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General Session 4

Reunited and it Feels so Good:  
Co-tenancy Negotiations in a Post-Covid World

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- I. **Introduction.** The effects of the COVID-19 pandemic have accelerated changes in the retail landscape that were occurring gradually over the past several years. We now know that the types of tenancies in shopping centers will be very different in a Post-COVID world than what we have seen traditionally. The concentration of the traditional retail anchors and big box and small shop retailers will lessen, and give way to an increased footprint of more uses that have not traditionally existed in shopping centers, including entertainment, fitness, experiential, promotional or marketing, as well as other uses, including hotel, office and residential.

On the one hand, landlords want to have the flexibility to lease out their shopping centers to reflect these developing trends without having to experience reduced rental income streams and tenant closures resulting from the failure of a co-tenancy condition. And despite this new reality, tenants, on the other hand, still need to have co-tenancy protections to ensure that the overall tenant mix and shopping center environment creates the positive synergy that is expected.

The discussion in this session will focus exclusively on what these changes have been and considerations that practitioners should make in negotiating balanced co-tenancy provisions that are suitable to landlords and tenants in this new landscape.

- II. **Co-Tenancy General Overview.** This is a brief description of the requirements, remedies and substitution rights that were generally part of a typical negotiation of co-tenancy pre-pandemic.
- a. **Types of Co-tenancy Provisions / Requirements:** There are several different types of co-tenancy provisions that may be found in shopping center leases: possession co-tenancy, opening co-tenancy and continuing co-tenancy. These provisions were typically tied to the presence of certain types of tenants that were traditionally found in shopping centers.

- i. **Possession.** A tenant constructing its own building and related improvements, either under a ground lease or a reverse build-to-suit lease, or constructing improvements in leased premises may seek a possession Co-Tenancy providing that the tenant is not required to commence construction of its improvements unless certain other key tenants or a percentage of the overall gross leasable area of the shopping center is also either operating or under construction.
  - ii. **Opening Co-tenancy.** An Opening Co-Tenancy will require that either certain anchor (a/k/a major) tenants, key tenants and/or a percentage of overall occupancy must be open for business in order for the tenant to open for business or otherwise elect to open but pay a reduced rent agreed upon by the parties should Opening Co-Tenancy not be satisfied.
  - iii. **Continuing Co-tenancy.** A Continuing (a/k/a an Ongoing) Co-Tenancy applies once a tenant has opened and is operating, and requires that the anchor tenants, key tenants and/or percentage of operating gross leasable area continue to operate while the tenant is operating. In some instances, a Co-Tenancy tied to the percentage of operating gross leasable area will exclude the anchor or key tenants. If the Co-Tenancy is tied to anchor tenants, anchors are typically defined by square footage (typically at least 40,000 square feet, but often much larger in a traditional enclosed shopping center), but sometimes include a requirement for a multi-departmental traditional department store. If Co-tenancy is tied to key tenants (typically occupying less than 20,000 square feet), the key tenants could be named retailers or be one or more categories of retailer (i.e., discount department store, home-improvement store, electronics superstore, office supplies superstore, etc.). Depending on the characteristics of the shopping center, landlords and tenants will frequently agree to satisfy the key tenant Co-Tenancy by agreeing that a minimum number of key tenants out of a pool of key tenants will be open and operating (e.g., 3 of 6 key tenants).
  - iv. **Requirements.**
    1. Anchor Co-tenancy. Many tenants used a formula to determine the number of required anchors. Typically, they would take the total number of anchors in the center, and subtract one or two based on the total number of anchors in the shopping center. If the shopping center fell below this number, tenants would be entitled to exercise certain remedies.
    2. GLA. Another benchmark that is often used is that a certain percentage of gross leasable area ("GLA") or number of stores in the shopping center be operating before that tenant has to open or remain open, or keep operating at full rent. If the shopping center fell below this GLA threshold, tenants would be entitled to exercise certain remedies.
    3. And vs. Or. Sometimes, a tenant will require that a combination of two (or more) provisions be satisfied before it must keep open its store at full rent (e.g., a tenant may require that one of two major tenants and/or 75% of the shopping center GLA /or at least 100,000 square feet of the shopping center GLA, be open for business by other tenants to keep operating at full rent). Depending on how the language in the lease is drafted, often, one party seeks use of one conjunctive adverb while the other party seeks the other.
- b. **What is an Anchor?** In traditional shopping centers, an anchor was a multi-departmental retail store, such as Sears, JC Penney, Lord & Taylor, Macy's, Dillard's, Nordstrom, in addition to many similar regional stores – all of which typically had square footages of at least 100,000 feet (and sometimes more than 300,000 feet); or smaller, boutique anchors like Saks Fifth Avenue and Nieman Marcus. Many of the traditional anchors have either disappeared completely, or have significantly reduced both their physical as well as their

geographical footprint. This is likely to continue into the foreseeable future in a Post-COVID world. The regional department stores are almost gone altogether. Many of the remaining anchors prefer to go into boxes that are around 50,000 – 75,000 feet.

