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Peer to Peer 6

Show Me Assign; Take Assignment and Subletting to the Limit, One More Time

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Because leases often have terms of at least ten years and perhaps as long as fifty years, tenants have to consider ways to assign the lease or sublet the premises if the tenant's plans change. Similarly, a landlord who is operating a shopping center will want to plan for future development and redevelopment of the shopping center and plan to maintain an occupied shopping center. A tenant desiring to assign the lease or sublease of the premises is not necessarily a bad thing. Often enough it is a sign that things are going well.

I. LETTER OF INTENT STAGE

The time to address assignment and subleasing is during negotiation of the letter of intent for the original lease. The planning then continues through negotiation of the lease.

Subletting and Assignment

Consider that a typical letter of intent will touch on subletting and assignment rights and permitted use. During the negotiation of the letter of intent, the tenant will want to make sure the tenant is given the right to sublet the premises or assign the lease. The tenant will want broad rights to sublet the premises or assign the lease. Oftentimes a landlord will want to condition the tenant's ability to sublet the premises or assign the lease on the landlord's consent. The landlord might want to establish criteria for the transferee so that the quality of the tenant's credit is maintained.

Permitted Use

Similarly, during negotiation of the letter of intent, the tenant will want to pay attention to the description of the permitted use. Usually, the tenant just wants to make sure its business is described in the permitted use, so a pizza restaurant will look to make sure that the sale of pizza is included in the permitted use. A tenant who is planning an exit strategy will want to expand on the permitted use to allow any other legal use. The landlord will want to qualify that to make sure the tenant does not violate the exclusives of other tenants in the shopping center, and perhaps limit the tenant to other retail uses.

Other Issues to Consider

The letter of intent stage is also the time to address any other specific issues that might arise as a tenant seeks to address subletting and assignment, such as permitted closures for remodeling, release of the tenant following an assignment and release of the guarantor if there is one. Often enough, this attention to detail is not an indication that the tenant is expecting things to go bad, they are expecting things to go so well that they might have to open two stores in a market where they only had one. Conversely, a tenant who is entering a new market might not be absolutely certain its concept will take off in a particular market and might want to plan a graceful exit if things do not go as planned.

II. LEASE STAGE

During the lease negotiations the parties will want to more thoroughly address the various provisions of the lease which will bear upon subletting and assignment.

Subletting and Assignment

Of course, there is the subletting and assignment language. Subletting and assignment can actually be broken down into internal and external transactions. Further divisions can be made for subletting language and assignment language.

Internal Transfer

Consider that the tenant might want to allow a subsidiary or parent to use all or part of the premises. A tenant might also be subject to an entity level transaction where all of the tenant or a particular division is acquired by someone else. The tenant will not want any of these transactions to be subject to the landlord's review and approval. As aggressive as the tenant might be on that topic, the landlord will still want to include some language in the subletting and assignment provision to ensure that the tenant does not use the exclusion to circumvent the restriction on the tenant transferring to an unrelated entity.

If the tenant is operating a franchise, the tenant might also want to include language allowing the tenant to assign the lease to the franchisor or a replacement franchisee. Depending on how the franchise is run the lease might include language for the franchisor to be the tenant and sublease the premises to the franchisee.

External Transfer

With an external transfer, the landlord will want to be more careful about how freely the tenant can assign the lease or sublease the premises. Obviously, the landlord and tenant will have widely divergent views on how broad are the tenant's rights to sublease the premises or assign the lease. The tenant will want the rights to be as broad as possible. Conversely, to maintain control of its shopping center, the landlord will want the rights to be as narrow as possible. Where the balance is struck is often determined by the relative bargaining positions of the parties.

From the tenant's perspective, assigning the lease is a pretty straightforward proposition – the tenant assigns the lease.

