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Workshop 12

“Experience is a good school, but the fees are high.”

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by:

Byron P. Alterman, Esq.
Byron P. Alterman LLC
524 Orme Cir., Unit 1
Atlanta, Georgia 30306
byron@byronalterman.com

Nick Egalanian
Founder and President
Siteworks Retail
1817 Hidden Point Road, Suite 110
Annapolis, Maryland 21409
Negalanian@siteworksretail.com

A workshop discussing how the pandemic changed the operations, practices, and relationships of retail landlords and tenants. We will discuss adaptive uses, changes in operations, and practices that landlords and tenants implemented during and after the pandemic, and how these have changed the industry.

I. How did Landlords and Tenants maintain assets and profits?

A. Rent abatements and deferrals. Many Landlords were faced with tenants who had no income. In some urban areas, the pandemic created a force majeure event where the tenants did not have the ability to operate or maintain an income. However, not all lenders had the same idea, and this created a tension between the tenant income, the landlord income and both of the landlords and tenants being able to make the required payments. If tenants could not pay the rent, landlords could not pay their mortgages. Many landlords began offering programs to allow for rent abatement, deferral, and even termination, and many of the federal and local governments helped the operators and landlords where possible. Sales reporting and income reporting requirements were crucial to see what losses were really happening.

1. Rent abatements. Some landlords simply forgave the tenants from paying rent and allowed abated rent while tenants were unable to stay open. Many landlords condition the full abatement upon the tenant fully complying with the provisions of the lease and should further allow the landlord to recoup the abated rent on the occurrence of a tenant default. See Appendix 1. This language would make the abatement immediately due and payable on the occurrence of a tenant default.

2. Rent Deferrals. In order to recoup the full rental for the entire term, many landlords offered a rent deferral. Rent deferrals extend the term of the lease beyond the current term expiration, and defer the current rental for the same amount of time. Like abatements, the rent deferrals should predicate the full abatement on the full performance of the lease terms by the tenant. See Appendix 2. This language provides for the deferral to be conditioned on no default and full performance.

B. Mortgage relief. While many tenants requested rent relief, many landlords also wondered if they too could get some relief. As it turns out, the markets required flexibility, and even many of the servicers for CMBS lenders were given mandates to comply. While many did, the approach has been inconsistent across the board, with both owners and lenders not having a clear understanding of the conditions and terms, and the servicers do

not have much room to improvise. This is because the servicers operate under strict authority guidelines, and are not typically permitted to allow anything inconsistent with their agreements from their lenders.

C. Government help. The federal government rolled out an unprecedented program of disaster relief to assist. This includes disaster relief, paycheck protection, and flexibility on existing laws.

1. Disaster relief loans. Disaster relief loans offered a one-time loan program administered by the small business administration of the US Government. These were extremely low interest rate loans that could be paid back over a long period of time. While these loans were made available but came with some restrictions on how the business could be run. For example, one of the requirements stated that any distributions must be approved.

2. Paycheck Protection Program. The paycheck protection program was created for companies to make sure that they could pay their employees while income was reduced due to the restrictions on essential business. It was administered by the small business administration, and the loans were granted on an expedited basis to help support employees whose business were affected by pandemic. Many retailers used this program. The federal government has stated that many of the PPP loans will not need to be repaid.

3. Landlords as operators (master leases). In order to attempt to deal with vacancies and maintain a vibrant center that does not appear “dead,” many retailers have begun to operate their own retail “stores” by using a master lease and hiring operators to run the stores. This solves one of the major problems for landlords who are dealing with co-tenancy provisions and operation thresholds which may have been driven by other agreements but may also create other issues for Real Estate Investment Trusts (REITS) who have specific requirements to maintain compliance with governmental regulations regarding the income sources and requirements for REITS.

i. Special help for REITS. 26 USC 856 and maintaining REIT qualification. Real Estate Investment Trusts must comply with certain legal requirements and the statute in order to maintain their status. Congress proposed a change to help these REITs have more flexibility for help on their taxes, but this bill is not likely to be passed. The key takeaway is that the retail industry and the landlords are being considered for additional help, and the REITs are also in line for this.

4. Recasting Retail as an amenity. The traditional retail model has changed and has been in transition for some time. Retail is becoming an essential service provider to cater to the needs of people in their homes and work. There is a high demand for services ancillary to living and working environments. Many of the condominium developers are targeting restaurants, coffee shops, “general stores” and drug stores as a key part of their urban development. Many developers are selling the retail components of their development to people who are willing to develop and manage those retail components, with use restrictions to promote higher end services and developments. But what did these “amenities” do to be able to survive and how did they maintain being an amenity? We will look at this in connection with the changing uses.