- c. **Replacement Rights for Key Tenants or Anchors**. Opening Co-Tenancy and Continuing Co-Tenancy provisions that provide for one or more anchors or key tenants to be open and operating in the shopping center will typically include requirements that a landlord must satisfy if the anchor or key tenant is to be replaced. Oftentimes, the acceptable replacement will require the tenant's consent, and certain criteria, including whether it is a similar use or a regionally or nationally known replacement tenant, or whether the premises size, number of stores, sales volume, quality or merchandise and/or price points will be comparable to the former tenant, are used to establish a consent standard of reasonableness. Other times, the acceptable replacement may not require the tenant's consent when the parties have negotiated in advance of the lease execution acceptable replacements of a former tenant. For larger anchors, typically those exceeding 50,000 square feet, often the parties would agree that the vacated premises can be subdivided within certain limitations (e.g., no more than 3 subdivided spaces, at least one must occupy 20,000 square feet).
- d. **Cure Periods**. Cure periods for the satisfaction of anchor, key tenant or gross leasable area Co-tenancy provisions varied widely, but often a cure period was limited to 12 months. Some tenants negotiate "waiting periods", rather than cure periods, so that once the waiting period expires, the reduced rent remedy is retroactive to the first day of the failure (as distinguished from a cure period, where the remedy commences once the cure period has expired).
- e. **Remedies**. If a Co-tenancy violation occurred, remedies typically were either a reduction in Rent, or the payment of an alternative rent in lieu of Gross Sales, in some cases after a cure or waiting period, typically ranging from 3 – 6 months, expired. Oftentimes termination rights occurred after a 6 – 12 month period following the occurrence of the Co-tenancy violation. Termination rights were either ongoing until the violation was cured or limited to a "fish or cut bait" provision, where the tenant must elect to terminate or go back to full Rent.
  - i. ***Sales test***. Some landlords will want a gross sales test. A tenant may be required to demonstrate that its store has been negatively impacted by the failure of the co-tenancy provision, landlords may desire to see evidence of a decrease in sales. a landlord may argue that a tenant should be required to show that sales have decreased in order to avail itself of the remedies available in the case of a co-tenancy failure. Sophisticated tenants are likely to respond that this is not equitable inasmuch as sales may increase but not as much as they would have otherwise increased, were it not for the Co-tenancy violation.
  - ii. ***No Default***. The tenant should not then be in default under the lease. Typically, such conditions may also include that the tenant is itself operating at the time of a violation of the co-tenancy provision, and that the right to invoke the remedy is personal to the original tenant that signed the lease. Sophisticated tenants are likely to respond that it is not reasonable to condition the right to invoke remedies resulting from the failure of a co-tenancy condition on the tenant not being in default under the Lease, as matters for which the tenant can be in default can be wholly unrelated to the landlord's failure to live up to the marketing assurances given with respect to other tenants operating in the shopping center.

### III. How has COVID-19 Impacted and Re-Shaped Co-Tenancy?

- a. The pandemic created an abundance of vacancies in shopping centers. It accelerated the decrease in the presence of department stores at shopping centers (e.g., JC Penney, Neiman Marcus, and Lord & Taylor filed for bankruptcy protection in 2020; Macy's announced the closure of a significant number of its department stores by 2023). The

pandemic also was major contributing factor in a number of other retailers with smaller footprints filing for bankruptcy protection, going out of business or significantly reducing its brick and mortar footprint (e.g., J Crew; True Religion; Pier 1 Imports; 24 Hour Fitness; GNC; Lucky Brand; Sur La Table; Brooks Brothers; Tailored Brands, which operates Jos. A. Bank and Men's Wearhouse; and Ascena Retail Group, which operates Ann Taylor, LOFT, Lane Bryant and Justice).