If the tenant is entering into a sublease rather than an assignment, the tenant will want to include a provision in the subletting and assignment language requiring the landlord to give the subtenant a recognition agreement where the landlord will agree that if the tenant defaults under the lease, the landlord will give the subtenant notice of the tenant's default and an opportunity to cure. The agreement should go on to say that if the tenant's lease is terminated the landlord will allow the subtenant to continue to occupy the premises under the terms of the sublease. The request to provide the recognition should spur the landlord to consider the implications of giving the recognition agreement. If the tenant wants the landlord to provide the recognition agreement and agree the subtenant can continue in occupancy following a default under the tenant's lease, the landlord will want to make sure the terms of the sublease follow the terms of the prime lease and do not impose more obligations on the sublandlord than are contained in the prime lease.

During the negotiation of the sublease and assignment provisions, the landlord will be concerned about the tenant profiting from the landlord's property and want to consider a recapture right if the tenant approaches the landlord requesting consent to a sublease or assignment. As simple as that might sound, consideration should be given to any costs that might arise from brokers hired by the tenant or the need to erect demising walls or separate utilities. If the landlord wants to recapture the premises, who should pay the tenant's broker who found the transferee? If it is a sublease of a portion of the premises, who should pay to erect the demising wall?

If the landlord does not recapture the premises, the landlord might want to consider including language saying the tenant will pay to the landlord all of the bonus rents collected from the subtenant. The landlord will want to include in the lease language similar to what a lender requires in an assignment of rents saying the tenant has a revocable license to collect rents from the subtenant, but if the tenant defaults, the landlord has the right to terminate the license and collect rents directly from the subtenant. Depending on the relative bargaining position of the parties, bonus rents might go 100% to the landlord, 100% to the tenant or split in some manner. Consideration should be given how the bonus rents are defined. As discussed above, the tenant will want to try to recoup its costs of finding the subtenant.

As the parties negotiate the sublease and assignment provisions, if the tenant has provided the landlord with a corporate guaranty, or a guaranty from a principal of the tenant, the tenant will want to try to have the guaranty released following an assignment. Naturally, the landlord will want to resist the release, so if the tenant really wants to try to get the guarantor released, the tenant should consider the landlord's concern with having as good or better support for the lease as the landlord enjoyed before the transfer. The tenant should expect the landlord to ask for a replacement guaranty from someone with similar wherewithal. If the initial guarantor is a high net worth individual or entity, the transferee might have a hard time finding someone with similar means, and in such instances the tenant might want to consider specifying a certain net worth. The landlord will want the net worth to be significant enough to cover all of the remaining monetary obligations under the lease by a wide margin.

Estoppels

Generally, a lease will require the tenant to sign an estoppel certificate if the landlord wants to sell the shopping center or obtain financing. A tenant considering subletting or assignment will want to make the obligation to provide an estoppel mutual so that the landlord will provide the tenant with an estoppel if the tenant is subletting the premises or assigning the lease.

Business Name

Most leases will specify the name under which the tenant will operate and some will go on to say the tenant will not operate under any other name without the landlord's consent. As part of negotiating the subletting and assignment language, a tenant will want the right to change the name of the business to the name under which its subtenant or assignee is operating.

Permitted Use

As mentioned above, the use clause should be discussed during the letter of intent phase. While negotiating the lease the tenant will want to make sure the premises can be used for any legal use.

Operating Covenant

If the lease contains an operating covenant, the tenant will want to make sure there is enough flexibility in the operating covenant to make sure the tenant can assign the lease or sublease the premises. For instance, a landlord's operating covenant will require the tenant to continually operate in the premises. If the tenant fails to operate, the landlord will want the right to terminate the lease. As an intermediate step, if the Tenant fails to operate, before terminating the lease, the landlord will want the right to increase the tenant's rent. If the tenant sublets the premises or assigns the lease, the transferee will require a certain amount of downtime to remodel, refixture and restock the premises. As it negotiates the operating covenant, the tenant will want to exclude closures due to a

remodeling of the premises; the landlord will want to limit the amount of time for which the tenant can be closed for remodeling.

Recapture

Whether the lease contains an operating covenant or not, the landlord might request a recapture right if the tenant fails to operate. As mentioned above, the tenant will want to make sure that the recapture right is not triggered because the tenant is closed because of remodeling.

