITY, NON-INFRINGEMENT OR FITNESS FOR A PARTICULAR PURPOSE.

11) **Notice**. Any notices under this Agreement are effective upon receipt, and may be delivered personally, by registered or certified mail, by overnight courier service, or by email to a Party as follows:

Any Party may change their notice contacts by written notice.

12) **Governing Law and Prevailing Party**. The laws of the State of _____ govern this Agreement and any matter arising out of or related to it, without regard to its conflicts of laws principles. The prevailing party shall have its reasonable attorney's fees and court costs, for trial and appeal, paid by the unsuccessful party.

13) **Assignment**. This Agreement is binding upon and inures to the benefit of the Parties and their respective successors-in-interest and assigns. Licensee may not assign this Agreement or the license granted hereunder without the prior written consent of Licensor, which may be withheld or granted in Licensor's sole discretion. Notwithstanding the foregoing, Licensee has the right to assign this Agreement without Licensor's prior consent, but upon fifteen (15) days prior written notice to Licensor, to any entity which controls, is controlled by, or is under common control with Licensee; to any entity which results from a merger of, reorganization of or consolidation with Licensee; or to any entity which acquires all or substantially all the assets of Licensee.

14) **Independent Contractor**. Licensee is an independent contractor and not an agent of Licensor. Neither this Agreement nor the relationship of Licensor and Licensee shall be deemed to be a joint venture, partnership, or any other association for any purpose.

15) **Waiver**. The waiver by a Party of any breach of any term, covenant or condition in this Agreement shall not be deemed to be a waiver of such term, covenant or condition for any subsequent breach thereof or any other term, covenant or condition in this Agreement.

16) **Partial Invalidity**. If any provision of this Agreement or its application be deemed invalid or unenforceable, the remainder of this Agreement, or the application of such term, covenant or condition to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term, covenant or condition of this Agreement shall be valid and enforced to the fullest extent permitted by law.

17) **Publicity**. Upon mutual written agreement, the Parties may issue a press release reasonably satisfactory to each to promote the fact that Licensor and Licensee have entered into this Agreement and that Licensee is providing EVSE charging services at the Property.

18) **Force Majeure**. A Party will be excused, and not in breach of this Agreement, to the extent that performance of its obligations is prevented, restricted or delayed or prevented by revolutions, insurrections, riots, wars, acts of enemies, acts of terrorism, emergencies, police actions, protests, strikes, floods, fires, earthquakes, acts of god, lock outs, labor disturbances, acts of governmental authorities, or by any other cause not within the reasonable control of the Party whose performance is interfered with, which such Party is unable to prevent despite the exercise of reasonable care. If any force majeure condition continues longer than thirty (30) days, each Party has the right to terminate this Agreement in whole or in part.

19) **Entire Agreement**. This Agreement, together with the Exhibits and Schedule attached hereto, contains the entire agreement between the Parties with respect to its subject matter and supersedes any and all prior agreements between the parties with respect to that subject

matter. No amendment to this Agreement is effective unless reduced to writing and signed by the Parties.

20) **Authority; Counterparts**. The persons signing below represent and warrant that they have the requisite authority to bind the Parties on whose behalf they are signing. This Agreement may be signed in multiple counterparts each of which shall be deemed an original, but all of which shall, taken together, be but one and the same instrument. Delivery by facsimile, or e-mail of a PDF or electronic copy, of a counterpart of this Agreement executed by a Party shall constitute delivery by such Party of such Party's executed counterpart of this Agreement.

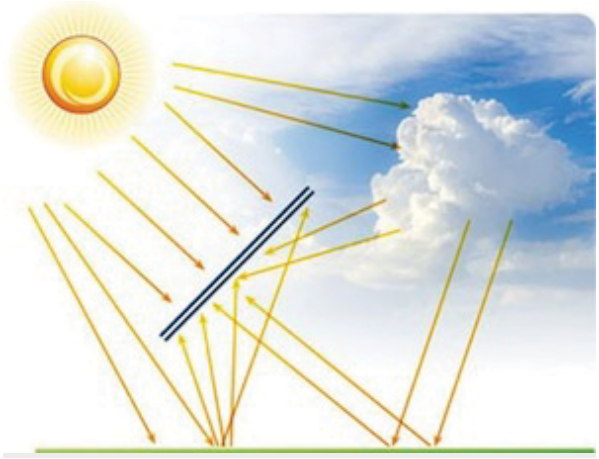
21) **Survival**. The provisions of Sections 5(c) and 6 through 20 survive expiration or termination of this Agreement.

**IN WITNESS WHEREOF**, the Parties have executed this Agreement as of the Effective Date.

SCALO SOLAR
SOLUTIONS, LLC

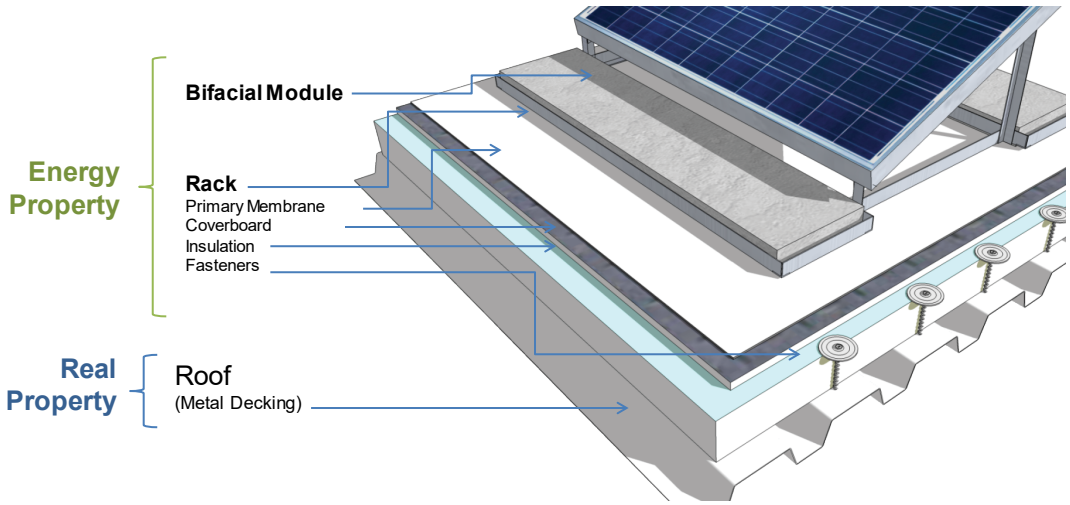
# What are **BIFACIAL SOLAR PANELS?**

Bifacial solar panels are solar modules that are **capable of producing solar power from both sides of the panel**. When bifacial panels are installed on a highly reflective surface, like a white TPO roof, the production of each panel can increase as much as 20%.



# Why use **BIFACIAL SOLAR PANELS?**

The power of the bifacial model comes from the module and the reflective roof both being considered **energy property** according to an IRS private letter ruling. Because of this, tax advantages are created to increase your return on investment.



SCALO SOLAR
SOLUTIONS, LLC

# What is my RETURN ON INVESTMENT?

Because of the IRS private letter ruling, 'Real Property' becomes 'Energy Property' thus qualifying for 5-year depreciation and Investment Tax Credit. Because of the tax incentives increase your ROI accelerates as well.

IRS section 1250
**'Real Property'**
qualfies for
**39.5 year**
depreciation

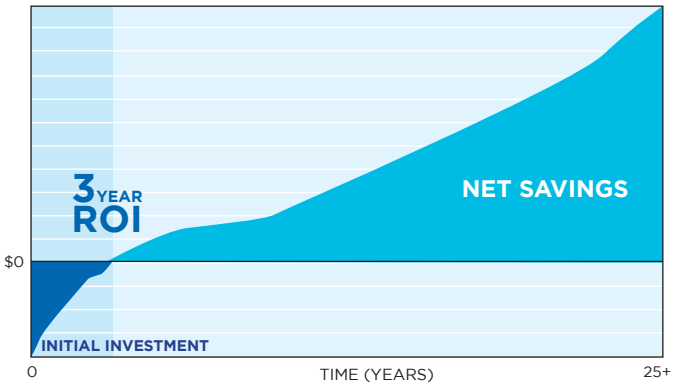
IRS Private Letter Ruling

IRS section 1245
**'Energy Property'**
qualfies for
**5 year**
depreciation

= **Tax Incentive Increase + ROI Acceleration**

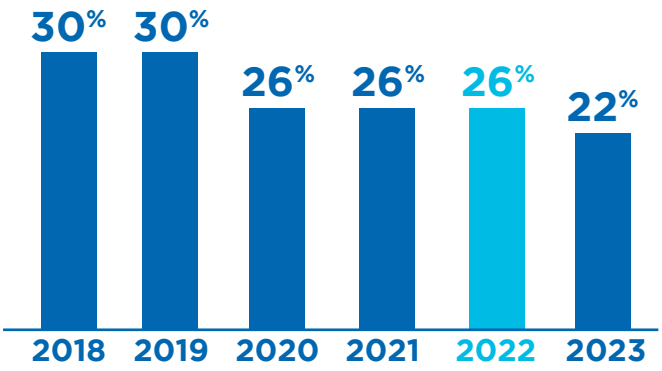
AS LOW AS
**3**
**YEAR ROI**
with as much as
60-90% return in Year 1

+ **$500K**
Average savings
over a 25-year lifespan of a
150kW solar system




# Why is now THE BEST TIME TO GO SOLAR?

The cost of solar is at its lowest price ever and 2022 will be the last year solar tax incentives will be at 26% before it begins to phase out.




For more information about how bifacial solar panels can help your home or business, contact:

**Jack Scalo** | President & CEO, Scalo Solar Solutions | **scaloj@scalocompanies.com**

# ICSC+LAW SYMPOSIUM OH/KY/IN/MI/PA

**Renaissance Columbus Downtown Hotel**

**Columbus, OH**

**Friday, March 18, 2022**

**2:30 – 3:30 pm**

## Session 4B: Welcome to the New Normal: What Real Estate Financing Looks Like in 2022

**Panelists**

**James Schwarz**

**Taft Stettinius & Hollister**

**Kevin Kelly**

**Simon**

**Geoffrey White**

**Frost Brown Todd LLC**

WELCOME TO THE NEW NORMAL-WHAT REAL ESTATE FINANCING LOOKS LIKE IN 2022

I. Current Trends in the Real Estate Market.

II. The Demise of LIBOR

A. Brief History of LIBOR

B. Recommendations and Approaches

C. Secured Overnight Financing Rate

D. Trigger Event

E. Fall Back Language

F. Alternatives to the Alternative

G. Next Steps for Lenders and Borrowers

III. Defeasance-What's it all About?

A. Defeasance Notice

B. Required Documents

C. Players Involved

D. Successor Borrower

E. Securities Required

F. Opinions Required

G. Why Defeasance

H. Costs Involved

IV. Equity Pledges in Real Estate Deals

A. Judicial Foreclosures

B. Timing Involved

C. Non-Judicial Foreclosure

D. Timing Involved.

E. Equity of Redemption.

F. Article 9 UCC Sale-Commercial Reasonable Disposition

G. New York cases

# Equity Pledges in Real Estate Transactions

**By: James H. Schwarz and Michael Brockman**

## I. Traditional Security Interests in Real Property

A. Lender provides a loan to finance the acquisition and/or development of real property. The loan is secured by a Mortgage or Deed of Trust recorded with the county recorder.