- i. Given this monumental shift in the landscape, landlords, understandably eager to lease back out their shopping centers, have sought to soften lease restrictions so they can fill vacancies without triggering a co-tenancy failure. Due to the decline in the number of department stores and other large anchors, which decline has been accelerated by the effects of the pandemics, landlords have attempted to secure greater rights to subdivide these large footprints for replacement tenants. They also have attempted to broaden the scope of what constitutes a suitable replacement by significantly expanding the types of uses that would qualify as suitable replacements of former tenants. And because of the current environment, many landlords have sought co-tenancy moratoriums, suspensions or waivers for a certain period of time to allow them to relet spaces without causing a co-tenancy failure that would allow tenants to exercise co-tenancy remedies.
- ii. Tenants, on the other hand, while amenable to modifying co-tenancy standards to better reflect current realities, have sought to avoid the scenario where it becomes purely an exercise in filling boxes, without any consideration being given as to whether or not the replacement tenants truly drive traffic into the store and attract repeat customers to the shopping center, which still remains the underlying purpose of co-tenancy. While tenants understand the reasons landlords have sought moratoriums, waivers or suspension of co-tenancy in the aftermath of the pandemic, if agreed to, it also is reasonable for tenants to seek some other benefit in the arrangement, because ultimately, tenants' sales suffer if other tenants are closed in the shopping center regardless of the reason for the closures.

IV. **New Resulting Trends for Co-Tenancy.** These are the requirements, remedies and substitutions that have changed due to the pandemic.

- a. **Requirements.** While the types of co-tenancies remain the same, the requirements are changing dramatically in this post-pandemic world. Enclosed mall shopping centers no longer depend on 4 or 5 traditional department stores to anchor their centers, and many retailers are finding that their success in a shopping center is driven by factors other than traditional department stores, as long as the replacement tenants for these spaces truly drive traffic into the store and repeat customers to the shopping center to create the positive synergy in the tenant mix that tenants expect when they agree to come to a shopping center.
- b. **Replacement Rights for Anchors.** When a traditional department store goes dark, landlords are looking for non-traditional replacements to add to their shopping center. Note that many of the categories below may not have been considered an anchor at the time a deal is being negotiated, but should qualify as an acceptable replacement anchor (if the replacement language is properly drafted), if they truly drive traffic into the store and repeat customers to the shopping center to foster the aforementioned positive synergy. ICSC recently published an article entitled *10 new developments to watch* dated June 3, 2021, where it outlined 10 redevelopments of shopping centers. This article illustrates some of the creative ways that landlords and developers are using space.
  - i. **Traditional anchors.** Most enclosed shopping centers still have one or two traditional anchors. Big box retailers such as Dick's Sporting Goods, Scheel's and Bass Pro Shops have added departments and experiences to have a broader appeal, and consideration must still be given as to whether these retailers, despite the expanded category offerings, are acceptable replacements for traditional

department stores which had even wider category and merchandise offerings.

- ii. **Entertainment.** In addition to theaters, which have anchored centers for years but not always as designated co-tenants, new entertainment and virtual reality concepts have stepped in to help give the centers what e-commerce cannot: bowling, video and golf concepts such as Dave & Busters, ESPN Zone, PinStripes, Lucky Strike, Round 1, Bowlero, TopGolf, museums and aquariums. Theaters have expanded their offerings to often include a more extensive food offering, along with beer and wine, and sometimes a full bar).
  - iii. **Office; Residential, Co-Working and Hotel.** Many shopping centers have added residential, office, co-working and hotel to areas that used to house an anchor.
  - iv. **Fitness.** Many strong fitness brands, including Lifetime, Equinox, Planet Fitness, are attracted to the large footprints and generous parking pads of traditional department stores.
  - v. **Discount / Value Brands.** Brands such as Ross, Burlington, TJ Maxx, Marshalls HomeGoods, Nordstrom Rack, Off Fifth, are often found in even upscale shopping centers.
  - vi. **Experiential.** Users that promote or market goods or services to customers but do not stock goods or services to offer for sale at the shopping center. If the parties are agreeable to this type of use, they also may want to consider if they need to include criteria which ensures that the promotion or marketing of such goods or services is of a quality and price-point consistent with other tenants of the shopping center.
  - vii. **Subdividing Anchor Spaces; Combination of Retailers.** Anchors are also being replaced with a combination of small shop retail, along with one or several of the categories above. Multi-use replacements often include service retail, grocery, restaurants and co-working. In considering the subdivision of anchor spaces, tenants want to focus on certain condition, such as whether it is reasonable to place limitations on the number of spaces that the anchor space can be subdivided into, or whether a minimum number of the replacement tenants must have entrances into the interior portion of the shopping center.
  - viii. **Connectivity into the Shopping Center.** Many leases call for the subdivided spaces to stay “attached” to the shopping center, or to be open on all levels of the center where the former anchor had entrances. But a former 3 level traditional department store which is replaced by a mixed use area including an office building, and retail shops, would fail as an acceptable substitute unless the “all levels” and “attached” language is removed, and the parties add a concept which provides for connectivity to the shopping center by means other than an attached building.
- c. **Longer Periods for Satisfying GLA Thresholds.** With COVID-19 causing large scale vacancies in many shopping centers (especially centers with a large amount of local “small shop” tenants), it has currently become harder for landlords when negotiating new leases to satisfy co-tenancy thresholds based on a percentage of the GLA of the center. Although tenants that are negotiating new leases understand the issue, many are not willing to forgo a co-tenancy provision in the lease that at least in part has an occupancy threshold based on GLA. A possible compromise may be to provide the landlord with a certain period of time (e.g., 12 - 48 months after lease execution or the commencement date) to reach the required occupancy threshold before the tenant would have the right to avail itself of the stated remedies. However, tenants still need to consider the impact on their sales, so they may want to agree to a modified remedy rent during that period. Included in the sample provisions attached as a rider to these materials is a sample co-tenancy provision addressing this issue and providing the aforementioned proposed compromise.