Signage

As the parties contemplate the assignment and sublease language consideration should be given to the signage provision contained in the lease. The landlord will want to establish some amount of uniformity for the signs in the shopping center and will usually attach sign criteria to the lease. The lease will refer to sign criteria and require the tenant to comply. Frequently, the signage language will go on to say the tenant will not install any signage without the landlord's consent. As the tenant reviews the language, attention should be paid to such language and it should either be deleted or revised to allow the tenant to use its prototypical signs so long as they comply with the sign criteria.

Co-Tenancy

If the tenant is dependent on a certain amount of synergy from other retail tenants, a tenant will want to have the right to terminate the lease if the co-tenancy is not met. Depending on the configuration of the shopping center, will the co-tenancy require an anchor tenant or two? Will it require a certain number of in-line tenants? What is the tenant's remedy if the co-tenancy is not met? Does the tenant want to terminate the lease and move out, or does the tenant want a rent reduction? Is it really practical for the tenant to terminate the lease and vacate? Will the tenant be able to replicate the hoped-for synergy somewhere else? The answers to all of these questions will determine how the tenant negotiates the co-tenancy provision. In responding to a tenant's request for a co-tenancy provision a landlord will want to be careful not to commit to having all of the anchor tenants and all of the in-line tenants open and operating. Usually, a landlord will want to try to commit to having $\frac{1}{2}$ to $\frac{2}{3}$ of the anchor tenants and 60% to 70% of the in-line tenants open and operating. If the co-tenancy drops below the required ratios, the landlord will want to negotiate for a cure period to replace the closed stores. A landlord will want as much time as possible to cure the co-tenancy; a year or two would not be unusual for a landlord to request. The tenant will want to try to limit that time as much as possible, but will probably have a hard time getting anything less than a year.

In negotiating the co-tenancy provision, the landlord might want to consider a stepped approach to the co-tenancy, so that the landlord only has to meet a certain amount of co-tenancy before the tenant is required to open. The landlord will then commit to meet a larger co-tenancy commitment within 6 to 12 months after the tenant opens. An issue to be negotiated is if the landlord does not meet the opening co-tenancy, will the tenant have the immediate right to terminate the lease, or will the tenant merely delay opening until the co-tenancy is met?

Overarching all of these concerns with co-tenancy is the issue of what, if anything, has the landlord committed to give other tenants in the shopping center if the landlord is dependent on this tenant specifically, or this tenants line of business generally, to meet co-tenancy requirements for other tenants, the landlord will want to be sure to include language in the assignment and sublease provision giving the landlord the right to consider those factors when considering a request to assign or sublease.

Exclusive Rights

If the lease contains an exclusive for the tenant, the tenant will want an exclusive that might benefit a replacement tenant. Rather than an exclusive for XYZ Supermarket, the tenant might negotiate for an exclusive for a supermarket and defined supermarket to include departments for groceries, bakery, meat, fish, produce, health and beauty aids and a pharmacy.

The landlord will want to determine how much it wants to tie up the shopping center with the exclusive for a tenant who might assign the lease or sublease the premises. At the very least the landlord should specify that in assigning the lease or subletting the premises, the tenant cannot violate the exclusive of other tenants in the shopping center. Depending on the relative bargaining positions of the parties, the landlord might want to say that if the lease is assigned, the exclusive will expire altogether.

Extension Rights

While negotiating the assignment and subletting provisions, the parties should pay attention to the language regarding the tenant's rights to extend the term. If the extension term has negotiated rates, the landlord might want to consider saying the rights to extend the term will expire if the tenant assigns the lease. Alternatively, the landlord might want to consider qualifying the assignment on an increase of the rent to a market rate. Conversely, the tenant will view the extension rights as an important asset and want to preserve them as much as possible. If the tenant is a franchise, the tenant will want to ensure that the right to extend the term transfers to the franchisor and a replacement franchisee.