B. Lender's Remedies upon a Borrower Default – Judicial or Non-Judicial Foreclosure

1. Judicial Foreclosure

a. Judicial Foreclosure is permitted in all states. The required procedures vary from state to state and county to county.

b. The lender files a complaint with the court in the county in which the property is located.

c. The lender gives notice to all known parties with an interest in the property; the lender may be required to publish notice of judicial foreclosure in a newspaper or other publication to put any unknown interested parties on notice of the foreclosure proceedings.

d. The borrower has the opportunity to contest the foreclosure proceedings. In some cases, litigation may take years to resolve.

e. Upon the eventual entry of a judgment in favor of the lender, the lender can request a Sheriff's sale of the property. The proceeds of the sale are first applied against the balance of the loan plus any accrued fees/costs. The borrower is entitled to any proceeds remaining after repayment of the loan and fees/costs and payment to subordinate lienholders.

f. If the proceeds are insufficient to repay the loan, the lender is typically able to pursue a deficiency judgment against the borrower, depending on state law.

2. Non-Judicial Foreclosure

a. Non-judicial foreclosure is permitted in many, but not all states. The required procedures vary from state to state and county to county.

b. The Mortgage or Deed of Trust contains a "Power of Sale" clause, which permits the lender to conduct a foreclosure sale of the property without judicial oversight.

c. The lender provides notices in accordance with state law and loan documents and conducts a foreclosure sale of the property. The proceeds of the sale are first applied against the balance of the loan plus any accrued fees/costs. The borrower is entitled to any proceeds remaining after repayment of loan and fees/costs and payment to subordinate lienholders.

d. Many states do not permit pursuit of deficiency judgments after non-judicial foreclosure if the proceeds of the sale are not sufficient to repay the loan and costs/fees.

C. The Borrower's Equity of Redemption

1. A defaulting borrower generally has the right to "redeem" the collateral by paying off the amount of the debt and any accrued costs and fees at any time prior to the foreclosure sale of the property. This was originally an equitable right in common law, but many states have adopted statutes codifying this right.

2. Historically, courts have struck down language in security instruments which attempt to "clog" the equity of redemption by granting the lender a right to acquire the collateral without going through the foreclosure process (for example, requiring the borrower to execute a deed in lieu of foreclosure to be recorded upon the default of borrower or granting the lender an option to purchase the property for less than its fair value).

3. Indiana Code § 32-29-7-7: "Before the [foreclosure sale], any owner or part owner of the real estate may redeem the real estate from the judgment by payment to the (1) clerk before the issuance to the sheriff of the judgment and decree or (2) sheriff after the issuance to the sheriff of the judgment and decree of the amount of the judgment, interest, and costs for the payment or satisfaction of which the sale was ordered."

## II. Mezzanine Lending

A. A mezzanine loan is a loan to finance the borrower's equity contribution, secured by the equity interests in the borrower. The security interest is perfected by filing a UCC financing statement with the Secretary of State of the borrower's state of incorporation.

B. Mezzanine loans are typically subordinate to any senior debt (e.g., a mortgage loan), but senior to the borrower's equity interests.

C. Mezzanine loans reduce the amount of equity needed by a borrower to fund a project and can increase the return on a borrower's cash investment. Mezzanine lenders typically charge higher interest rates on mezzanine loans than traditional mortgage loans due to their subordinate status to the mortgage loan.

D. Lender's Remedy upon a Borrower Default – Article 9 UCC Sale

1. Upon default by the borrower, a mezzanine lender is entitled to conduct a sale of the pledged equity interests in the borrower entity in accordance with Article 9 of the Uniform Commercial Code.

2. All states have adopted Article 9 of the Uniform Commercial Code, with minor variations from state to state.

3. Pursuant to UCC § 9-610, the lender may dispose of the collateral in "any commercially reasonable preparation or processing." Whether a sale is "commercially reasonable" is dependent on the nature of the asset being sold. Price is an important factor, but other factors surrounding the sale are also considered.

4. Before conducting the sale, the lender must send a "reasonable authenticated notification of disposition" in accordance with UCC § 9-611 to:

   a. The debtor;

   b. Any secondary obligor;

   c. Any other person that has submitted an authenticated notification of a claim of an interest in the collateral; and

   d. Any other secured party that had a UCC financing statement on file within 10 days before the notification date.

5. There is no minimum required time to send notices of a UCC sale. Whether a notice is reasonable depends on the facts and circumstances surrounding the sale.

6. Although all states have adopted Article 9 of the UCC, each state's courts may interpret the same sections differently, and a court in one state is not obligated to follow the interpretation of a court in another state on the same subject matter. Accordingly, courts in different states facing identical facts could come to different conclusions regarding whether a sale is "commercially reasonable".

7. Generally, as long as a lender has conducted a commercially reasonable sale and given proper notices, the lender may pursue a deficiency judgment against the borrower if the sale proceeds are not sufficient to repay the loan and any accrued costs/fees.

8. Under UCC § 9-623, borrowers have a right to redeem the collateral at any time prior to the disposition of the collateral at the UCC sale. However, due to the shorter time period generally required to complete a UCC sale compared to a foreclosure sale, this right is not as useful to a borrower when compared to the common law "equity of redemption."

## III. **Timing of Foreclosures vs. UCC Sales**

A. Judicial Foreclosure – Slowest. 6-18+ months depending on state law and if the borrower contests foreclosure process.

B. Non-Judicial Foreclosure – Faster than judicial foreclosure because the lender does not need court approval, but slower than UCC sales due to more rigid notice and sale requirements. Timing depends on the Power of Sale clause and procedures required by state law.

C. UCC Sale – Fastest. No minimum timing as long as reasonable notices are given to all required parties and the sale is conducted in a commercially reasonable manner.

D. If the sale under a foreclosure or UCC sale results in a deficiency judgment, the lender will have to institute a separate lawsuit to collect the deficiency, assuming deficiency judgments are not prohibited by anti-deficiency statutes, which will require additional time and expense.

E. If the borrower has filed bankruptcy, a lender may be prevented from conducting a UCC sale or foreclosure sale, or pursuing a deficiency judgment, during the pendency of the "automatic stay" under Section 362 of the Bankruptcy Code.

## IV. Dual Collateral Transactions – Mortgage and Pledged Equity Interests

A. Typically, borrowers will obtain mezzanine financing and mortgage financing from two different lenders. However, some mortgage lenders require the borrower to put up both forms of collateral to secure the mortgage loan:

1. A mortgage on the real property, consistent with a traditional mortgage loan; and

2. A pledge of the borrower's equity interests, consistent with a mezzanine loan.

B. By taking two forms of security, the lender has two remedies upon a borrower default:

1. Foreclose on the property through time-consuming judicial or non-judicial foreclosure; or

2. Conduct a UCC sale of the equity interests in the borrower entity.

C. The ability to conduct a UCC sale of the borrower's equity interests potentially permits a lender to avoid the time-consuming foreclosure process, and limits the borrower's ability to exercise their equity of redemption under the mortgage to redeem the collateral before the foreclosure sale.

D. Historically, any attempt by a lender to prevent a borrower from exercising their equitable right of redemption and paying off a defaulted loan prior to foreclosure was prohibited as a "clogging" on the Borrower's equity of redemption.

E. Recent New York court decisions have analyzed whether this dual-collateral structure constitutes an impermissible "clogging" of the Borrower's equity of redemption.

1. HH Cincinnati Textile L.P. v. Acres Capital Servicing LLC, 2018 WL 3056919 (NY 2018)

a. Borrowers obtained loans to finance two development projects; loans were secured by (1) mortgages on the underlying real property and (2) pledged equity interests in the borrower entities. Borrowers defaulted and lender initiated a UCC sale of the pledged equity interests in the borrowers. Borrowers alleged that the sale of the equity interests under the UCC sale constituted unlawful "clogging" of the borrowers' equity of redemption.

b. The court denied the borrowers' motion for preliminary injunction[1] stating that their equity of redemption had not been clogged because:

(i) UCC § 9-623 provided the borrowers with the right to redeem the equity interests prior to completion of UCC sale.

(ii) Nothing prevented the borrowers from taking part in the bidding process at the UCC sale.

2. Atlas Brookview Mezzanine LLC v. DB Brookview LLC, Index No. 653986/2020 (NY 2020)

a. Borrower obtained loan to finance acquisition of real estate in Illinois. Loan was secured by (1) a mortgage on the real estate and (2) a pledge and security agreement pledging the equity interests in the borrower entity. Borrower alleged that the UCC sale of the borrower's equity interests constituted impermissible clogging of the borrower's equity of redemption. Specifically, the borrower argued that the UCC sale could take place in as little as 30 days, which is much quicker than could take place through a judicial foreclosure of the property.

b. Notably, New York law does not permit a borrower to waive the equity of redemption. Illinois law does permit such waiver in certain circumstances. The mortgage contained a New York choice of law clause.

c. The court rejected Borrower's claim, stating that the borrower entered the transaction voluntarily with the advice of good counsel, and nothing prevented the borrower from redeeming the collateral prior to the UCC sale.

[1] Note, to succeed on a motion for preliminary injunction, the borrowers needed to show a reasonable likelihood of ultimate success on the merits, irreparable injury, and a balancing of the equities in borrower's favor. A ruling on a motion for preliminary injunction is not a final judgment on the merits of the case, but is indicative of how a court might apply the law when making a final judgment on the merits of a clogging claim.

F. These New York cases suggest that, when structured properly, a dual-collateral loan will not necessarily be voidable as an impermissible clogging on the borrower's equity of redemption, enabling the lender of a defaulted loan to potentially avoid the costly and time-consuming foreclosure process.

## V. Special Considerations when Conducting UCC Sales

A. D2 Mark LLC v. Orei VI Investments LLC, 2020 WL 3432950 (NY 2020) – 36-day notice-to-sale period was commercially unreasonable for sale of equity interests of borrower of $500+ million dollar project because:

1. COVID stay-at-home orders in effect at the time of the sale created difficulties for potential buyers to evaluate the property.

2. Loan documents provided that lender could credit bid on the UCC sale before or after the closing of third-party bidding.

3. Winning bidder was required to submit 10% nonrefundable deposit and remaining 90% within 24 hours of sale.

B. UCC § 9-610, Comment 4: although the UCC permits both public and private sales, including public and private dispositions conducted over the internet, private dispositions are encouraged based on the assumption that they will frequently result in a higher realization on collateral for the benefit of all parties concerned.

C. UCC § 9-627: Determination whether a Sale is Commercially Reasonable

1. The fact that a greater amount could be realized through another method of disposition is not alone enough to determine that a sale is commercially unreasonable.

2. A disposition is commercially reasonable if:

a. It is conducted in the usual manner on any recognized market;

b. At the price current in any recognized market at the time of the disposition; or

c. The sale is otherwise in conformity with reasonable commercial practices.

## VI. Takeaways

| | Judicial Foreclosure | Non-Judicial Foreclosure | UCC Sale |
|---|---|---|---|
| **Permitted in all States?** | Yes | No | Yes |
| **Timing** | 6-18+ months | Faster than Judicial Foreclosure; Slower than UCC Sale | No minimum time |
| **Flexibility** | Little to None | Moderate | Very Flexible |
| **Deficiency Judgments Permitted?[2]** | Typically, yes | Varies from State to State | Yes, provided that sale was commercially reasonable |
| **Redemption Rights** | Before Foreclosure Sale | Before Foreclosure Sale | Before UCC Sale |

A. Conducting judicial or non-judicial foreclosures is a rigid, expensive, time-consuming process.

B. Dual collateral loan structures have the potential to provide lenders more flexibility upon borrower defaults, provided that lenders act commercially reasonable in conducting the sale of the pledged borrower equity interests.

C. Generally, loans between two sophisticated parties are less subject to claims that a borrower's equity of redemption has been "clogged", but lenders should nonetheless exercise caution when circumventing the judicial or non-judicial foreclosure process.