II. How did tenants maintain assets and profits?

A. Adaptation by tenants. Restaurant tenants began to offer takeout and pickup stations, and delivery services thrived. Retailers who sold traditional items began to offer curbside pickup of items bought online. Some retailers began delivering products via courier service from online orders. The local governments also helped by swiftly relaxing some of the laws that pertain to open containers, alcohol takeout, and alcohol delivery. Also, many food tenants were able to share branding and preparation spaces, and many talented restaurant operators offered many new concepts.

1. Curbside pickup. Retailers implemented and improved contactless curbside pickup programs to keep both compete with delivery services and to serve their customers better. Many have kept this pickup as customers have responded positively. This offers a measure of convenience for the shopper who does not want to be inside a store and allows the retailers to compete with online sellers by providing immediate pickup rather than waiting for the delivery time.

2. Delivery services. Some retailers offer delivery service for their customers where the customer can order and have their product delivered locally within a few hours. Both Apple and Best Buy, for example, in many retail areas would provide drop services to a home address within a radius of their stores, even when the stores were closed.

(a) Grocery Delivery. Many grocery stores began to offer a larger range of delivery services and tuned in to this market. Some operators created new industries of shoppers who would shop for groceries and deliver them to the consumer after ordering from the website. This delivery system is still in place for many urban dwellers, and certainly offers a service that many have found to be invaluable, pandemic or not.

3. Restaurant Adaptation. This will be further discussed below in connection with ghost kitchens, restaurant markets, and delivery services.

B. Revisiting standard lease clauses and boilerplate.

1. Continuous Operation. Many of the opening covenants and continuous operation covenants that are applicable to retail leases are subject to force majeure. Many national retailers closed all of their stores and remained closed until they determined that it was safe to reopen, in spite of covenants under their leases that required them to remain open for business on all days that the shopping center remained open. This led to some shopping centers that had stores that were not operating. Many of the national landlords “looked the other way” in spite of this clause and the fact that the closures were technical lease violations. The continuous operation clauses are one of the many that have been revisited and changed by the pandemic.

2. Force Majeure. The typical landlord-oriented force majeure clause allows for the landlord and tenant to excuse performance based on acts that would frustrate the performance of the obligations, but does not excuse rent. With tenants facing closure and the uncertainty of the pandemic, many of tenants and landlords refocused on what typically was viewed as boilerplate. Some of the larger tenants insisted on new force majeure language that called for automatic abatement of rent based on a closure related to pandemic or an automatic rent deferral (See Appendix 3, attached). If force majeure causes a closure of a store, should the tenant still be obligated to pay rent?

i. Changes to the force majeure clause. Many landlord forms did not contain the concept of force majeure. With both the landlord and tenant obligations being affected by the pandemic, this provision is now scrutinized, with some tenants going as far as trying to incorporate an automatic abatement in the event that they are required to be closed due to government mandate or pandemic. While there is no doubt that a forced closure due to a mandate would qualify for force majeure, what about the situation where retailers decide to close for safety reasons when the law would otherwise allow them to operate their business?

3. Insurance and Business Interruption Insurance. Many landlords and tenants were surprised to learn that pandemic is excluded from business interruption insurance. Landlords and tenants both attempted to make a claim for loss of income. These claims were denied by the insurers as loss by pandemic is specifically excluded from business interruption insurance. This will likely be something that neither will forget, and many have proposed a federal insurance program to cover the large gap and the lost income from both the landlords and tenants.

4. Rent Deferrals. A more likely scenario for landlords was granting rent deferrals. These deferrals either excused payments of all or part of the rent for a period of time and extended the lease term to recapture the amounts that were previously deferred. The rent deferrals could also include an unincreased rent component.

5. Modifications of uses and adaptive uses. The pandemic forced many retailers and franchisees to assess their concepts and the way they interact with the public. Self-service frozen yogurt, buffets, and several other “high risk” categories closed their doors to the public or changed their operations. In person dining was forced to adapt both by adding on delivery and pickup options (as discussed above), creating ghost kitchens, and opening “food markets” with take and cook menus.

i. Ghost Kitchens. A ghost kitchen is a restaurant space that is occupied by either one tenant or a multitude of tenants who use the space only for food preparation, with no customer seating or dining area. A ghost kitchen can be used by several different food concepts and can be branded as several different restaurants either by the same restaurateur or by several restaurateurs and provide the space for food preparation delivery and pickup. Some ghost kitchens operated several type of restaurant concepts under one umbrella, creating different menus and styles of food prepared at one hub. In the traditional retail setting, this would violate the use provisions since landlords like to have control over tenant operations and the mix of the center. However, as the tenants and centers struggled to stay alive, many existing restaurant spaces were used in this fashion, with some even operating 4 or 5 food concepts from one space. It will be interesting to see if these ghost kitchens remain in place, and how the landlords will deal with them in the future.