Other Preemptive Rights

In addition to co-tenancy, exclusive rights and extension rights, the parties should consider how transferable are other preemptive rights such as expansion rights, rights of first offer, rights of refusal and rights to terminate. As with most of the provisions discussed above, the landlord will view these rights as an inducement to this particular tenant and the tenant will view them as a benefit that adds to the value of its leasehold estate.

Memorandum of Lease

If the tenant wants to record a memorandum of lease, the tenant might want to include its exclusive and options to extend the term in the memorandum of lease. Consideration should be given to the memorandum while negotiating the sublease and assignment provisions. If the tenant wants to record a memorandum of lease including the tenant's exclusive and then wants to assign the lease or sublease the premises to someone who will change the use, the landlord will want to condition the transfer on the tenant releasing the memorandum of lease. Similarly, if the landlord does not want the transferee to have the benefit of any option to extend the term, the landlord will want to require the tenant to release that provision of the memorandum of lease. The tenant will want the right to amend the memorandum of lease or record a new memorandum of lease to address the new use of the transferee.

III. Survey of State Laws Addressing Assigning and Subleasing

A survey of State Laws Addressing Assigning and Subleasing, performed in early July 2021, revealed that the common law tenets of contracts being freely assignable and disfavoring restraints on transfer form the basis on which courts address the issue of tenants assigning their lease or subletting their premises. Similarly, courts apply the same criteria to the Landlord assigning the lease. The same notions of contracts being freely assignable and disfavoring restraints on transfer underpin courts' approaches to interpreting restrictions on transfer. The majority view is that absent specific language in a lease prohibiting such a transfer the landlord and tenant are free to assign the lease and tenant is free to sublease the premises. There is a small minority of states (fewer than five) that require a tenant to obtain the landlord's consent before assigning the lease or subleasing the premises.

Naturally enough, most commercial leases do contain language prohibiting the tenant from assigning the lease or subletting the premises without the landlord's consent. Even in those instances, the majority view is that landlords have to be reasonable in considering such requests. The states that do allow the landlord to consent in their sole discretion require the language of the lease to be clear that the landlord can grant or withhold its consent in its sole discretion.

IV. Lease Language:

Internal Transfer Tenant's Language:

Notwithstanding the foregoing, Lessee shall not be required to obtain Lessor's consent for an assign or sublet of the Premises or any portion thereof to: (i) an affiliate of Lessee; (ii) a parent or subsidiary of Lessee, or (iii) any person or entity which controls, is controlled by or under common control with Lessee, or (iv) any entity which purchases all or substantially all of the assets of Lessee, (v) any entity into which Lessee is merged or consolidated, (vi) Tenant's Franchisor, (vii) a replacement franchisee (all such persons or entities described above being referred to individually as an "Affiliate", and collectively, as "Affiliates"). An assignment or sublease to an Affiliate shall be deemed a "Permitted Transfer".

Finally, Subtenant reserves the right without Tenant's consent to grant permission to use the Leased Premises (or any portion thereof to (1) any affiliate of Tenant or (2) any contractor, consultant, service provider joint venture partner or client of Tenant which is occupying space in the Leased Premises for purposes related to the conduct of Tenant's or any of its Affiliates' business therein.

Another Version of Internal Transfer Tenant's Language:

Consent Except for a Permitted Transaction, Tenant shall not assign this Lease or sublet the Premises without the prior written consent of Landlord, which consent, including consent to a proposed change in the Permitted Use, shall not be unreasonably withheld, delayed or conditioned.

Exemptions 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 the Premises shall have the appearance of being operated as a single store by a single entity. "Related Party" means an Affiliate of Tenant or a successor to Tenant by merger or consolidation or acquisition of substantially all of the assets or stock of Tenant or an Affiliate thereof. "Affiliate" of a party or other entity (a "Party") means another entity that controls, is controlled by, or is under common control with the Party. The issuance or transfer of the stock, partnership interests or other equity interests of Tenant or the partners of Tenant as a result of (i) the public offering or trading of Tenant's stock on a nationally or internationally recognized exchange or on the NASDAQ over-the-counter market or (ii) a private placement or other raising of funds to be invested in Tenant for future expansion or additional working capital shall not be deemed to be an assignment, transfer or change in control requiring Landlord's consent.