D. In conducting a UCC sale of a borrower's pledged equity interests, the lender should consider what method of sale (public vs. private, notice period, bidding requirements, etc.) are likely to encourage a competitive sale.

E. The lender should exercise caution in imposing any restrictions on the Borrower's ability to participate in the UCC sale. If a UCC sale is conducted in a commercially unreasonable manner, a court could determine that the dual collateral loan constitutes an impermissible clogging on a borrower's equity of redemption.

F. Lenders should understand the differences between laws of different jurisdictions concerning:

1. Whether non-judicial foreclosure is permitted or if judicial foreclosure is required;

[2] Note, even though a deficiency judgment may be permitted, it is critical that a lender have sufficient guarantees in place to ensure that the lender is able to collect on any deficiency judgments, especially if the borrower is a single-purpose entity (SPE).

2. If state law permits the voluntary waiver of the borrower's common law or statutory equity of redemption;

3. How to conduct a UCC sale in a manner that is not likely to be challenged as commercially unreasonable, especially in light of ongoing COVID-19 restrictions.

G. If the borrower has filed bankruptcy, lenders should immediately halt any foreclosure or UCC sales until it is determined that such actions will not violate the "automatic stay" under the Bankruptcy Code.

## VII. TREATMENT WHEN NON-RECOURSE GUARANTEES ARE IN PLACE

A. Party of substantial net worth guarantees bad boy carve-outs in order for Lender to feel safe in non-recourse loans.

B. Guarantor is willing to enter into such bad boy guarantees because Guarantor "controls" the Borrower and is in a position to make sure such bad boy acts do not occur.

C. If an equity pledge is foreclosed upon, then the Guarantor is no longer in this control position.

D. In order to protect the Guarantor, counsel should be sure to provide that upon the foreclosure of the equity interest, the Guarantor no longer has any liability for acts taken by the foreclosing party or its successors in the future.

# The Demise of LIBOR – SOFR and Alternative Rates

**By** Austin S. Conner and Geoff White

*Introduction*

For years lenders and borrowers have relied upon the London Interbank Offered Rate ("LIBOR") as the applicable reference rate in a variety of lending transactions, but in the near future, LIBOR will phased out of utilization in the financial markets. This article briefly summarizes the history of LIBOR and what lenders and borrowers should know and expect as the eventual LIBOR cessation draws near.

*Brief History of LIBOR*

LIBOR is an unsecured, short-term interest rate based on the average rate estimates calculated by select participant banks and is intended to measure the rates that would be charged on loans from banks to other banks for different tenors or loan maturities. The origination of LIBOR is credited in large part to a Greek banker named Minos Zombanakis, who in 1969 helped syndicate an $80 million loan for the Shah of Iran, by pooling a group of banks and periodically setting the interest rate based on the funding costs of the banks. For decades thereafter, LIBOR has been a critical component in the financial markets, serving as both a benchmark rate and a reference rate for a variety of financial transactions and contracts, but while LIBOR's use became more widespread in the 1970s and early 1980s, it was not until 1986 that the British Bankers' Association ("BBA") formally took control governing LIBOR and its data and methodology process.

Although the BBA was tasked with formalizing and governing LIBOR, claims of LIBOR manipulation during and shortly after the 2007-2008 financial crisis called into question the legitimacy and reliability of LIBOR and its administration. Such claims alleged that participant banks were providing artificially low interest rates in order to appear more financially secure during the crisis because, in theory, a lower rate represented a more reliable loan with less risk of default.

In response to such claims, regulatory and criminal authorities in multiple countries (including the United States and the United Kingdom) began to investigate how LIBOR participant banks were establishing their rates. The result of their investigations determined that not only were banks manipulating their interest rates, but they were also colluding with other participant banks while doing so. The penalties for the LIBOR manipulation and collusion resulted in multiple major international financial institutions, including Barclays, UBS, JPMorgan Chase, Deutsche Bank and others, paying billions of dollars in settlement payments and fostered a general public distrust for the credibility and reliability of LIBOR. However, on January 27, 2022, the 2nd U.S. Circuit Court of Appeals in Manhattan overturned the convictions of two individual Deutsche Bank traders, stating that prosecutors' evidence was insufficient to prove that the individuals caused Deutsche Bank to make false or misleading LIBOR submissions.

In addition to billions of dollars in settlement payments and other punishments, one of the primary outcomes of that investigation was that the UK's primary financial regulator, the Financial Conduct Authority (the "FCA"), transferred oversight and regulation of LIBOR to the ICE

Benchmark Association (the "IBA") in early 2014. Since the FCA transferred oversight to the IBA, financial market participants have been searching for an alternative reference rate to replace LIBOR, and in July 2017, the FCA announced that it was planning for the cessation of LIBOR by the end of 2021. As such, lenders and borrowers have had to account for LIBOR's eventual cessation in their loan documents and other financial contracts by implementing alternative reference rate transition definitions and provisions.

In December 2014, in consideration of finding a sufficient replacement rate for LIBOR, the Federal Reserve Board (the "Fed") and the New York Federal Reserve, in consultation with the U.S. Department of the Treasury (the "Treasury"), the U.S. Commodity Futures Trading Commission and the U.S. Office of Financial Research, created a group of private financial market participants, known as the Alternative Reference Rates Committee (the "ARRC"), which was charged with the task of analyzing and identifying LIBOR's eventual replacement rate.

*ARRC's Recommendations and Approaches*

Since its inception, the ARRC has published periodic updates and recommendations for proposed alternative reference rates. In August 2020, the ARRC published updated recommended fallback language for new originations of U.S. LIBOR denominated bilateral business loans, and the update was intended to make the recommended fallback language for bilateral business loans more consistent with the ARRC's recommended fallback language for new originations of syndicated loans. Additionally, in its update, the ARRC also discussed the different approaches potentially used by financial market participants may use in implementing LIBOR cessation language in different financial contracts. There different approaches are: (i) the "hardwired" approach, (ii) the "amendment" approach, and (iii) the "hedged loan" approach.

Under the "hardwired" approach, where the replacement terms are "hardwired" into the documents in anticipation of LIBOR being unavailable, the loan documents set forth specific and defined LIBOR transition terms and conditions in the loan documents so that the parties agree upon the trigger event(s), the new reference rate and the rate spread at the time the loan is originated (i.e., the transition terms and conditions are "hardwired" into the documents) rather than waiting until LIBOR is no longer available.

With the "amendment" approach, the alternative reference rate specifics are not "hardwired" into the document or agreed upon by the parties in advance, but rather, the documents provide for amendment procedures in which the parties will agree upon the new reference rate terms and conditions (such as the rate itself and the spread) at a future date.

Finally, the "hedged loan approach" is applicable for loans that utilize a replacement reference rate and where borrowers enter into interest rate swaps to hedge their floating rate interest exposure. The ARRC's August 2020 updated recommendation provides for a benchmark rate floor in the "hedged loan approach," because ARRC assumes the parties would expect a negotiated rate floor to apply after the transition.

*The Hardwired Approach*

The ARRC took into consideration the pros and cons of the different approaches, but the ARRC has and continues to emphasize that it recommends loan parties implement the "hardwired" approach in their loan documents. Additionally, in line with the ARRC's recommended best practices published in May 2020, and updated on August 27, the updated fallback language is only to the "hardwired" approach and the "hedged loan" approach, but it excludes the "amendment" approach. The belief is that implementing "hardwired" fallback language offers more clarity and certainty whereas with an "amendment" approach, the market participants would have to wait and agree upon a new reference rate upon LIBOR cessation, which could lead to uncertainty and problems administering the loan.

In sum, ARRC's principal reasons for requiring the adoption of the hardwired approach over the amendment approach are:

- Hardwired fallback language offers certainty as to what the replacement rate and spread will be and likely gets rid of the need to amend the loan at the time of the LIBOR transition.
- There will be no winners and losers due to different market cycles. In a borrower-friendly market, a borrower may be able to extract value from the lender by refusing to include a spread adjustment when transitioning to the alternative rate.
- In a lender-friendly market, a lender might block a move to a comparable rate, forcing the borrower to pay a higher interest rate for a period.
- The amendment approach may require the lender and borrower to agree on the replacement rate and amend the loan documents accordingly, which may be difficult to accomplish prior to LIBOR's cessation. Lenders may be overwhelmed by the large number of loans that would have to all be amended within the same timeframe upon LIBOR cessation, and that if such loans cannot be timely amended, there would be significant disruption in the financial markets.

*SOFR: Secured Overnight Financing Rate*

A key component of the recommended "hardwired" approach depends on utilizing a reliable alternative reference rate. In 2017, the ARRC officially recommended, and continues to recommend, that lenders and borrowers adopt the Secured Overnight Financing Rate (SOFR) as the alternative reference rate to LIBOR. Like LIBOR, SOFR is also an interbank rate that serves as both a benchmark and reference rate, but unlike LIBOR, SOFR is a *secured* risk-free rate that banks would be willing to use on overnight loans to each other. Further, unlike LIBOR, which uses estimated forward-looking average rates for unsecured financing, SOFR measures observable overnight interest rates for secured financing in the United States.

Because LIBOR and SOFR have methodologies for calculating rates, ARRC encourages implementing a "spread adjustment" to minimize the difference between the two rates when LIBOR ceases. The spread adjustment methodology recommended by ARRC would be based on a historical median over a five-year lookback period calculating the difference between U.S. LIBOR and SOFR. SOFR is published on the Federal Reserve Bank of New York's website every U.S. business day at 8 a.m. ET. After recommending SOFR, the issue then became how lenders and borrowers would actually incorporate and draft SOFR into their loan documents. Accordingly,

the ARRC has explored how lenders and borrowers should prepare their loan documents to provide for "fallback language" for the eventual cessation of LIBOR.

Among the most important elements of drafting fallback language are references to permanent cessation and pre-cessation "trigger events" (*e.g.* an official public statement or publication of information from the FCA or the IBA that the actual cessation of LIBOR has occurred or is expected to occur) in the recommended fallback language. Once a trigger event occurs, the LIBOR replacement rate shall be established pursuant to a three-step waterfall. With its August 27 update, the ARRC modified the second step in the waterfall to utilize a Daily Simple SOFR rate (instead of a compounding rate), so that the waterfall now flows as follows: (i) Term SOFR *plus* Adjustment, (ii) Daily Simple SOFR *plus* Adjustment, and (iii) a Lender Selected Rate *plus* Adjustment. This updated waterfall means Daily Simple SOFR would be used if the ARRC determines that a robust forward-looking SOFR term rate is not available. With a Daily Simple SOFR loan, interest accrues in arrears based on SOFR for each day in the interest period. ARRC modified its recommendation to a Daily Simple SOFR instead of a Daily Compounded SOFR because implementing simple interest is more straightforward and the basis between simple and compounded SOFR, if any, is typically a few basis points or less. The third prong of the waterfall, the Lender Selected Rate, would only be used if ARRC decides that neither Term SOFR nor Daily Simple SOFR is available to be implemented.

Despite the ARRC's recommendation for a "hardwired" approach, many U.S. lenders, particularly capital funds and other non-bank lenders, have expressed concern that SOFR could lead to increased market volatility, which would ultimately reduce banks' willingness to make credit available. Because of the desire to have flexibility and the fact that lenders are not comfortable yet on using SOFR many opted to use the amendment approach.

*Trigger Event: Cessation Certainty*

On March 5, 2021, the FCA and IBA each made official announcements regarding the future of LIBOR, providing a "trigger" event as noted by the ARRC. Additionally, both announcements provided much needed certainty for financial markets and market participants both as to the timing of the LIBOR termination and as to the economic impact of the transition to alternative reference rates.