ii. Take Out and Delivery Restaurants. Many restaurants who did not traditionally offer to-go or delivery options became take out only. These users adapted in many ways by expanding their offerings or adapting their offerings to a delivery or pickup service. As discussed below, many of the governmental restrictions related to delivery of alcohol were relaxed to allow restaurants to deliver wine and cocktails to try and maintain profitability. Traditional white tablecloth full-service restaurants set up pick up stations. Some went so far as to offer walk up delivery and pickup stations outside of their spaces to allow for customers to have limited contact with an employee.

iii. Restaurant Markets. With the mandated closure of dining and restrictions on non-essential businesses, some restaurants, to have some income as they were required to be closed, changed their use to a “market” and attempted to sell some of their inventory. This would include things such as restaurant quality meats and produce, or meals that were pre-made and only needed to be cooked. Fine dining restaurants offered “popup” markets selling prime meats, fish and fine produce that are not typically available to consumers. This was done, many times, in contravention of the restaurant’s use clauses, but with the uncertainty looming, most landlords were hesitant to say anything as long as the tenants paid rent. These pop-up markets existed by word of mouth or social media, and allowed a non-essential business who would otherwise be shuttered to convert into an essential business to provide food.

iv. Additional Food Delivery Industries. Many restaurants also began to realize that the platforms of delivery services such as uber eats and grub hub were indispensable to their models. Few delivery restaurants could compete with the infrastructure in place by the delivery companies, and many restaurants began catering to the delivery industry. These services have thrived, and many restaurants are offering promotions by paying fees to these delivery providers that allow reduced delivery fees to the consumer.

6. Co-tenancies and “anchor stores”. The standard co-tenancy clause in many leases typically provide that the anchor tenant or some other will be open and occupying or else either rent will be reduced, the tenant will have a termination right, or both. Most of the co-tenancy provisions revolve around a department store or some other major draw. However, in the past few years, department stores are becoming obsolete and are being replaced with other types of uses. Both co-tenancy clauses and the traditional department store idea are changing. See Appendix 4 for an example co-tenancy clause.

i. Alternative co-tenancies. Mixed use developments no longer require a department store, but they do require another draw such as a hotel, residences or offices. Many retailers and other concepts are examining what a new co-tenancy provision may look like. This could be based on office occupancy, residential occupancy, or something different. See sample clauses at Appendix 4 for traditional co-tenancy and alternatives.

(a) co-tenancy tied to office occupancy. As an alternative to department stores, many tenants are tying their opening and operation requirements to the occupancy of the office users. This is done based on moving thresholds and representations by the office and mixed use developers.

(b) co-tenancy tied to residence and hotel occupancy. Many retailers are tying their co-tenancy to the occupancy of residences. Similar to the office co-tenancy, these can be tied to something entirely different such as average rental nights for rooms, bookings, or reservations.

(c) co-tenancy and the traditional department store. The traditional department store concept is no longer a safe place for the landlord. Department stores have been dying out, and the replacement department store is not a department store at all. The “well” of department stores is drying out due to the prevalence of discounters and online shopping.

7. Government restrictions.

i. Mask mandates. Many retailers enacted strict mask policies in their stores. Without the federal government creating a mask mandate, the authority was questioned, and some retailers enforced mask mandates to some unwilling customers. News stories and viral social media videos emerged of the standoffs between store employees and those who were unwilling to wear face coverings in stores. Without any federal mask mandates, stores had to take it upon themselves to enforce mask requirements for the safety of their customers and employees.

ii. Enforcing Social Distancing. Some stores limited the number of customers that were permitted to be in the stores at one time. They also created rules for checkout lines, flow of customer entrances and exits. Some stores also stopped taking cash payments or limited cash to certain stations in order to provide for less contact between employees and customers.

iii Relaxation of alcohol laws. Many restaurants derive a large portion of their profits from sales of alcohol. Local governments enacted measures to allow sales of alcoholic beverages by delivery and sales of alcohol to go. In addition, many of the open container laws were temporarily waived to permit socially distant gatherings in certain urban and retail areas. Many restaurateurs who would traditionally pair food and alcohol were able to do so on pickup or delivery.

iv In person dining - bar and Restaurant Closures. Bars and restaurants were typically the last businesses to re-open. They were not considered “essential businesses” and in-person dining was typically prohibited or not something that consumers were interested in doing, unless socially distanced or on an outdoor area. Many restaurants in warmer areas expanded their outdoor patio seating and in person dining experiences. Many of them adapted their spaces with enclosures and patio heaters.