Tenant's Assignment and Subletting Language:

Assignment and Subletting: (a) Tenant may assign, mortgage or otherwise encumber this Lease or sublease all or any part of the Demised Premises without Landlord's consent but with written notice thereof to Landlord. Tenant agrees to furnish to Landlord written notice of any assignment or subletting within thirty (30) days thereafter, together with the name and address of the assignee or subtenant. Notwithstanding anything contained herein to the contrary, Tenant may assign or sublet the Demised Premises, to an operator, franchisee or licensee of Tenant without notice to Landlord; provided, however, following any assignment or subletting hereunder, Tenant shall remain fully responsible for all obligations under this Lease except as otherwise set forth in Section 21(b)(5). Notwithstanding the foregoing, if Tenant assigns this Lease to an entity with a net worth of \$25,000,000.00 or greater, then upon such assignment (and the assumption of this Lease by such entity) Tenant shall be released from any and all liability under this Lease arising from and after the date of such assignment.

Another Version of Tenant's Assignment and Subletting Language:

Except for an assignment or subletting to its parent, subsidiary or affiliated entity or Franchisor or a successor franchisee, wherein no Landlord consent shall be necessary, Tenant shall have the right to assign its rights herein or sublet the Premises subject to Landlord's consent, not to be unreasonably withheld, conditioned or delayed beyond ten (10) days.

Landlord's Assignment and Subletting Language:

Assignment and Subletting. Tenant shall not assign, mortgage, pledge or encumber this Lease or any interest therein, or sublet the whole or any part of the Leased Premises, or permit the use of the whole or any part of the Leased Premises by any licensee, concessionaires or other occupant (whether by operation of law or otherwise) (collectively, a "Transfer"), without first obtaining the prior written consent of Landlord. Landlord's consent may be given or withheld in its sole discretion. Notwithstanding any such assignment, subletting, licensing or granting of a concession made with the prior written consent of the Landlord as aforesaid, Tenant shall nevertheless remain liable for the performance of all of the terms, conditions and covenants of this Lease. If Tenant is a partnership, corporation or other entity other than an individual, an assignment or transfer of equity interests constituting an aggregate change in the legal or beneficial ownership of Tenant of more than fifty percent (50%) over the Lease Term shall be deemed an assignment or transfer of this Lease requiring Landlord's prior written consent thereto. In no event may Tenant assign this Lease or sublet the whole or any part of the Leased Premises prior to the completion of Tenant's Work and the issuance of a Certificate of Occupancy for the Leased Premises.

Standards for Consent. If Tenant desires the consent of Landlord to a Transfer, Tenant shall submit to Landlord, at least thirty (30) days prior to the proposed effective date of the Transfer, a written notice which includes the business terms of the assignment or subletting, financial information and statements concerning the proposed transferee and such other information as Landlord may reasonably require about the proposed Transfer and the transferee, together with a non-refundable processing fee in the amount of Two Thousand Five Hundred Dollars (\$2,500.00). Landlord shall not be deemed to have unreasonably withheld its consent if, in the judgment of Landlord: (i) the transferee is of a character or engaged in a business which is not in keeping with the standards or criteria used by Landlord in leasing the Center; (ii) the financial condition of the transferee is such that it may not be able to perform its obligations in connection with this Lease or the sublease, as applicable; (iii) the transferee is a governmental agency, entity or unit; (iv) Tenant is in default under this Lease beyond any applicable notice and cure period, unless the default is cured as part of the Transfer; or (v) such a Transfer would violate any term, condition, covenant or agreement of the Landlord involving the Center or any other tenant's lease within it. If Landlord wrongfully withholds its consent to any Transfer, Tenant's sole and exclusive remedy therefor shall be to seek specific performance of Landlord's obligation to consent to such Transfer.