The announcements confirmed that IBA could no longer publish LIBOR and therefore set specific cessation dates for all LIBOR tenors and some of those cessation dates have now already occurred. Specifically, all non-US LIBOR tenors ceased as of December 31, 2021 and the 1-Week and 2-Month tenors for US LIBOR also ceased as of such date. However, there are some US LIBOR tenors that remain available for the time being, as the cessation dates for the Overnight and 1, 3, 6, and 12 Month tenors do not occur until June 30, 2023.

The one caveat to these firm cessation dates is that, under the UK's Financial Services Bill, FCA possesses the ability to require IBA to continue publishing 1-Month, 3-Month and 6-Month U.S. LIBOR after June 30, 2023, provided that IBA does so on a "synthetic" basis, meaning it must

change its methodology for the rates. However, FCA has not stated whether it will exercise this requirement, but it has indicated that it will consult and evaluate whether the new "synthetic" U.S. LIBOR might be necessary for certain "tough legacy" financial contracts, where implementing a new replacement reference rate would be particularly problematic.

In addition to the timing certainty, the recent announcements also provided additional clarity on the economic impact of transition away from LIBOR. The economic clarity provided stems from a statement by the International Swaps and Derivatives Association (ISDA) that pursuant to ISDA IBOR Fallbacks Protocol and ISDA IBOR Fallbacks Supplement, an "Index Cessation Event" occurs upon the earlier of LIBOR (i) no longer being provided, or (ii) becoming "non-representative". According to ISDA, per FCA's announcement that LIBOR will cease to be published after the dates set forth above or will be "non-representative", an "Index Cessation Event" did occur. Further, with an "Index Cessation Event" having occurred, the fallback spread adjustment is also established. Referencing the FCA announcement, ISDA declared, "Today's announcement constitutes an index cessation event under the IBOR Fallbacks Supplement and the ISDA 2020 IBOR Fallbacks Protocol for all 35 LIBOR settings. As a result, the fallback spread adjustment published by Bloomberg is fixed as of the date of the announcement for all euro, sterling, Swiss franc, US dollar and yen LIBOR settings." As a result, market participants no longer face the uncertainty of when an index cessation event will occur or what the spread adjustments might be.

*Simplifying Fallback Language*

Following the certainty provided by FCA and IBA announcements, on March 25, 2021, the ARRC supplemented its recommended fallback language for new originations of U.S. LIBOR denominated syndicated and bilateral business loans. The supplemental fallback language simplifies the previous fallback language recommended by ARRC for syndicated loans and bilateral business loans while maintaining ARRC's stated goal that lenders and borrowers implement SOFR "hardwired" fallback language for clarity and certainty as market participants prepare for LIBOR's upcoming cessation. However, while ARRC continues to strongly recommend its "hardwired" fallback language, ARRC reiterated that whether lenders and borrowers do so is voluntarily, and that lenders and borrowers should independently evaluate their existing financial contracts and decide whether to implement such recommended language.

By leaning on the economic and timing certainty provided by the FCA and IBA announcements, ARRC was able to update its previously recommended fallback language to "simplify the fallback language and to offer additional transparency into the spread adjustments that will be applied to fallback rates upon transition." More specifically and most notably, ARRC's updated language: (i) eliminates and consolidates definitions now that there are set dates for when the trigger event for the transition away from LIBOR will occur, (ii) provides for what the payment period will be for loans that have made the transition to Daily SOFR, and (iii) with the spread adjustments having been fixed, ARRC implements the spread adjustment values within the definition of "Benchmark Replacement."

*Ameribor: Alternative to the Alternative*

While the ARRC continues to promote, and many large, traditional banks are adopting, SOFR as the preferred alternative reference rate to LIBOR, another alternative rate, the American Interbank Offered Rate, more commonly known as "Ameribor", has also been recently introduced to the markets. Ameribor is published on the American Financial Exchange ("AFX") and is calculated on the weighted average of unsecured overnight interbank transactions on the AFX. Community, state and smaller regional banks may prefer Ameribor as an alternative replacement rate under the theory that Ameribor accounts for credit risk in the markets and the AFX is a regulated exchange.

*New York Law*

It is not just banks and lenders that are taking action to prepare for the pending LIBOR cessation, but state governments are also examining the issue. On April 6, 2021, then New York governor Andrew Cuomo signed into law a bill that mandates if a financial contract is governed by New York law and such contract references US LIBOR but does not contain LIBOR replacement language, then US LIBOR shall automatically be deemed by operation of law to be replaced by the "recommended benchmark replacement", which shall be based on SOFR and shall have been selected or recommended by the Federal Reserve Board, the Federal Reserve Bank of New York or the ARRC for the applicable contract. However, the New York law does not override any existing replacement language that is in a contract, and it does not extend to financial contracts that are not governed by New York law.

*Conclusion: Next Steps for Lenders and Borrowers*

In spite of the recommendation by the ARRC to implement SOFR using the hardwired approach, some are continuing to adopt the amendment approach – at least for now – while they explore options for a different replacement rate. A group of regulator-convened U.S. regional banks part of the Credit Sensitivity Group met on July 22, 2020 and, based on the minutes, claimed that a more credit sensitive rate is required as an alternative to SOFR with the currently contemplated spread adjustment. One potential alternative to SOFR that has been gaining attention in the financial markets is Ameribor, because it does take into account credit risk. Further, because borrowers, and some lenders, remain unfamiliar with SOFR, many continue to utilize the "amendment approach" due to its flexibility rather than commit to SOFR at this time, and while ARRC continues to push the "hardwired approach" and hopes the updated and simplified fallback language will provide clearer guidance for lenders and borrowers, adopting such approach remains a voluntary and independent decision for market participants. The ARRC recommendation is just that and ultimately lenders and borrowers are the ones that will decide whether to implement or adopt any of the suggested contract language.

Many non-bank financial institutions, such as private debt funds, and their borrowers, particularly private equity sponsors and their portfolio companies, prefer to negotiate directly with one another and will address the LIBOR replacement once there is more pricing certainty with the rate

alternatives. Meanwhile, traditional national and regional banks have adopted the "hardwired approach" and are requiring replacement language in all of their loan documents, which such replacement language generally tends to be in line with the ARRC's recommendations (i.e. SOFR) and does not leave much room for negotiation or input from borrowers. Given the fact that SOFR is perceived as less certain than LIBOR, Lenders have been even more reluctant to negotiate these provisions than ever the past few quarters.

In any event, the reality is that there is not a lot of time for market participants to support a different replacement rate as some LIBOR tenors have already stop being published and the remaining tenors for US LIBOR will cease by the middle of next year.

While some private debt funds are still using the amendment approach, with the March announcements by the FCA and IBA, all lenders need to consider using a rate other than LIBOR on new loan originations and most are now using SOFR on new CRE loans. One unanticipated outcome we have seen in the past few months is that the combination of or anticipation of a rising interest rate environment combined with the general uncertainty of SOFR on an intermediate to long term basis has resulted in increased costs for interest rate cap agreements that need to be purchased for longer than 18-24 month terms.

Finally, with the recent FCA and IBA announcements, finance market participants now have long awaited certainty as to both when the publication of the different LIBOR tenors will occur and also as to how that cessation event means for fallback spread adjustments. As a result, ARRC was able to simplify its recommended fallback language while maintaining the substance of its recommendations – that both lenders and borrowers need to evaluate their existing loan documents and implement a "hardwired" approach adopting SOFR as the replacement reference rate.

# ICSC+LAW SYMPOSIUM OH/KY/IN/MI/PA

**Renaissance Columbus Downtown Hotel**

**Columbus, OH**

**Friday, March 18, 2022**

**3:45 – 4:45 pm**

## Session 5A: Practical Tips for Avoiding Trouble When Working Remotely: Privilege, Confidentiality, Technology Competence and More

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The COVID-19 pandemic has been a monumental challenge on so many levels. But as the saying goes, "change is good" and with challenge comes to the opportunity to test ourselves, expand our skill sets, and increase our resilience and flexibility. This workshop is designed to explore both what we have learned from working remotely and virtually, and how we can incorporate those lessons into our law practices in the future. Bar Associations across the nation also rose to the challenge to provide us with guidance regarding best practices and strategies to address the new realities of our practice in a manner that is consistent with our ethical obligations as attorneys.

***The Basic Concepts: So What are the Rules?***

**State Bar Guidance:** Remote practice does not alter a lawyer's ethical duties in any respect. Here is a California example in the form of a Draft Formal Opinion Interim No. 20-0004 Ethical Obligations When Working Remotely: https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000027511.pdf

**American Bar Association**: Formal Opinion 495, Lawyers Working Remotely, issued December 16, 2020 and Formal Opinion 498, Virtual Practice, provides numerous guideposts for working remotely, and that state bars look to for guidance in state rules. See https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility /aba-formal-opinion-495.pdf

Several principles can be elucidated from the ABA Opinion of relevance, even if not adopted directly by state bars. *First,* all the rules regarding UPL (unauthorized practice of law) still apply – you are practicing law in the jurisdiction you are actually sitting in while working remotely, but there is flexibility in the rules. *Second,* technology is a blessing and a curse – exercise care and focus on cybersecurity. *Third*, a lawyer must always uphold their duties of clear communication, diligence and competence, regardless of the technology used and the location where they are using it. *Fourth*, the ABA has a Cybersecurity Handbook that lawyers can familiarize themselves with, and have their IT staff familiarize themselves with in order to implement security protocols: "The ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals, Second Edition"

**Model Rule 5.5**: The key consideration is how the lawyer holds herself out to the public. *Appendix 1* provides the text of the Rule. In essence, an attorney may not establish "an office or other systematic and continuous presence" where they are not properly licensed. However, every attorney potentially engaged in such practices should check their local rules, including both those of the state where they are sitting and the places where they are presumptively practicing as both may have rules that apply. Particularly in light of the recent past, the local rules continue to evolve. *Appendix 2* provides a cautionary tale: No Good Deed Goes Unpunished – a Harsh Lesson on Multi-Jurisdictional Practice.

**California Rules of Professional Conduct** – Rule 1.1 Competence. California's Rule 1.1 concerning competence was updated as of March 22, 2021 – *see Appendix 3.* It made a key addition concerning the duty of the lawyer to keep abreast of changes, ***including the benefits associated with relevant technology.*** The Rule also references a lawyer's obligation to supervise subordinate lawyers and nonlawyers, a practice made more challenging in a remote environment.

**Other Jurisdictions:** Various other jurisdictions have enacted new rules on "working from home" and they cover a variety of practical scenarios.