- d. **Cure Periods.** While a 12 or 18--month cure period may have been enough time to have one large department store step into the existing footprint of another, rarely does that happen anymore. Many department stores are torn down when closed, and redeveloped into large projects which may take years to entitle, construct and lease. Landlords are looking for much longer cure periods for the replacement of anchors. And Covid-19 showed landlords that small shop occupancy could experience dips even in the best leased centers, so landlords are pushing for cure periods for gross leasable area to be increased as well. Tenants have concerns about cure period extensions because sales will nevertheless take a hit for that much longer without the tenants having the ability to exercise co-tenancy remedies. Tenants may agree to longer anchor cure periods for anchor replacements if landlords can prove that they are moving forward in good faith toward the replacement of an anchor, which such proof including things like a site plan, evidence of submission for entitlements for redevelopment work, a list of prospective tenants and square footages.
- e. **Remedies.**
- i. **Remedy Rent.** With e-commerce becoming an increasingly vital part of most tenants' businesses, remedies should be revised so as not to be so dependent on gross sales. Landlords should consider adding a "greater of" component tied to a percentage of the existing rent, in case store sales are diverted to the tenant's website. The ICSC has published several relevant articles dealing with the subject of percentage rent, including *The limits of percentage rent* dated 4/26/21 (in which some of the pitfalls of percentage rent deals are discussed)), *6 ways stores can boost retailers' bottom lines* dated June 2, 2021 (in which the article states that among the ways to boost sales is to use stores as distribution centers, pick-up locations for online orders, and return centers).
  - ii. **Fish or Cut Bait Provisions.** Landlords should consider whether forcing a tenant to elect to either terminate or revert to paying full rent makes sense, or whether they are better off with the tenant having flexibility to stay paying remedy rent, with the landlord making the decision to terminate when the time is right, unless the tenant elects to revert to full rent.
  - iii. **Right to Close and Pay Rent.** Traditionally, some tenants had the remedy of not opening or operating provided that they continued to pay regular rent during the co-tenancy failure. Landlords now seek to condition the exercise of all remedies on tenants being open, and tenants should consider whether it is reasonable to cede to landlords a measure of control over whether it is best for their business to close and pay regular rent, or remain open and pay reduced rent and retain the right to exercise a remedy such as termination after a waiting period has run.
  - iv. **Rights Personal.** Landlords will want to limit the co-tenancy provision to the specific tenant negotiating the Lease. Tenants will want the right to have this provision to apply to any assignee; but a compromise is to allow the provision to apply for any assignee from a transfer permitted under the lease without the landlord's consent.
  - v. **Options.** The parties should consider whether a tenant is permitted to continue to pay reduced rent if they exercise an option. One of the major factors in this analysis is whether the option was exercised before or after the co-tenancy condition occurs. While this factor is important, tenants can argue that, at the reduced rent level, the store is still viable (the same argument as to why a sunset provision does not make sense) and a negotiated right, such as an option, should not be revoked because a tenant exercised a right granted to it under the lease. Landlords will argue that the original option was being granted at a stated rent, and if the tenant is not willing to pay that rent, they should not have the right to the option.

- f. **Force Majeure.** As the transition into a post-Covid-19 world is underway, landlords have continued to insist on including force majeure as qualifying as an excused closure under co-tenancy (or if that language wasn't already in their form, landlords have attempted to introduce the concept). The parties should consider whether force majeure is an appropriate tie-in to co-tenancy. Is co-tenancy an obligation of the landlord, which if not performed entitles tenants to exercise remedies, or is it a failure of a condition, which if not satisfied entitles tenants to exercise remedies?