Requirements for Subletting. Any sublease which Tenant enters into as sublandlord for all or any portion of the Leased Premises (a "Sublease") shall provide that: (i) the Sublease is subordinate and subject to this Lease, including, without limitation, all prohibitions and restrictions contained herein; (ii) the fixed expiration date thereunder shall not extend beyond the Termination Date; (iii) that any subtenant shall maintain insurance meeting the same minimum requirements imposed upon Tenant under this Lease (including any provisions related to delivery of certificates of insurance and naming Landlord as an additional insured or loss payee); and (iv) that the subtenant shall indemnify Landlord and Landlord's Indemnitees to the same extent as Tenant provides under the Lease. Tenant shall not, without Landlord's consent, amend or modify any Sublease in a manner which would cause such Sublease (as amended or modified) to violate the provisions of this Section 10.3 and Tenant shall deliver to Landlord, or shall cause to be delivered to Landlord, within five (5) days after the full execution and delivery thereof, a true and complete copy of any executed Sublease or any material amendment or modification thereto. In the event Tenant enters into a Sublease, Tenant shall pay to Landlord, in addition to the Fixed Rent and other charges due to Landlord pursuant to this Lease, as Additional Rent fifty percent (50%) of the excess, if any, of the rent and other charges payable by its subtenant over the Fixed Rent and other charges payable to Landlord under the

Lease (as calculated on a per square foot basis, if only a portion of the Leased Premises is sublet) (the "Excess Rent"). Any Excess Rent shall be net of Tenant's reasonable costs including alterations, tenant improvement costs or allowances or other concessions granted by Tenant to the Transferee; brokers' commissions, brokers' fees, advertising expenses, reasonable concessions, and all other costs and damages attributable to the Transfer, including all attorneys' fees and costs incurred by Tenant. The Excess Rent shall not include any amounts paid to Tenant for its furniture, fixtures, equipment or inventory.

Improper Transfer. Any transfer by Tenant in violation of this article shall, at Landlord's option, be void.

Assignment by Landlord. Landlord's right to assign its interest under this Lease shall in all events remain unqualified and unrestricted.

Another Version of Landlord's Assignment and Subletting Language:

Procedure for Transfer. Except for a permitted Transfer, should Tenant desire to make a Transfer hereunder, Tenant shall, in each instance, give written notice of its intention to do so to Landlord at least thirty (30) days before the intended effective date of any proposed Transfer, specifying in such notice whether Tenant proposes to assign or sublet, or enter into license, franchise or concession agreements, the proposed date thereof, and specifically identifying the proposed Transferee, the liquid net worth and previous business experience of the proposed Transferee including, without limitation, copies of the proposed Transferee's last two (2) years' income statement, balance sheet and statement of changes in financial position (with accompanying notes and disclosures of all material changes thereto) in audited form, if available, and certified as accurate by the proposed Transferee. Such notice shall be accompanied, in the case of a proposed assignment, subletting, license, franchise or concession agreement, by a copy of the proposed assignment, sublease, license, franchise or concession agreement or, if same is not available, a letter of commitment or a letter of intent. In the case of a proposed sale of Tenant's business, Tenant shall provide a copy of the proposed sale and financing agreements. Landlord shall, within thirty (30) days after its receipt of such notice of a proposed Transfer, by giving written notice to Tenant of its intention to do so: (a) pursuant to Section 13.1(a) or 13.1(b), whichever shall be applicable, withhold consent to the Transfer; or (b) consent to the Transfer; or (c) terminate this Lease, such termination to be effective thirty (30) days after receipt by Tenant of Landlord's notice to terminate this Lease. If Landlord elects to terminate this Lease pursuant to (c) above, Tenant shall have the right, within thirty (30) days of Landlord's notice of its intent to terminate, to withdraw Tenant's request to Transfer, which shall nullify Landlord's right to terminate this Lease (but Tenant shall not withdraw more than two (2) requests in any twenty-four (24) month period). No Transfer of this Lease or agreement entered into with respect thereto, whether with or without Landlord's consent, shall relieve Tenant of this Lease from primary liability under this Lease. Any modification, indulgences, waivers, or extensions of time granted by Landlord to any Transferee, not expressly agreed to by Tenant, which has the effect of increasing the Tenant's obligations under this Lease, shall relieve the transferring Tenant of this Lease from primary liability under this Lease as to the increase in obligations.