The **Pennsylvania Bar Association** has issued guidance that includes advice on handling client information in a home environment. *See Pennsylvania Bar Association Formal Opinion 2020-300*. https://www.pabar.org/members/catalogs/Ethics%20Opinions/formal/f2020-300.pdf

The **District of Columbia Court of Appeals Committee on Unauthorized Practice of Law** issued an opinion concluding that "persons who are not District of Columbia bar members may practice law from personal residences or other locations within the boundaries of the District of Columbia, as that practice constitutes "incidental and temporary practice" *See Opinion 24-20: Teleworking from Home and the COVID-19 Pandemic. http://dccourts.insomnation.com/sites/default/files/2020-03/CUPL-Opinion-24-20_0.pdf*

In **Florida**, the UPL Standing Committee issued an advisory opinion finding that an out-of-state licensed attorney working remotely from his Florida home for his out-of-state law firm on matters of federal law was not engaged in the unlicensed practice of law. Key to this determination was the fact that the lawyer did not have or create a public presence or profile in Florida as an attorney. *See Opinion No. SC20-1220 issued May 20, 2021 by the Supreme Court of Florida*. https://www.floridasupremecourt.org/content/download/743446/opinion/sc20-1220.pdf

In **New York**, the Rules of the Court of Appeals for the Temporary Practice of Law in New York allow a lawyer not admitted in the State to provide legal services on a temporary basis provided that:

> (a) A lawyer who is not admitted to practice in this State may provide legal services on a temporary basis in this State provided the following requirements are met.
>
> (1) The lawyer is admitted or authorized to practice law in a state or territory of the United States or in the District of Columbia, or is a member of a recognized legal profession in a non-United States jurisdiction, the members of which are admitted or authorized to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority; and
>
> (2) the lawyer is in good standing in every jurisdiction where admitted or authorized to practice; and
>
> (3) the temporary legal services provided by the lawyer could be provided in a jurisdiction where the lawyer is admitted or authorized to practice and may generally be provided by a lawyer admitted to practice in this State, and such temporary legal services:
>
> > (i) are undertaken in association with a lawyer admitted to practice in this State who actively participates in, and assumes joint responsibility for, the matter; or
> >
> > (ii) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer or a person the lawyer is assisting is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; or
> >
> > (iii) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in this or another jurisdiction, if the services are not services for which the forum requires *pro hac vice* admission; or
> >
> > (iv) are not within paragraph (3)(ii) or (3)(iii) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted or authorized to practice. [*Rule 523*]

## Putting It Into Practice: The Every Day Realities

While staying abreast of rule changes that may affect your practice is difficult, putting all of these rules into practice is more so. Several considerations should be given to facilitate compliance with the rules that continue to evolve for lawyers engaging in remote practice: ***First,*** if you are not at a "big firm" with a cutting edge IT department, may be necessary to onboard a consultant or other advisor to advise as to use of technology and adopting new technology. ***Second,*** hardware and software systems must be protected from unauthorized access: encryption, anti-virus measures, security updates, secure routers, measures to address stolen identities. ***Third***, the security of "Dropbox" methods is of paramount concern when transmitting confidential documents. You need the surefire ability to lockout unauthorized collaborators, track access and entry. ***Fourth***, confidentiality is more of a challenge when you work virtually. There are benefits and risks of all the virtual communication and videoconferencing platforms – Zoom, Teams, Chime, etc. It is both difficult and necessary to stay up with all the latest security measures. ***Fifth***, an Emergency Preparedness Plan should be prepared. Everyone needs one, regardless of the size or type of your office or company. We are now requiring this in most tenant leases, including law firms. It is easy to have a phone tree, but more complicated to develop and implement a data breach policy and a plan to communicate with clients in the event of a breach. ***Sixth***, there are pitfalls of Smart Speakers as they are always listening! ***Seventh***, for notices and service of process, there should be means to stay in touch with your team. Is anyone checking on what actually came to the office? Many examples over the past year of missed official notices and defaults. ***Eighth***, retention agreements for consultants, vendors and experts need to be analyzed. Likely, these templates all need to change and evolve with the circumstances of remote practice by the lawyers and the experts/consultants. Many clients are requiring law firms to sign and update cybersecurity policies and addressed directly to benefit the client's sensitive information and data. ***Ninth,*** are you engaging in the Unauthorized Practice of Law (UPL)? Double check yourself! ***Tenth***, accessing client systems for collaboration also includes risk. One client recently sent a whole package of cybersecurity rules and key fobs just to allow us to access a status portal. ***Eleventh***, new "hotdocs" style systems and well known forms (e.g., AIR and CAR) may result in client information stored in the cloud. Before commencing use of any system that populates forms through a cloud-based system, complete a thorough review of the security aspects of each program. Who can get to the information you put into "cyberspace"? Are there alternatives that provide better security? ***Twelfth***, if you print at home, don't forget to SHRED!

## Action Items and Take-Aways

In preparing for this workshop, we reviewed a wide range of information, new rules, commentary and advice. We look forward to discussing new developments and guidelines with you and invite discussion on the following concepts, we also offer the following action items and take-aways to consider as you return to practice.

**A.** Sharing information is more important than ever. Participation in workshops at conferences enables us all to tell our "war stories" ("horror stories") and learn about what can go wrong

**B.** It's ok to be paranoid. Always think about the information you have and who may get it.

**C.** Be careful how you present yourself – on video and in writing - in a legal practice setting. Review the relevant multi-jurisdictional practice rules and act accordingly. You may want to consider adding additional information and specific disclosures to your electronic communications.

**D.** If you are not a cybersecurity maven and you don't have a cutting edge IT department, secure a good outside resource, perhaps sharing with your similarly situated colleagues in the profession.

**E.** Take special care with written and verbal communications when you are outside the office – assume "they" are always listening.

**F.** Don't skip or gloss over those ethics presentations available online and in newsletters. The legal ethics world is constantly evolving and we all need to pay more attention than ever.

Thank you for joining us. We welcome your comments.

**APPENDIX 1**
**California Rules of Professional Responsibility**
**Rule 1.1 Competence**
**(Rule Approved by the Supreme Court, Effective March 22, 2021)**

(a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

(b) For purposes of this rule, "competence" in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.

(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.

(d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

**Comment**

[1] The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

[2] This rule addresses only a lawyer's responsibility for his or her own professional competence. See rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[3] See rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence.

## APPENDIX 2

### No Good Deed Goes Unpunished—A Harsh Lesson on Multi-Jurisdictional Practice
### by John G. Cameron, Jr. *

In a decision that many will find surprising, the Minnesota Supreme Court recently held that engaging in e-mail communications with people in Minnesota may constitute the unauthorized practice of law in Minnesota, in violation of Minn. R. Prof. Conduct 5.5(a), even if the lawyer is not physically present in Minnesota.[1] In this sad case, the Colorado lawyer involved represented a Minnesota couple (his in-laws) with respect to a Minnesota judgment and attempted to negotiate, via e-mail, the satisfaction of that judgment with a Minnesota lawyer.[2] Many lawyers, perhaps even some ACREL fellows, may unwittingly engage in similar practices.

Now a more careful approach may be warranted. Many practitioners may not realize that in most jurisdictions being sanctioned out of state triggers a duty to self-report to all jurisdictions admitted and may then result in "hometown" disciplinary proceedings. Discipline may also trigger ACREL sanctions. And unauthorized practice is unlawful in many jurisdictions.[3] Just because others may do it, or that the counseling may, to you, be *de minimus,* that may not satisfy a bar that is "foreign to you"!

Before 1998, many attorneys assumed that unauthorized practice in a state required some degree of physical presence in the state.[4] The *Birbrower* decision changed that. What, then, is the present state of the law on the subject of contacts sufficient to subject a lawyer to the jurisdiction of a state's rules of conduct and disciplinary proceedings under them? In other words, what constitutes "entry" into a state by a lawyer sufficient to constitute the practice of law there?

The best known decision in this arena is indeed *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119; 949 P.2d 1 (1998). In this case, the California Supreme Court held that an out-of-state law firm, not licensed to practice law in California, violated California law when it performed legal services in California for a California-based client under a fee agreement which stipulated that California law would govern all matters in the representation. *Birbrower* is the seminal decision discussing the unauthorized practice of law under these circumstances.

California's Business and Professions Code Section 6125 provided that "[n]o person shall practice law in California unless the person is an active member of the State Bar." In the early 1990's (prior to the prevalent use of e-mail), three attorneys from a New York law firm, each licensed in New York and not in California (none of the firm's attorneys were licensed in California), performed "substantial work" for a California client under California law. 17 Cal 4th at 124-125. The attorneys traveled to California several times in their representation of the client, and in those meetings, they unquestionably practiced law through the giving of recommendations and legal advice and even filing an arbitration demand in California. *Id.*

The client subsequently sued the law firm for legal malpractice, alleging, among other claims, that the firm practiced law without a license in California, making its fee arrangement unenforceable. *Id.* at 126.

The California court discussed at length the definition of the statutory phrases to "practice of law" and "in California." *Id.* at 127-128. It concluded there was no doubt that the firm was practicing law, but noted that there was no authority on what it meant to practice law "in California." The court said:

> the practice of law 'in California' entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law 'in California.' The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.

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[1] *In re Charges of Unprofessional Conduct in Panel File No. 39302,* 884 N.W.2d 661 (Minn. 2016).

[2] That Minnesota lawyer reported the Colorado lawyer to the Minnesota disciplinary authorities. About the only solace coming out of this decision for the Colorado lawyer is the court's conclusion that the appropriate disposition for this misconduct was an admonition. It is unclear whether the lawyer will be subject to discipline in Colorado.

[3] *See, e.g.,* HRS §§ 605-14, 17; MCL 600.916.

[4] *See* S. Wechsler, "Professional Responsibility," 53 Syracuse L. Rev. 737, 741-43 (2003).

*Id.* at 128. Thus, the concept of "sufficient activities" was raised, though not specifically defined.

The court adopted a case-by-case approach, noting that an unlicensed lawyer's physical presence in the state is only one factor in deciding whether a person engaged in the unauthorized practice of law. "For example, one may practice law in the state . . . although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means," rejecting "the notion that a person automatically practices law 'in California' whenever that person practices California law anywhere or 'virtually' enters the state by telephone, fax, e-mail or satellite." *Id.* at 128-29.

The court ultimately held that the law firm engaged in the unauthorized practice of law in California. In making its decision, the court said "[a]lthough we are aware of the interstate nature of modern law practice and mindful of the reality that large firms often conduct activities and serve clients in several states, we do not believe these facts excuse law firms from complying with section 6125." *Id.* at 124-25.

The Minnesota court, in evaluating the Minnesota lawyer's allegations of the unauthorized practice of law, leaned on the *Birbrower* analysis. "Appellant contacted 'D.R.,' a Minnesota lawyer, and stated that he represented Minnesota clients in a Minnesota legal dispute. This legal dispute was not interjurisdictional; instead, it involved only Minnesota residents and a debt arising from a judgment entered by a Minnesota court." 884 N.W.2d at 666.

A brief review of decisions around the country reveals that other courts have on other facts also found "sufficient contact" to implicate their rules of conduct:

- *In re Williamson*, 838 So.2d 226 (Miss. 2002): Here, the Mississippi court reviewed the lower court's denial of an out-of-state lawyer's motion for admission *pro hac vice.* The lawyer, who was not licensed in Mississippi, had participated in more than five cases in Mississippi within the immediately preceding one-year period, in violation of Mississippi's rules governing the unauthorized practice of law. The Mississippi court held that the lawyer was engaged in the unauthorized practice because he advertised legal services in Mississippi and retained clients specifically to represent them in litigation in courts of that state, but then used local counsel to handle the actual court appearances in an attempt to circumvent the state's practice of law requirements.

- *In re Babies,* 315 B.R. 785 (Bankr. N.D. Ga. 2004): This decision provides a cautionary tale for lawyers who believe they are appropriately seeking local counsel for their out-of-state clients following preparation of documents or similarly limited representation. In this case, Illinois lawyers who were not licensed in Georgia were retained by debtors through a credit counseling referral service. The Illinois lawyers prepared their bankruptcy filings for the debtors and found local counsel in Georgia to represent them. The Georgia counsel filed the bankruptcy papers and appeared as the debtors' sole counsel. After learning that the debtors had paid Illinois counsel for preparing their papers, the court brought all counsel in to determine whether Illinois counsel was engaged in the unauthorized practice of law in Georgia. The court held that the Illinois counsel had engaged in the unauthorized practice of law, but admitted them *pro hac vice* to eliminate any sanctionable conduct, finding that they had operated in good faith in obtaining Georgia counsel. Interestingly, the court held that the Illinois attorneys had performed legal services in Georgia through their use of the telephone and the mail.