III. Other Effects of the Pandemic on Retail

A. Amplification of the market. While non-essential services remained shut down, it became apparent that many of the classic retailers in what would appear to be classic locations (malls, strip centers, power centers) had been struggling before the pandemic to maintain profitability. The pandemic pushed them into looking at their internal balance sheets and taking action to reduce expenses. It also exposed the retail concepts that were and were not working. It would seem that the market itself is the best way to predict the required changes to the retail industry and what concepts will trend in the new environment.

B. Rental rates in traditional retail settings. The rental rates began to see volatility based on the fact that many of the national retailers reassessed their rents and put holds on any expansion plans. Many of the prime retail locations are not seeing the rates that were promised to investors and banks, especially in high profile locations that are tourist destinations or otherwise depend on destination shopping.

C. Landlord Insolvency and profitability. Many landlords who operate traditional shopping centers and malls also felt the effects of the volatility created by the pandemic. Many large shopping areas were shuttered, causing a wave through the entire industry.

1. Landlord Insolvency. Some of the larger landlords owning malls and large shopping centers have filed for reorganization or other debtor relief. Many of the fundamentals that have always applied to tenant protections should be in place to protect the tenant allowances and any defaults by the landlord. There have been many high-profile mall owner bankruptcies. This leads the tenants to ask for and brush up on many of the fundamental protections.

i. SNDA. If the center is foreclosed, does the tenant have rights vis-à-vis the new shopping center owner?

(a) Is the new owner required to cure any past landlord defaults? Many of the SNDA forms allow the new landlord to disavow any of the previous landlord defaults. Are there any carveouts to this?

(1) Allowances. Many lenders qualify the non-disturbance by providing that defaults by the previous landlord will not be attributable to the new landlord. However, the tenants should be careful to provide that they can recover their allowances by allowing offset rights for non-payment under the lease and the right to recover any allowance.

(i) Offset rights on non-payment. Offset rights for non-payment of the allowance by the landlord should be specified both in the lease and in the non-disturbance document to be sure that they can be enforced. Depending on the bargaining power of the tenant and the amount of the allowance, many tenants will insist upon other security measures such as letters of credit or guarantees for the payment of the allowance. At any rate, it is important that large allowances and their payments be addressed by the tenants.

D. Further Evolving retail and further effects of pandemic.

1. Department Stores. Many of the department stores have been offering both home delivery and in store pickup, with the stores themselves becoming a return and pickup hub. There are even some retail clothing stores that are only “showrooms,” where a customer can try on clothes and get “fitted,” with the final purchased item being delivered. This hybrid model is becoming more prevalent as it requires less inventory and

shop space at any given time. Still, department stores take a lot of space and require a lot of employees and store maintenance. This may ultimately be a detriment to their continued operation.

2. Experiential Retail. The retail use is now transitioning into an “experiential” category. Restaurants, exhibitions, and entertainment are helping people’s desire to get out of their homes and connect to their communities. People want to be out of their homes for entertainment and experiences.

3. The importance of communication, social media and the internet. Retailers and tenants became more reliant on direct communication via social media websites and direct internet sites. Some tenants switched to online ordering only, through either their own website or a third-party order fulfiller. This was used to communicate new store hours, closures, social distancing measures, and other information that the operators needed to get to the public quickly.

4. Pent up demand. Many restaurants and tourist attractions are experiencing the pent-up demand. Consumers, feeling confident after vaccinations, are now dining out again and reconnecting in public spaces. This has created high demand for travel, dining, shopping, and other things that were restricted by the pandemic.

Appendix 1 Rent Abatement Clause

The abatement of Minimum Rent provided for in this paragraph is conditioned upon Tenant's full and timely performance of all of its obligations under the Lease. If at any time during the Term an event of default by Tenant occurs, then the abatement of Base Rent provided for in this paragraph shall immediately become void, and Tenant shall promptly pay to Landlord, in addition to all other amounts due to Landlord under the Lease, the full amount of all Base Rent herein abated.