If this Lease shall terminate as provided in (c) above, Landlord and Tenant shall be relieved of any further liability or obligation hereunder accruing from and after the date of termination, except for those obligations and liabilities which expressly survive the expiration or termination of this Lease. In the event of any default by the Transferee, Landlord may proceed directly against Tenant or anyone else responsible for the performance of Tenant's obligations under this Lease, including any assignee or sublessee, without first exhausting Landlord's remedies against any other person or entity responsible therefor to Landlord, or any security held by Landlord.

Landlord's non-circumvention language:

Nothing herein contained shall abrogate the requirement of the written assumption of such assignee, sublessee or other transferee, nor be used to circumvent the remainder of the provisions of this Lease, including without limitation, the provisions of this Paragraph 32. Tenant shall give Landlord at least ten (10) days' prior notice of any Permitted Transfer.

Tenant's Language for the Landlord to Provide a Recognition Agreement:

Lease Recognition Agreement. Landlord agrees, upon request of Tenant, to execute and deliver a lease recognition and non-disturbance agreement in form and substance reasonably satisfactory to Landlord and the Sublessee ("Lease Recognition Agreement") for each Qualified sublease (as hereinafter defined). Tenant shall, upon request of Landlord and as a condition to Landlord executing a Lease Recognition Agreement, submit to Landlord sufficient information to enable Landlord to verify that the sublease for which a Lease Recognition Agreement is being requested is a Qualified Sublease. For this section a "Qualified Sublease" shall mean a sublease which is executed after the date hereof with a subtenant who is a person or entity which has a credit rating or creditworthiness (taking into account any security deposit, letter of credit or other credit enhancement provided by such subtenant) which is reasonably acceptable to Landlord. The Lease Recognition Agreement shall contain the following terms: (i) the Sublease and Subtenant's rights under the Sublease will not be disturbed if any eviction, or termination action or other action taken by Landlord so long as Subtenant is not in default under the Sublease beyond all applicable notice and opportunity to cure periods; (ii) the Sublease will automatically become a direct lease between Landlord and Subtenant in the event of any eviction, or termination action taken by Landlord.

Landlord's Language Regarding Bonus Rents:

If the rent due and payable by a sublessee, assignee or licensee under any such permitted transfer (or a combination of the rent payable, plus any bonus or other consideration therefor or incident thereto) exceeds the Rent provided for in this Lease, then Tenant shall pay Landlord all such excess rentals and other excess consideration within ten (10) days following receipt thereof by Tenant from such sublessee, assignee, licensee or other occupant, as the case may be.

Another Version of Landlord's Language Regarding Bonus Rents:

Tenant absolutely and irrevocably assigns to Landlord all of Tenant's right, title, and interest in and to all rents and other sums collected under any Sublease ("Sublease Rents"), and Landlord hereby grants Tenant a license, which shall remain in effect so long as no Event of Default exists under the Lease, to collect all Sublease Rents. Upon an Event of Default, unless otherwise declared in writing by Landlord, such license shall automatically terminate. Tenant shall give written notice to any subtenant prior to executing a Sublease of this assignment, and any Sublease shall direct the subtenant to immediately direct all Sublease Rents to Landlord upon receipt from Landlord of a notice of an Event of Default. Tenant further agrees to execute any subsequent instruments necessary to direct payment of Sublease Rents to Landlord. Landlord shall not use or enjoy any Sublease Rents (except for Excess Rent) except for the purposes of (i) applying such against Tenant's unfulfilled obligations under the Lease; (ii) reimbursing Landlord for any costs incurred as a result of any Event of Default; or (iii) compensating Landlord for other damages suffered by Landlord as a result of an Event of Default. Subsequent to the foregoing applications by Landlord, any Sublease Rents remaining in Landlord's possession or control following the cure of any Event of Default shall be delivered promptly to Tenant. Nothing in this Section 10.4 or any actions performed in accordance herewith shall be deemed to have created (a) any privity of contract or estate between Landlord and any subtenant under a Sublease; (b) any assumption by Landlord of any liability or obligation whatsoever under any Sublease; or (iii) any non-disturbance, recognition or similar agreement between Landlord and any subtenant under a Sublease.