- *In re Tonwe*, 929 A.2d 774 (Del. 2007): In this case, a Pennsylvania lawyer was found to have engaged in the unauthorized practice of law in Delaware. She represented Delaware residents in connection with their personal injury claims under Delaware insurance policies from her Delaware office. The lawyer lived in Delaware, was active in networking with church groups in Delaware, and actively recruited clients in that state.

- *In re Ferrey*, 774 A.2d 62 (R.I. 2001): In this case, a Massachusetts attorney actively practicing law before the Rhode Island Energy Facility Siting Board sought *pro hac vice* admission, *nunc pro tunc*, to the Rhode Island bar. However, the Board before which he had been practicing did not have the authority to grant the attorney permission to practice before it, so the lawyer sought admission through the courts. The court refused to admit the attorney *nunc pro tunc* because he was not authorized to practice law in Rhode Island and did so unlawfully, but did permit a prospective *pro hac vice* admission.

Thus, *Birbrower's* "sufficient-contact" analysis seems to be consistent with the way most courts analyze cases involving contact (i.e. emails,[5] phone calls, etc.) emanating outside of their state. The two key factors seem

[5] Notably, all of the cases discussed above involve a sustained pattern of communications being sent into the state. None of the cases deal with a situation where an attorney sent but a single email message.

to be: (1) whether the attorney advises the client on the law of the state or engages in conduct, like negotiations, that might require knowledge of the law; and (2) whether the client is located in the state where the attorney is unlicensed.[6] Where the answer to both of those questions is "yes," courts tend to find unauthorized practice in the state. But where the answer to at least one of those questions is "no," courts tend find that the attorney did not engage in unauthorized practice in the state.

Two decisions illustrate the latter point:

In *Fought & Co. v. Steel Eng'g & Erection, Inc.,* 87 Haw. 37; 951 P.2d 487 (1998), the law firm at issue, that consulted with the Hawaiian counsel that was in charge of their common client's litigation, was located outside of Hawaii and did not appear in any Hawaii court on Fought's behalf. Its services in connection with the Hawaii litigation did not constitute the unauthorized practice of law because Fought and the law firm were both located in Oregon; hence, the law firm did not represent a Hawaiian client, all services performed by the law firm were in Oregon, and the law firm did not draft or sign any papers filed during the appeal, did not appear in court, and did not communicate with counsel for other parties on Fought's behalf.

According to the Hawaii court, the following did amount to the practice of law, but because none were conducted in Hawaii members of the Oregon firm were not subject to discipline there:

- Consultation with Fought and Fought's Hawaiian counsel regarding an appeal
- Preparation of Fought's statement of position in anticipation of mediation
- Assisting Fought's Hawaii counsel with legal research, analysis of briefs and papers submitted by other parties
- Resolution of issues pertaining to the posting of bond
- Planning Fought's strategy for the appeal
- Reviewing and critiquing briefs and other papers prepared by Fought's Hawaiian counsel

*El Gemayel v Seaman,* 72 N.Y.2d 701; 533 N.E.2d 245 (1988), involved an attorney admitted to practice in Lebanon and working as a Middle Eastern law consultant in Washington, D.C., who sought fees incurred in New York in connection with a Lebanese legal matter. His contacts with New York were deemed incidental and innocuous:

- Client residing in New York sought his advice on whether Lebanese courts would honor a Massachusetts custody decree
- He made frequent phone calls to client in New York to report on progress of the case
- He made a single visit to New York to return luggage client had left in Lebanon (although they did discuss the bill he was owed during that visit)
- He mailed his bill to New York

The lawyer had contacts in places other than New York:

- He rendered his opinion in a letter addressed to clients in Massachusetts
- The bulk of plaintiff's services were performed in Lebanon
- He accompanied client and her Massachusetts attorney to a Massachusetts court to obtain copy of judgment
- He authenticated documents so that they could be used in Lebanon
- He helped client complete a power of attorney form and in applying for a Lebanese visa[7]

It is important to remember that the rules in many states expressly allow an out-of-state attorney to "occasionally" or "temporarily" represent clients in the state, if the representation arises out of that attorney's authorized practice in his home state. *See* ABA Model Rule 5.5; 8.5. Like the "sufficient contact" test itself, these exceptions seem to turn in large part on whether the client is located in the state where the attorney is unlicensed to practice. *See, e.g., In re Babies,* 315 B.R. 785 (Bankr. N.D. Ga. 2004) (lengthy discussion of when it is appropriate for an attorney to continue advising an existing client in another state).

Finally, although this is not the unanimous opinion of members of the ACREL Committee on Professional Responsibility, it seems that states generally are not concerned with attorneys who represent out-of-state clients

[6] Indeed, the behavior that is most likely to subject an attorney to discipline is the engagement of a new client in a state where the attorney is not licensed, and advising that client or negotiating on behalf of that client in a way that relates to the law of the state where the attorney is not licensed.

[7] The lawyer arguably engaged in the practice of law in Massachusetts, but that wasn't an issue in this case.

with respect to out-of-state matters while vacationing or visiting. See comments to Florida Rule 4-5.5; Maine Professional Ethics Opinion #189. The same two factors that courts consider with respect to extraterritorial activities seem to also be the most relevant when the out-of-state attorney is physically present in the state.

**APPENDIX 3**
**American Bar Association Model Rules**
**Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law**

***Law Firms And Associations***

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

**Comment on Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law**
***Law Firms And Associations*:**

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rule 7.1.

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d) and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission *pro hac vice* before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted *pro hac vice*. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [Model Court Rule on Provision of Legal Services Following Determination of Major Disaster].

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. See also Model Rule on Temporary Practice by Foreign Lawyers. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another United States or foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is

well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under paragraph (d)(1) of this Rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See Model Rule for Registration of In-House Counsel.

[18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. See, e.g., Model Rule on Practice Pending Admission.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.3.

# ICSC+LAW SYMPOSIUM OH/KY/IN/MI/PA

**Renaissance Columbus Downtown Hotel**

**Columbus, OH**

**Friday, March 18, 2022**

**3:45 – 4:45 pm**

## Session 5B: Title 102: Why is That on my Survey and in my Title Commitment? How to Resolve Common Title and Survey Issues.

**Panelists**

**Donald G. Groesser**

**Civil & Environmental Associates, Inc.**

**Pittsburgh, PA**

**Rebecca L. Mishner**

**Chicago Title Insurance Company**

**Cincinnati, OH**

**Alan K. Sable**

**Sable and Sable, LLC**

**Cranberry Township, PA**

ICSC+LAW SYMPOSIUM OH/KY/IN/MI/PA
Renaissance Columbus Downtown Hotel, Columbus, OH
March 17- 18, 2022

*This introductory level session will have title insurance and survey experts discuss how to identify and (hopefully) resolve common – and not so common – title and survey issues.*

# TITLE 102: WHY IS THAT ON MY SURVEY AND IN MY TITLE COMMITMENT? HOW TO RESOLVE COMMON TITLE AND SURVEY ISSUES

I. Title Insurance

- A. What is it?
- B. Why do you need it?
- C. What does it show and how does it show it?
- D. What do you get with title insurance?

II. The ALTA Survey

- A. What is an ALTA Survey?
- B. What does an ALTA Survey include?
- C. How is an ALTA Survey performed?

III. Title Issues

- A. What are title issues?
- B. Where do title issues show up?
  - 1. Schedule B-II of the Title Insurance Commitment
    - a. Standard exceptions
    - b. Specific exceptions
  - 2. ALTA Survey
    - a. Encroachments
    - b. Easements
    - c. Improvements

IV. Resolving and Addressing Title Issues

- A. Title insurance endorsements
- B. Curative actions

V. Practical Tips

*This introductory level session will have title insurance and survey experts discuss how to identify and (hopefully) resolve common – and not so common – title and survey issues.*

# TITLE 102: WHY IS THAT ON MY SURVEY AND IN MY TITLE COMMITMENT? HOW TO RESOLVE COMMON TITLE AND SURVEY ISSUES

## I. Title Insurance

What is title insurance? Title insurance is a policy of indemnity that is issued in favor of an owner, lessee, lender, or other holder of an estate or interest in real estate. Having a title insurance policy means that the title insurance company will indemnify or reimburse the insured for actual losses caused by a covered title issue, defect or other covered matter. In practical sense, a title insurance policy is a contract between an insured (whether an owner or lender) and a title insurance company where the title insurance company, in exchange for the payment of a fee (a premium) by the insured, agrees to pay the insured a sum of money if a certain event or events occurs. The title insurance company's obligations are subject to certain exclusions and conditions set forth in the title insurance policy. More specifically, a title insurance policy is an insurance policy that provides coverage to the insured for future claims or future losses that occur due to title defects that were created by a past event. Unlike traditional insurance, which insures against risk of loss arising from events that occur in the future, title insurance insures against risk of loss arising from events that occurred in the past. For title insurance purposes, a "past event" or "in the past" means prior to the insured taking title to the insured real property (in the case of an Owner's Policy of Title Insurance) or the making of a loan by the insured to the party who owns the real property (in the case of a Loan Policy of Title Insurance).

Title insurance insures against loss or damage suffered by the insured (whether an owner of real property or a party with another interest in the real property) as a result of defects in the title to that real property as of the date of the title insurance policy. In short, title insurance insures the quality of title to real property. Generally, there are two (2) types of title insurance policies: (1) an Owner's Policy of Title Insurance; and (2) a Loan Policy of Title Insurance. An Owner's Policy insures that an owner of real property has good title to the subject real property. A Loan Policy insures the validity and priority of a lender's security interest in the subject real property. **It is important to understand that title insurance insures an interest in real property only.** What constitutes an interest in real property will depend on the laws of the state where the property is located.

Title insurance policies provide coverage against various specified items, including, among other things, the existence of title defects. Title issues and defects insured against include (a) forgery, fraud, incompetency and incapacity, (b) lack of authority of a person or entity to authorize a transfer or conveyance, including the granting of a security interest, or (c) improper, or lack of notarization, witnessing or execution of a document. Such matters include other persons claiming an interest in the real property or, for purposes of this discussion, other encumbrances affecting

the real property that were not otherwise set out as an exception in the title insurance policy. Lender's coverage (i.e. a Loan Policy of Title Insurance) insures the priority and validity of the lender's lien on the property. Some of the items that title insurance covers are known or knowable because they are matters of public record or visible by an inspection of the property (e.g. easements, possessory rights, encroachments, liens, etc.) and others are hidden because they are not shown by the public record (e.g. forgery, incompetency or incapacity of the parties, etc.). The title issues discussed in these materials are those that are known or knowable, as described above.

There are many reasons that an owner or lender should purchase title insurance. In general, title insurance protects the insured's investment in the real property by providing a legal defense to claims against, or defects in title to, the real property, monetary compensation to reimburse the insured for losses sustained as a result of claims against, or defects in title to, the real property, or both a legal defense and monetary compensation. In addition, unlike an attorney's opinion of title, title insurance provides coverage regardless of negligence in the search process or analysis. More importantly, if the title insurance company identifies title defects when you are buying real property, the seller has to resolve them at its cost. If you do not buy title insurance, you will likely have to resolve those issues when you sell the real property.

In order to obtain a title insurance policy, the title insurance company issues a Title Commitment. The Title Commitment is your roadmap to the closing and the final title policy. It sets forth the information for the policy or policies that will be issued, the title underwriter's requirements for the issuance of a final title policy and specifies the exceptions that the title underwriter will include in the final policy unless those exceptions are able to be eliminated prior to the closing. Along with the Title Commitment you should receive copies of the Schedule B-I, Schedule B-II exception documents (which include documents, typically of record, that may constitute title defects) and vesting documents. **It is important to understand that matters of title go hand in hand with the survey.** You should provide a copy of the Title Commitment and all supporting documents to your surveyor immediately upon receipt so the surveyor has adequate time to depict the Schedule B-II Exceptions on the survey, in addition to other matters that the surveyor identifies.