V. **Considerations for Practitioners in Negotiating Co-tenancy.** How can a Landlord and Tenant navigate all this uncertainty to reach an agreement that works for both parties in this Post-COVID-19 world?

- a. **Determine what is important to your client.** Spend time understanding what your client needs to be successful in a shopping center. High traffic counts are great, unless the traffic does not consist of your customer. But a vibrant center with a variety and the right synergy of uses will often benefit a diverse range of tenants and their customers. Tenants should consider whether the evolving tenant mix resulting from having this new generation of uses creates the desired synergy that creates optimal traffic counts into the store.
- b. **Don't lose sight of the big picture.** Shopping centers have changed dramatically over the years and these changes have accelerated considerably over the past 18 months as a result of the effects of the pandemic. For example, negotiating prohibited uses or other restrictions that do not reflect the current realities for how shopping centers will be tenanted going forward may unreasonably restrict a landlord's ability to operate a successful center and it is equally important for landlords to recognize that tenants still need certain assurances that the center will be occupied by a critical mass of tenants that foster the synergies that bring generate traffic and sales conversion into stores. The overarching goal is to have a successful center that brings traffic to the tenants.
- c. **Do you really need an "anchor component"?** Or can you protect your client in a different way? It may make sense to focus on a particular wing or level of the shopping center, rather than focusing on the operation of tenants at the other end of the center. Even if acceptable to replace an anchor with a non-traditional anchor or a non-anchor, consider whether terms are needed to address the period of time when anchor space remains vacant.
- d. **What are the traffic patterns in the Center?** Some anchors facilitate a primary access point for the shopping center, so if they close, it may affect where a tenant's customer enter (and may slow traffic in a particular area of the center).
- e. **Does size matter?** For a multi-tenant replacement, how much square footage is needed? The old formulas of requiring 80% of the old anchor's square footage may not be as relevant nowadays— especially if the new replacement is a combination of uses which will now include common areas.
- f. **Will the new "anchor" be a part of the Center?** Will there be some kind of connectivity between the tenants who comprise the replacement for the anchor, and the balance of the center? Often, these uses aren't attached to the building, but rather have a corridor or open-air passage that leads to the mall. While not every tenant in this new replacement may have direct access to the shopping center, ensuring the traffic has a direct flow to the center is important.
- g. **Be mindful of the type of center for your deal.** Negotiate with the site plan in hand, as the type of center you are negotiating on will greatly impact the terms of co-tenancy. Conforming co-tenancy may not be the best approach, so take a step back from the "form language" and make sure the provision makes sense for both parties based on the type of deal being negotiated.

VI. **Case Law.** As of the date these materials were prepared, there does not appear to be any published cases that specifically address the effects of COVID-19 on the enforcement of co-tenancy provisions. It is possible that cases involving these issues have not progressed far enough through the court system where published verdicts have been reached or alternatively landlords and tenants have been pursuing rent collection and rent relief using arguments other than co-tenancy. There are 2 recent articles addressing the issue and highlighting prior cases: *Lease Co-Tenancy – A Cautionary Tale* by Andrew R. Lubin, September 2, 2020, published on the Neubert Pepe & Monteith, P.C. website and *Retail Co-Tenancy and COVID-19: Why Retail Tenants May Invoke Rights to Reduced Rent or Termination in Coming Weeks*, April 8, 2020, published on the Cleary Gottlieb LLP website. Mr. Lubin eloquently summarizes the issue of co-tenancy and COVID-19 in his article “[b]y their nature, lease co-tenancy provisions deal with uncertain future events over which the parties may have little control. The effects of COVID-19, market downsizing, store closings and mergers have been felt in many markets and more are on the horizon. The cases provide modern day reinforcement that careful attention to language should be at a premium.”

Outlined below are some of the most recent co-tenancy cases:

- a. *Kleban Holding Co., LLC v. Ann Taylor Retail, Inc.*, 2013 WL 6191904 (D. Conn. Nov 26, 2013). The co-tenancy required “Borders” to be open, and did not provide for a replacement. The court found that the parties’ decision to name the tenant, rather than describe the use or the space occupied, indicated an intention not to permit a replacement. Sophisticated parties should heed the following: “Although it appears that Kleban now finds itself a party to a “bargain unwisely made,” this Court has no authority to unmake a deal agreed upon by two sophisticated parties to a commercial contract whose language is presumed to be definitive.”
- b. *Sun Valley, Ltd. V. Galyan’s Trading Co., LLC*, (d/b/a Dick’s Sporting Goods) 2014 WL 1030956 (E.D. Mich. Mar. 17, 2014). The court found that the lease language requiring a Major Anchor to be operated “using its then latest concept under the name “Sears Great Indoors” did not allow the landlord to substitute a Sears Outlet store, even though Sears was no longer operating any stores as “Sears Great Indoors”, and rejects the notion that the doctrine of impracticability excuses the landlord from the requirement for such replacement.
- c. *Staples Office Superstore E., Inc., v. Flushing Town Ctr. III, L.P.*, 933 N.Y.S.2d 732 (2011). The court found that the leases requirement that space be leased to a “national retailer” did not allow BJ’s Wholesale Club to qualify, since they are a regional retailer.
- d. *Radio Shack Corporation v. Azusa Pacific University*, 2016 WL 3640370. The court determined that a fitness operator, which sold ancillary items, qualified as a “similar tenant” to a “Big Lots”. “Similar Tenant” was defined in the lease as a tenant occupying all of the former occupant’s space, and “which has the same or higher quality of goods to be sold and equal or better customer traffic”). The court’s analysis seemed to turn on the tenant’s failure to include the word “retail” in their qualification, as well as the emphasis on “quality”, given that the original tenant sold a lot of close-out merchandise. This court expressly distinguished this case from the Old Navy case cited in (e) below, because that case focused on “use”, rather than “quality of goods”.
- e. *Old Navy, LLC v. Center Developments Oregon, LLC*, 2012 WL 2192284 (E. Or. June 13, 2012). The court determined that the requirement that “the use to be conducted by such substitute retailer is substantially the same as that conducted by the Key Store it is intended to replace” did not permit the Landlord to substitute a discount junior department store with a grocery store.



- f. *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332 (2015). The case provided that the opening co-tenancy provision in the lease was unenforceable as it constituted an unreasonable penalty in violation of California law. The court of appeals reversed the lower court's determination that the provision was unconscionable, citing the sophistication of the parties. Interestingly, the court noted that the fact that the landlord's business person decided not to seek the assistance of an attorney "was not significant", given his sophistication. A significant factor in the court's decision was that the opening co-tenancy provision was virtually incurable because it did not provide the landlord with opportunity to replace the named anchor with a substitute retailer. Note that this case seems to be an outlier but it has, nonetheless, caused a great deal of consternation among practitioners who assumed that many of these concepts were standard practice and were enforceable.
- g. *Shoe Show, Inc. v. One-Gateway Assocs., LLC*, 2015 WL 5674876 (M.D.N.C. Sept. 25, 2015). This case dealt with the requirement that a replacement be "a similar major tenant occupying at least 90% of the leased premises". The court found that the replacement must be located in the same space as vacated by the original tenant, but that the words "similar major tenant" were ambiguous.

VII. **CONCLUSION.** COVID-19 has taught us, more than anything, that we do not know what the future holds. However, through such a major crisis, the strong shopping centers and retailers have survived. As we watch shopping centers and retailers bounce back as the country begins to re-open, it seems that people want to be around people, and that shopping centers can thrive. However, COVID-19 has also shown us that landlords and tenants must be flexible and nimble to deal with the challenges that lie ahead. As always, careful, thoughtful drafting can help us avoid some of the mistakes that can be made by simply "conforming" to what someone did before.

## **SAMPLE CO-TENANCY CLAUSES**

**[NOTE: THE CLAUSES BELOW ARE SAMPLES THAT ARE NOT PROVIDED TO CONTEMPLATE ANY SPECIFIC DEAL OR SITUATION BUT MERELY ILLUSTRATE THE TYPE OF CO-TENANCY NOTED BELOW. ANY CO-TENANCY CLAUSE USED IN CONNECTION WITH A LEASE SHOULD BE SPECIFICALLY DRAFTED TO TAILOR THE SPECIFIC DEAL CONTEMPLATED AND PARTICULARITIES OF THAT GIVEN SITUATION]**