In the event of a breach by Tenant in the performance of its obligations under this Lease, Landlord, at its option and without any obligation to do so, may require any subtenant to attorn to Landlord, in which event Landlord shall undertake the obligations of the sublandlord under such sublease from the time of the exercise of said option to the expiration of such sublease; provided, however, Landlord shall not be liable for any prepaid rents or security deposit paid by such subtenant to Tenant or for any other prior defaults or breaches of Tenant as sublandlord under such sublease.

Tenant's Language Regarding Exclusions from Bonus Rents

Any excess shall be net of Tenant's reasonable costs including alterations, tenant improvement costs or allowances or other concessions granted by Tenant to the Transferee; brokers' commissions, brokers' fees, advertising expenses, reasonable concessions, and all other costs and damages attributable to the Transfer, including all attorneys' fees and costs incurred by Tenant. The excess shall not include any amounts paid to Tenant for its furniture, fixtures, equipment or inventory.

Tenant's Language for Release of the Guarantor Following an Assignment:

If: (i) Tenant assigns this Lease with Landlord's consent or pursuant to a Permitted Transfer; and (ii) Tenant provides Landlord with a replacement guaranty in the form attached to this Lease as Exhibit E from an entity related to the sublessee or assignee, which has a liquid net worth equal to or greater than \$_____, Guarantor shall be released from all liability under the guaranty.

Tenant's Language for Release of the Tenant Following an Assignment:

In the event of an assignment of this Lease, Tenant shall remain liable for the performance by the assignee-in-possession of Tenant's obligations hereunder; provided, however, that, if Tenant's assignee or any subsequent assignee has, at the time of the assignment, or subsequently attains a net worth of at least Fifty Million Dollars (\$50,000,000.00), determined as of the end of the most recent fiscal year of such assignee prior to such intended release (unless more current figures are available, in which event such current figures shall be used), then Tenant shall be released and discharged from any further liability under this Lease. The provisions of this Section 20.3 shall not apply where the assignee-in-possession is an Affiliate of Tenant. The foregoing release shall be effective upon the date such assignee attains the required net worth, or the date of the assignment to an assignee having the required net worth, whichever is later. Notwithstanding anything to the contrary contained herein, if Landlord and a non-Affiliate assignee of Tenant amend this Lease, Tenant shall not be liable for the performance and observance of the obligations to be performed by the assignee pursuant to the amended provisions of this Lease; however, Tenant shall remain liable for the performance and observance of all of the original obligations to be performed by Tenant pursuant to this Lease (unless otherwise expressly provided in this Lease). Prior to exercising any remedies for a non-Affiliate assignee's default under this Lease, Landlord shall deliver to Tenant copies of any default notice(s) and Tenant shall have a reasonable opportunity to cure any such default.

Tenant's Language Regarding Changing Business Name:

Tenant shall operate the Premises under the Trade Name, or any other trade name approved by Landlord, which approval shall not be unreasonably withheld, conditioned or delayed. Notwithstanding the foregoing, any permitted assignee or subtenant shall be permitted to use its own trade name.

Landlord's Language Regarding Use:

Tenant shall use the Premises solely for the use specified in the applicable Fundamental Lease Provision, and shall not change such use except with the prior written approval of Landlord, which Landlord may give or withhold in its sole discretion. Tenant shall use the Premises solely under the tradename specified in the applicable Fundamental Lease Provision and under no other tradename without the prior written consent of Landlord, which Landlord may give or withhold in its sole discretion.

Tenant's Permitted Use Language:

Tenant may use and occupy the Premises for a _____ or any other lawful retail or restaurant use.