In that regard, Schedule B-II of the Title Commitment sets forth the exceptions from coverage under the title insurance policy to be issued. These are documents or instruments that are recorded in the public record that affect and/or encumber the subject property. You should carefully review each exception to determine how it affects the subject property – does the exception create an encumbrance that would affect the proposed development or future marketability of the property? Does the exception place obligations/burdens on the owner of the property that you or your client may not want to assume (*i.e.*, maintenance of a lift station or easement area)?

Schedule B-II will also contain standard exceptions that are found in all Title Commitments; however, the wording and numbering may vary slightly from state to state. Also, some states may have other state specific standard exceptions that may or may not be able to be removed. The standard exceptions are typically the following:

1. The gap between the latest search date available for the public records and the recordation of the insured instrument;

2. Rights of parties in possession;

3. Easements not shown in the public records;

4. Encroachments, overlaps, boundary line disputes, shortages in area and other matters that would be disclosed by a survey;

5. Mechanics liens not shown in the public records;

6. Real estate taxes for current and prior years which are hereafter assessed and are not yet due and payable;

7. All roads, public and private, affecting the real property; and

8. In some states, such as Pennsylvania, Ohio and Kentucky, coal and related mining rights, subsidence and support rights, and oil, gas and mineral extraction and development rights.

Generally, some of these standard exceptions can often be removed upon receipt of an ALTA "as-built" survey or a survey meeting the minimum technical standards for the state where the property is located, which has been completed within 90 days before the date of closing. However, if the standard survey exception is removed, it should be replaced with any specific survey exceptions shown on the survey.

The typical Title Policies issued in commercial transactions are the commercial Owner's Policy and the commercial Loan Policy. Though there are different title insurance policies available, the basic components of the title insurance policies are the same: (a) a jacket; (b) Schedule A; (c) Schedule B (called Schedule B, Part I on a Loan Policy); (d) Schedule B, Part II (only on a Loan Policy); and (e) any endorsements. For purposes of this discussion, we will focus on the jacket and Schedule B.

With regard to title issues and defects, the jacket contains the boilerplate language[1] of the title insurance policy. As noted above, the Covered Risks include, but are not limited to, the following:

1. Title being vested other than as set forth in Schedule A of the policy.
2. Defects in title or liens or encumbrances on title, including defects caused by forgery, fraud, incompetency or incapacity, lack of authority to transfer or convey, improper or missing signature, notarization or witnessing, improper filing, recording or indexing, and invalid powers of attorney.
3. Unmarketable title.
4. Lack of access to and from the real property.

[1] Note that the boilerplate language in the jackets of title insurance policies can vary from state to state.

Schedule B contains the exceptions to coverage. The exceptions, which are different from the Exclusions contained in the jacket, are comprised of two (2) categories. Similar to the Title Commitment, the first are "standard" exceptions. Standard exceptions apply to all title insurance policies and all real property being insured. Standard exceptions vary slightly between different states, but typically include (1) rights or claims of parties in possession, (2) easements, encroachments, shortages of area and boundary line issues that an accurate and complete survey would disclose (the so-called "survey exception"), (3) mechanic's liens, (4) real estate taxes for current and prior years which are hereafter assessed and are not yet due and payable, and (5) all roads, public and private, affecting the real property. In some states, such as Pennsylvania, Ohio and Kentucky, additional standard exceptions can include coal and related mining rights, subsidence and support rights, and oil, gas and mineral extraction and development rights.

The second category of exceptions is specific exceptions. Specific exceptions are those Exceptions that apply specifically to the real property being insured. Specific exceptions are typically identified during the title search and examination process, but may also arise as the result of a survey of the real property. Specific exceptions typically include easements and other right-of-way documents affecting the real property, restrictions, covenants or other matters contained in recorded documents affecting the real property, including restrictive covenants and similar documents, and matters shown on recorded subdivision plans or other recorded maps or plans.

Finally, the Title Policy may include title endorsements. Title endorsements are changes to the Title Policy to add or modify coverages provided by the Title Policy. Title endorsements will be discussed below.

## II. THE ALTA/NSPS LAND TITLE SURVEY

What is an ALTA/NSPS Land Title Survey? An ALTA/NSPS Land Title Survey is a boundary survey that was prepared in accordance with the minimum standards of the American Land Title Association (*i.e.* ALTA) and the National Society of Professional Surveyors (*i.e.* NSPS). These materials will refer to an ALTA/NSPS Survey as just an ALTA Survey for simplicity's sake. Typically, an ALTA Survey is prepared for a title insurance company and a mortgage lender, but can also be prepared for a property owner. An ALTA Survey is prepared in accordance with national standards promulgated by ALTA and NSPS, which address methods, precision and accuracy requirements. Notwithstanding the national standards, local survey standards and best practices also still apply in the preparation of an ALTA Survey. The intent is to establish standards for the preparation of surveys that all parties in a commercial transaction understand and expect as a common standard.

An ALTA Survey includes (but is not limited to), among others, the following required items:

a. Boundary lines of the property;
b. Location of the main building located on the property, if any;
c. Location of any ancillary buildings on the property;
d. Location of any other improvements on the property;

e. Location of existing utility lines, even if outside of easements;
f. Identification of easements, including unrecorded easements;
g. Identification fo any encroachments;
h. A plat or map showing boundaries and any new information obtained in the process of preparing the ALTA Survey; and
i. A graphic review of the title exceptions set forth on Schedule B-II of the Title Commitment (as described above).

The required items listed above are contained in the Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys. The Minimum Standard Detail Requirements were updated effective as of February 23, 2021 (new requirements are adopted every 5 years on Terminalia, the festival of the Roman god Terminus – the god boundaries!). In addition to the standard required items, an ALTA Survey may include certain optional items. Optional items are listed in Table A, Optional Survey Responsibilities and Specifications. Table A is attached hereto as Exhibit "A". Table A items include, but are not limited to:
i. Monuments placed at all major corners;
ii. Flood zone classification;
iii. Vertical relief with contour datum and related information;
iv. Zoning information (as supplied in a zoning letter or report);
v. Exterior building dimensions at ground level;
vi. Substantial features;
vii. Number and type of parking spaces;
viii. Determination and location of certain division or party walls;
ix. Evidence of underground utilities by plans or private utility locator;
x. Names of adjoining owners; and
xi. Plottable offsite easements.

Table A items are selected by the proposed insured (i.e. lender, buyer, etc.) by providing Table A with the appropriate boxes checked for the items desired to be included in the ALTA Survey by the proposed insured.

In order to prepare an ALTA Survey, the surveyor or his staff collects and documents data from a number of sources including from fieldwork. Among other things, the party requesting the ALTA Survey must provide the surveyor with (1) the current record description of the property or the current record description of the parent property that contains the parcel to be surveyed, (2) complete copies of the most recent Title Commitment, (3) the current record description of any adjoining properties, unless part of a recorded subdivision plan, (4) copies of any recorded easements benefitting the property to be surveyed, (5) copies of any recorded easements, covenants or servitudes burdening the property to be surveyed, and (6) if desired by the party requesting the ALTA Survey, copies of any unrecorded documents affecting the property to be surveyed. In some cases, especially where the surveyor is not provided copies of all relevant recorded documents, the surveyor may have to perform its own research in order to comply with applicable state or local surveying standards.

The surveyor or his staff then performs fieldwork – literally on the ground. The fieldwork will be based on the use of the property, whether existing or planned, as identified by the party for whom the ALTA Survey is being prepared. As noted above, the fieldwork will identify proper boundary control lines, as well as the location, size, character and type of any monuments. The fieldwork will also delineate easements, rights-of-way and access ways, including such physical attributes as streets, street names, curbs, driveways, visible footpaths and cartways, waterways and bodies of water, and access points to adjoining properties. Fieldwork must also detail walls, fences and other improvements on or within five (5) feet of the boundaries of the property.

Upon completion of the records research and fieldwork, the surveyor must prepare a plat or map, illustrating in detail the results of the foregoing. This is the physical ALTA Survey – it shows the boundary lines of the subject property, including existing and new monuments identifying major corners along the boundary lines, the location, dimensions and physical characteristics of any easements, rights-of-way or other servitudes, and visible access points, along with the location of all improvements on the property. The ALTA Survey map will also include any optional Table A items requested by the party for whom the ALTA Survey is prepared. The ALTA Survey will also include a legal description of the property (often metes and bounds), which will be the deed or mortgage description, or in the case of significant variations from the deed description, will also include an "as surveyed" legal description. The surveryor will also include a list of the Schedule B-II title exceptions and the surveyor's opinion as to whether such exceptions are identified on the survey, whether such exceptions cannot be located or identified on the survey, and whether such exceptions do not affect the subject property based upon the description of the supporting document. Finally, once the survey map is completed, the surveyor will provide an appropriate certification of the ALTA Survey, as required by the ALTA/NSPS standards.

In conclusion, an ALTA Survey is a pictorial depiction of the subject property, with a legal description of the subject property, along with identification and depiction of applicable title exceptions and other matters affecting the property found in the public record and in the field. The ALTA Survey provides the affected parties (i.e. the owner, the buyer and/or the lender) with an accurate understanding of what property is being acquired or subjected to the mortgage lien and how that property is encumbered.

## III. TITLE AND SURVEY ISSUES

Title issues are matters that are or may threaten impair the current owner's rights in certain real property. Title issues can be monetary and non-monetary liens, fraudulent documents, or recorded or unrecorded interests in the property. This discussion will focus on recorded and unrecorded interests in the property, such as easements and rights-of-way.

Typically, title issues are first identified in the Title Commitment. As discussed above, when properly prepared, the Title Commitment will list all documents recorded in the public record granting interests in the subject property. These documents are listed on Schedule B-II of the Title Commitment as the specific exceptions. Specific exceptions usually include utility rights-of-way, access and other easements, and conditions, covenants and restrictions. Specific exceptions can

also include leases and prior conveyances of title to a portion of the subject property, as well as agreements regarding the sale of the property.

Additional title issues can be identified in an ALTA Survey of the property.[2] On the one hand, the ALTA Survey will confirm what exceptions set forth in the Title Commitment can be confirmed to affect the property, as well as identify the location of those exceptions on the ground. On the other hand, the ALTA Survey may also identify title issues, such as footpaths, cartways and encroaching improvements that are visible on the ground, but not identified in the Title Commitment because there are no recorded documents expressly granted rights with respect to such items. Therefore, the ALTA Survey and the Title Commitment must work hand-in-hand to list all title issues, both those recorded in the public record and those only visible on the ground.

## IV. RESOLVING TITLE AND SURVEY ISSUES

Title issues, including specific exceptions, at least those involving matters affecting the ownership rights with respect to the property, can generally be resolved in one of several ways: (1) title insurance endorsements; (2) negotiation with the holder of the interest to release, terminate, modify or clarify the rights granted in the recorded instrument; (3) investigation and explanation sufficient to permit the title company to insure without exception for the specific title issue; or (4) litigation, whether a quiet title action, a declaratory judgment action, or some other action to establish the rights of the affected parties. In some instances, a title company may be willing to issue a title endorsement or insure without exception for a specific item upon receipt of an indemnity from the proposed insured as well.

As noted above, certain specific exceptions may be able to be removed expressly or with the issuance of an endorsement to the title insurance policy. Often, surveyors are able to identify on the survey the exceptions that are not related to the insured property. Removal of, affirmative coverage for or the issuance of an endorsement to address a specific exception will depend on the terms and conditions of the exception document and what coverage is permitted in that particular state. In addition, some matters may be able to be addressed with an affidavit and/or an indemnification from a party with the financial wherewithal to support the risk. It is important to engage the title underwriter as early as possible if there is a specific exception you would like to see removed from the final policy.