### **OPENING CO-TENANCY:**

In no event shall Tenant be required to open for business in the Premises until at least 60% of the leasable space in the Shopping Center is open or is contemporaneously opening along with Tenant on the Commencement Date (the "Opening Threshold"). If the Opening Threshold is not met on the Commencement Date, then Tenant may delay the opening of its store for business until the earlier of the date the Opening Threshold is met or the date that is one hundred eighty (180) days after the Commencement Date, and Minimum Rent and all other charges shall begin accruing as of such date. Notwithstanding the foregoing, if Tenant elects to open for business in the Premises before the Opening Threshold is met, Tenant shall commence the payment of all Additional Rent due hereunder plus one half (2) monthly Minimum Rent (the "Alternate Rent") until the earlier of (i) the date the Opening Threshold is met or (ii) the date that is one hundred eighty (180) days after the Commencement Date. If the Opening Threshold is not met within one hundred eighty (180) days after the Commencement Date, then, as Tenant's sole and exclusive remedy, Tenant shall have the right to terminate this Lease, provided Tenant gives Landlord at least ten (10) days' written notice of termination not later than thirty (30) days after the expiration of such one hundred eighty (180) day period. Failure by Tenant to notify Landlord within the time period prescribed herein shall constitute a waiver of the termination right provided in this Section \_\_\_\_\_. If Tenant waives, or is deemed to have waived, its termination right as provided above, Tenant shall immediately begin the payment paying full annual Minimum Rent and Additional Rent due hereunder. The rights granted under this Section \_\_\_\_\_ are personal to \_\_\_\_\_, and shall not be assigned to nor inure to the benefit of any other party.

### **ONGOING CO-TENANCY:**

Subject to the conditions precedent that Tenant (a) has remained open for business for the Permitted Use, fully stocked and staffed, during not less than the normal business hours for the Shopping Center, since the Commencement Date, subject to closures that are expressly permitted in the Lease and due to Force Majeure, (b) has not defaulted in any of its obligations pursuant to the Lease beyond the applicable cure period, if any, and (c) has not assigned the Lease or sublet any portion of the Premises, then in the event that either (i) two or more of the following named anchors in the Shopping Center permanently close for business: \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, or \_\_\_\_\_, or (ii) less than seventy-five percent (75%) of the Gross Leasable Area of the Shopping Center on the ground level is open for business during substantially normal business hours for the Shopping Center (with the Gross Leasable Area of the Premises being included in both the numerator and the denominator of such calculation)(either being a "Co-Tenancy Violation"), the following shall thereafter apply, (but only so long as the Co-Tenancy Violation continues):

(i) In lieu of the Annual Rent, Percentage Rent and all other regular monthly charges that would otherwise be due for such period, Tenant shall pay Alternate Rent. As used herein, "Alternate Rent" shall mean an amount equal to the lesser of (1) seven percent (7%) of monthly Gross Sales, which shall be paid monthly in arrears and provided together with Tenant's monthly report of Gross Sales from the Premises, or (2) the Annual Rent, Percentage Rent and all other regular monthly charges.

(ii) In the event that Tenant has been authorized to pay and has paid Alternate Rent for a period of twelve (12) consecutive full calendar months, Tenant shall have the option, exercisable within sixty (60) days after the end of such twelve (12) month period, to either (1) elect to terminate this Lease by giving Landlord sixty (60) days prior written notice, or (2) waive any further rights under this Section 17.2, and, effective as of the expiration of such sixty (60) day period, resume full payment of Annual Rent,

Percentage Rent and all other regular monthly charges as originally provided under this Lease for the remainder of the Term. If Tenant fails to timely elect (1) or (2) above, Tenant shall be irrevocably deemed to have elected (2) above.

**ONGOING CO-TENANCY WITH LONGER PERIOD TO SATISFY GLA OCCUPANCY REQUIREMENT:**

If at any time during the Term of this Lease the tenant currently operating as \_\_\_\_\_ (“Named Anchor”) (or a comparable replacement national retail tenant therefor operating in at least 90% of the Gross Leasable Area of the Named Anchor premises) in the location shown in the Site Plan shall cease to operate, other than temporary closures as a result of casualty, condemnation, or renovation (a “Named Anchor Co-Tenancy Failure”), and provided Tenant is then open and operating, Basic Rent shall be reduced by thirty percent (30%) for so long as the Named Anchor Co-Tenancy Failure shall continue. In addition to the foregoing, if at any time (i) during the first thirty-six (36) months of the Term, less than thirty percent (30%) of the Gross Leasable Area of the Shopping Center (excluding the Named Anchor premises and the Leased Premises) is occupied by tenants open for business to the public, or (ii) from the commencement of the thirty-seventh (37<sup>th</sup>) month of the Term through the date the Term expires, less than seventy percent (70%) of the Shopping Center (excluding the Named Anchor premises and the Leased Premises) is occupied by tenants open for business to the public (in either (i) or (ii), an “Occupancy Co-Tenancy Failure”), and provided Tenant is then open and operating, Basic Rent shall be reduced by thirty percent (30%) for so long as such occupancy failure shall continue. Tenant shall have the right to pay reduced rent as herein above set forth for a maximum period of thirty-six (36) consecutive months, following which, if the Named Anchor Co-Tenancy Failure or Occupancy Co-Tenancy Failure has not been satisfied or cured, and Tenant has not terminated this Lease as set forth herein below, Tenant shall resume payment of full Basic Rent. Notwithstanding the foregoing, or anything in this Lease to the contrary, if Tenant shall have paid reduced rent as set forth above for a period of eighteen (18) months in connection with a Named Anchor Co-Tenancy Failure or Occupancy Co-Tenancy Failure, and such failure has not been cured prior to the expiration of such eighteen (18) month period, at any time thereafter, prior to such time as such Named Anchor Co-Tenancy Failure or Occupancy Co-Tenancy Failure is cured, Tenant shall have the right to terminate this Lease by written notice to Landlord, which such notice shall be effective thirty (30) days following Landlord’s receipt thereof; provided, however, if Tenant has not terminated this Lease within thirty-six (36) months after commencing payment of reduced rent, Tenant shall be deemed to have waived the right to terminate this Lease based on the existing failure and shall resume payment of full Basic Rent as set forth above.

**SUITABLE REPLACEMENT LANGUAGE FOR ANCHORS:**

The term a “Suitable Replacement” of an Anchor means a tenant or tenants that: (i) offer merchandise or operate their respective businesses in a manner consistent with the manner found in similar first-class shopping centers in the metropolitan areas surrounding the Center; (ii) possess regional or national name recognition; (iii) operate in a square footage equal to at least 80% of the ground floor square footage of the former Anchor; (iv) use their respective premises for a first-class operation of any of the following uses: retail, service retail, fitness, entertainment, restaurant, hotel, co-working, office or grocery; and (v) occupies premises which include reasonable connectivity to the enclosed mall portion of the Center.

**Or**

Suitable Replacement of Anchor Store. Landlord may replace an Anchor Store vacating its premises with another Retailer without Tenant’s consent if: (i) the substitute Retailer is one of the national or regional Retailers identified on **Exhibit \_\_\_** (the “**Substitute Store List**”); (ii) such substitute Retailer operates in at least 90% of the original vacating Anchor Store’s premises (or 80% of the original vacating Anchor Store’s premises, if the original vacating Anchor Store’s premises exceeds 50,000 square feet of GLA) under the tradename identified on the Substitute Store List; and (iii) Landlord notifies Tenant in writing of the substitution.

If the conditions above are not met, Landlord may submit a substitute Retailer to Tenant for Tenant's written approval, which approval shall not be unreasonably withheld. Without limiting the foregoing and Tenant's right to consider all other relevant factors, it shall be deemed reasonable for Tenant to withhold its approval if the following are not satisfied: (1) the use to be conducted by the substitute Retailer is substantially the same as that conducted by the vacating Anchor Store [CONSIDER INCLUDING: or any of the Retailers identified on the Substitute Store List; (2) the quality in terms of national or regional recognition, merchandise and assortment of merchandise is equal to, or better than, that of the vacating Anchor Store [CONSIDER INCLUDING: or any of the Retailers identified on the Substitute Store List]; (3) the retail price of the merchandise sold by the substitute Retailer is equal to, or higher than, that of the vacating Anchor Store [CONSIDER INCLUDING: or any of the Retailers identified on the Substitute Store List]; (4) the substitute Retailer is a national Retailer with at least 50 stores or a regional Retailer with at least 25 stores operating under the same tradename; and (5) the substitute Retailer operates for retail purposes in at least 90% of the original vacating Anchor Store's premises (or 80% of the original vacating Anchor Store's premises, if the vacating Anchor Store's premises exceeds 50,000 square feet of GLA).

A vacating Anchor Store whose premises is in excess of \_\_\_\_\_ square feet of GLA may be subdivided, provided that, in order to be considered to be a substitute Anchor Store under this Section, at least 80% of the original vacating Anchor Store's premises is occupied and there are at least two Retailers, each of which must (i) either be on the Substitute Store List (or qualify under subsections (i) through (iii) of Section \_\_ above), and (ii) occupy at least 20,000 square feet of GLA of the original vacating Anchor Store's premises, in which event all such substitute Anchor Stores shall collectively be deemed to be the replacement for the vacating Anchor Store.

Tenant's right of approval under this Section is solely for the purpose of determining whether the substitute Retailer qualifies as an Anchor Store under this Article, and is not intended to impair or restrict the freedom of Landlord to enter into leases or operating agreements with any party with whom Landlord desires in the exercise of its sole and absolute discretion. If a substitute Anchor Store occupies less than the entire premises occupied by the original Anchor Store, the excess GLA shall be included in the GLA of the Shopping Center for purposes of this Article.