Following are several ALTA Endorsements commonly requested for commercial transactions that can be used to resolve title issues. This list does not include all of the available ALTA Endorsements or any state specific endorsements.

ALTA 9 Series – Restrictions, Encroachments & Minerals/ Covenants, Conditions & Restrictions/Private Rights (“Comprehensive”) – these endorsements may be issued with an Owner’s Policy or a Loan Policy, depending on the endorsement being issued. The ALTA 9 Series is sometimes referred to as comprehensive coverage. Each endorsement in this series is subject to

[2] For convenient reference when reviewing an ALTA Survey in conjunction with at Title Commitment, a sample Survey Checklist is attached as Exhibit “B”.

specific exceptions within the policy and the endorsement itself. In the event a matter otherwise covered by an endorsement in this series is to be excepted from coverage (i.e., to be the subject of "an exception in Schedule B of the policy" identifying the violation), the exception must be specific, descriptive, and precise. A blanket exception with a reference to a document will not suffice.

ALTA 17 Series – Access Endorsements– Owner's and Loan Policies - The ALTA 17 series of endorsements expands the coverage given under traditional access endorsements by giving an assurance of both vehicular and pedestrian access. The series also gives assurances with respect to the right to use existing curb cuts or other entries along that portion of the public right of way abutting the insured land.

ALTA 19 Series – Contiguity Endorsements – Owner's and Loan Policies - The ALTA 19 series of endorsements insure that two or more parcels are contiguous along defined lines or boundaries and that there are no gaps or gores separating the insured contiguous boundary lines.

ALTA 25 Series – Same As Survey Endorsements – Owner's and Loan Policies – These endorsements insure that the survey identified in the endorsement is the same as the land described in Schedule A of the policy.

ALTA 28 Series – Easements & Encroachments Endorsements – Owner's and Loan Policies – The ALTA 28 series of endorsements provides various coverages as a result of buildings or improvements located on the insured land that encroach onto adjoining land or easements, and buildings or improvements located on adjacent land that encroach onto the insured land.

ALTA 35 Series – Minerals & Other Subsurface Substances Endorsements – The ALTA 35 series of endorsements provides limited coverage for damage to improvements located on the surface of the land that occurs because of the use of the surface for the extraction of minerals and other subsurface substances that are excepted from the description of the insured land or excepted in Schedule B of the policy.

## V. PRACTICAL TIPS

Read and understand the endorsements, policy and jacket and how they interact. Sometimes, a requested endorsement is redundant because adequate – or even better – coverage is provided by another endorsement that is already being provided.

Read the entire ALTA Survey, including the Notes, to make sure everything is accurate.

Make sure that the commitment, ALTA Survey, and title policies are consistent with one another and with the proposed insured's requirements, whether the insured is the owner or a lender. There is a bit of a chicken-and-the-egg situation between matters shown on the ALTA Survey and matters listed in the commitment.

Don't just rely on the title agent or title insurance company. Whether you are owner's or lender's counsel, make sure that you review the vesting deeds, title exception documents, survey and legal description closely. Prior to closing is the time to raise any issues and identify any discrepancies, especially in legal descriptions. It is better to raise an issue and delay a closing to resolve it than it is to wait and have the issue become your client's problem!

# EXHIBIT "A"

## TABLE A OPTIONAL SURVEY RESPONSIBILTIIES AND SPECIFICATIONS FOR ALTA/NSPS LAND TITLE SURVEY

## TABLE A

### OPTIONAL SURVEY RESPONSIBILITIES AND SPECIFICATIONS

*NOTE: Whether any of the nineteen (19) items of Table A are to be selected, and the exact wording of and fee for any selected item, may be negotiated between the surveyor and client. Any additional items negotiated between the surveyor and client must be identified as 20(a), 20(b), etc. Any additional items negotiated between the surveyor and client, and any negotiated changes to the wording of a Table A item, must be explained pursuant to Section 6.D.ii.(g). Notwithstanding Table A Items 5 and 11, if an engineering design survey is desired as part of an ALTA/NSPS Land Title Survey, such services should be negotiated under Table A, Item 20.*

***If checked, the following optional items are to be included in the ALTA/NSPS LAND TITLE SURVEY, except as otherwise qualified (see note above):***

1. ☐ *Monuments placed (or a reference monument or witness to the corner) at all major corners of the boundary of the surveyed property, unless already marked or referenced by existing monuments or witnesses in close proximity to the corner.*
2. ☐ *Address(es) of the surveyed property if disclosed in documents provided to or obtained by the surveyor, or observed while conducting the fieldwork.*
3. ☐ *Flood zone classification (with proper annotation based on federal Flood Insurance Rate Maps or the state or local equivalent) depicted by scaled map location and graphic plotting only.*
4. ☐ *Gross land area (and other areas if specified by the client).*
5. ☐ *Vertical relief with the source of information (e.g., ground survey, aerial map), contour interval, datum, with originating benchmark, when appropriate.*
6. ☐ *(a) If the current zoning classification, setback requirements, the height and floor space area restrictions, and parking requirements specific to the surveyed property are set forth in a zoning report or letter provided to the surveyor by the client or the client's designated representative, list the above items on the plat or map and identify the date and source of the report or letter.*

   ☐ *(b)If the zoning setback requirements specific to the surveyed property are set forth in a zoning report or letter provided to the surveyor by the client or the client's designated representative, and if those requirements do not require an interpretation by the surveyor, graphically depict those requirements on the plat or map and identify the date and source of the report or letter.*
7. ☐ *(a) Exterior dimensions of all buildings at ground level.*

   ☐ *(b) Square footage of:*

   ☐ *(1) exterior footprint of all buildings at ground level.*

   ☐ *(2) other areas as specified by the client.*

☐ *(c) Measured height of all buildings above grade at a location specified by the client. If no location is specified, the point of measurement shall be identified.*

8. ☐ *Substantial features observed in the process of conducting the fieldwork (in addition to the improvements and features required pursuant to Section 5 above) (e.g., parking lots, billboards, signs, swimming pools, landscaped areas, substantial areas of refuse).*

9. ☐ *Number and type (e.g., disabled, motorcycle, regular, and other marked specialized types) of clearly identifiable parking spaces on surface parking areas, lots, and in parking structures. Striping of clearly identifiable parking spaces on surface parking areas and lots.*

10. ☐ *As designated by the client, a determination of the relationship and location of certain division or party walls with respect to adjoining properties.*

11. *Evidence of underground utilities existing on or serving the surveyed property (in addition to the observed evidence of utilities required pursuant to Section 5.E.iv.) as determined by:*

    ☐ *(a) plans and/or reports provided by client (with reference as to the sources of information)*

    ☐ *(b) markings coordinated by the surveyor pursuant to a private utility locate request.*

    *Note to the client, insurer, and lender – With regard to Table A, item 11, information from the sources checked above will be combined with observed evidence of utilities pursuant to Section 5.E.iv. to develop a view of the underground utilities. However, lacking excavation, the exact location of underground features cannot be accurately, completely, and reliably depicted. In addition, in some jurisdictions, 811 or other similar utility locate requests from surveyors may be ignored or result in an incomplete response, in which case the surveyor shall note on the plat or map how this affected the surveyor's assessment of the location of the utilities. Where additional or more detailed information is required, the client is advised that excavation may be necessary.*

12. ☐ *As specified by the client, Governmental Agency survey-related requirements (e.g., HUD surveys, surveys for leases on Bureau of Land Management managed lands). The relevant survey requirements are to be provided by the client or client's designated representative.*

13. ☐ *Names of adjoining owners according to current tax records. If more than one owner, identify the first owner's name listed in the tax records followed by "et al."*

14. ☐ *As specified by the client, distance to the nearest intersecting street.*

15. ☐ *Rectified orthophotography, photogrammetric mapping, remote sensing, airborne/mobile laser scanning and other similar products, tools or technologies as the basis for showing the location of certain features (excluding boundaries) where ground measurements are not otherwise necessary to locate those features to an appropriate and acceptable accuracy relative to a nearby boundary. The surveyor must (a) discuss the ramifications of such methodologies (e.g., the potential precision and completeness of the data gathered thereby) with the insurer, lender, and client prior to the performance of the survey, and (b) place a note on the face of the survey explaining the source, date, precision, and other relevant qualifications of any such data.*

16. ☐ *Evidence of recent earth moving work, building construction, or building additions observed in the process of conducting the fieldwork.*

17. ☐ *Proposed changes in street right of way lines, if such information is made available to the surveyor by the controlling jurisdiction. Evidence of recent street or sidewalk construction or repairs observed in the process of conducting the fieldwork.*

18. ☐ *Pursuant to Sections 5 and 6 (and applicable selected Table A items, excluding Table A item 1), include as part of the survey any plottable offsite (i.e., appurtenant) easements disclosed in documents provided to or obtained by the surveyor.*

19. ☐ *Professional liability insurance policy obtained by the surveyor in the minimum amount of $_____ to be in effect throughout the contract term. Certificate of insurance to be furnished upon request, but this item shall not be addressed on the face of the plat or map.*

20. ☐ _____

*Adopted by the American Land Title Association on October 1, 2020. More at: www.alta.org.*
*Adopted by the National Society of Professional Surveyors on October 30, 2020. More at: www.nsps.us.com.*

# EXHIBIT "B"

## SAMPLE SURVEY CHECKLIST

# SURVEY READ CHECKLIST

_____ **SURVEY SIGNED (FINAL SURVEY ONLY)**

_____ **CONFIRM CERTIFICATION TO TITLE COMPANY (UNLESS ACCEPTING PRIOR SURVEY W/NO CHANGE AFF)**

_____ **CHECK WRITTEN AND DRAWN LEGAL DESCRIPTION AGAINST COMMT – IF DIFFERENT – WHY?**

- _____ **DO WE NEED NEW LEGAL IN COMMT?**
- _____ **DO WE NEED APPROVAL FOR SPLIT?**

_____ **DO WE NEED TO INSURE ANY APPT EASEMENTS?**

_____ **CHECK ALL EXCEPTION NOTES AGAINST SCHEDULE B-2**

- _____ **IF N/A TO FEE – WOULD IT AFFECT AN APPT EASEMENT THAT WE ARE INSURING?**
- _____ **CONFIRM ALL EASEMENTS STATED AS "SHOWN ON SURVEY" ARE IN FACT SHOWN**
- _____ **CHECK FOR EASEMENTS REFERENCES NOT SHOWN IN OUR COMMT**

_____ **CHECK FOR ENCROACHMENTS:**

- _____ **BUILDINGS OVER EASEMENTS**
- _____ **BUILDINGS OVER SETBACK LINES**
- _____ **PARKING OVER PARKING SETBACK LINES**
- _____ **UTILITY LINES WITHOUT EASEMENTS (NOT SERVICE LINES)**
- _____ **ENCROACHMENTS OVER PROPERTY LINES – UTILITIES OR BUILDINGS**
- _____ **APPARENT DRAINAGE ONTO OR OFF OUR PROEPRTY WITHOUT BENEFIT OF AN EASEMENT (OTHER THAN NATURAL DRAINAGE FLOW) IE CULVERT DIRECTING DRAINAGE FLOW**

_____ **CHECK SURVEYOR NOTES FOR: PRE-START OF CONSTRUCTION; ACCESS; PROPERTY ADDRESS (THIS MAY BE ON DRAWING); NO CHANGE TO STREETS; CONTIGUITY WHERE NECESSARY; WETLANDS, ETC.**