Appendix 2 Rent Deferral Clause

So long as (i) Tenant is not in default of any terms or conditions of the Lease beyond the applicable cure period, and (ii) the confidentiality provision set forth in Section 11 hereof is not breached, the payment of Base Rent for the months of April, 2020 and May, 2020 (in the total amount of \$18,761.52) shall be conditionally excused (the "Conditionally Excused Rent"). If any of the requirements in this paragraph 3 are not met, then from and after such failure the Conditionally Deferred Rent shall immediately become due and payable to Landlord. In consideration of the Conditionally Excused Rent, (a) the term of this Lease shall be extended for an additional two (2) months, so that the expiration of the Base Term of the Lease shall expire on the date that is the last day in which the sixty second (62nd) month following the Rental Commencement Date; and (b) any Taxes and Insurance Premiums which remain unpaid for April, 2020 and May 2020 shall be due and payable with the payment of rent pursuant to the terms of the Lease in June, 2020.

Appendix 3

Continuous Operation Clause 1

In the event that any Force Majeure Event, act by Landlord, or act of any governmental authority having jurisdiction over Tenant's use of the Premises materially and adversely restricts or otherwise limits Tenant's business operations in the Premises and (i) reduces Tenant's gross sales from the Premises for any month of the Term by twenty-five percent (25%) or more, then Tenant shall pay fifty percent (50%) of the monthly Base Rent in lieu of Base Rent each month until such restrictions or limitations are lifted, or (ii) Tenant ceases operations in the Premises, then Tenant shall pay no Base Rent, but shall continue to pay Annual Additional Rent. The "**Alternative Rent Period**" shall run from the date the restrictions or limitations are imposed until the date such restrictions or limitations are lifted. Tenant shall provide Landlord with notice of its election to apply the foregoing rent adjustments for the Alternative Rent Period and documentation reasonably acceptable to Landlord supporting the gross sales amounts for the Alternative Rent Period. For a rent adjustment pursuant to subsection (i) above, upon Landlord's written request, Tenant shall provide reasonable documentation of the decline in gross sales from the Premises for the months covered by the Alternative Rent Period.

Continuous Operation Clause 2

If Landlord or Tenant shall, as a result of any force majeure, fail to timely perform any obligation to be performed under this Lease, then such failure shall be excused and shall not be deemed to be a breach of this Lease by the party in question, and the time allotted said party to so perform its obligation shall be extended by a period equal to the time such delay continues. The affected party's performance shall be diligently commenced and carried to completion when the excused period of delay ends. As used herein, force majeure shall include, without limitation, fire, catastrophe, strikes or labor trouble, civil commotion, acts of God, governmental prohibitions or regulations, inability or difficulty to obtain materials (or reasonable substitutes therefor), governmental restrictions or controls, quarantines, weather related damage or disasters, casualty, or enemy or hostile governmental action, in each case, beyond the reasonable control of the party obligated to perform and not due to the fault or negligence of said party. In the event that Tenant is not reasonably able to open and operate its business to the public from the Demised Premises as a result of any of the foregoing, then the Base Rent and additional rent otherwise payable under this Lease during such time shall fully abate until the date on which Tenant is reasonably able to re-open and operate its business to the public from the Demised Premises. In addition, in the event that Landlord closes the Shopping Center for business to the public for any reason (other than on New Year's Day, Easter Day, Thanksgiving Day and Christmas Day), then for each day that the Shopping Center is closed for business to the public, the Base Rent and additional rent otherwise payable under this Lease shall fully abate.

Example Force Majeure Clause

Neither Landlord nor Tenant shall be in default under this Lease for failure to perform if such performance is illegal or is not reasonably possible to perform on account of Force Majeure or if such performance is materially hindered or prevented due to Force Majeure. In the event of Force Majeure, the time period for such performance of any action under this Lease shall be extended for each day performance is delayed by Force Majeure. For the purposes

of this Lease, "**Force Majeure**" means: (i) acts of god; (ii) strikes; (iii) delays caused by the other party or any governmental or quasi-governmental entity (including, specifically, a delay resulting from the failure of any governmental or regulatory body to issue any necessary permits); (iv) shortages of materials, natural resources or labor; (v) epidemic or pandemic; (vi) governmental order or command; (vii) flood, hurricane, tornado, or similar extreme weather event (expressly excluding normal rain or other normal weather event); (viii) riot, civil commotion, war, invasion, rebellion, hostilities, military action, or other war-like activities; or (ix) any and all other causes beyond the reasonable control of the performing party other than shortage of funds required to perform a task. Additionally, notwithstanding anything contained in this Lease to the contrary, should any Force Majeure event; order or recommendation of any governmental or quasi-governmental authority; or order or recommendation of Landlord, result in the closure of the Center, the Premises, or more than twenty-five percent (25%) of the tenants in the Center (collectively "**Closure Event**"), for any reason, Base Rent and Additional Rent shall be abated for the period of such closure. If a Closure Event results in a restriction of Tenant's use, Base Rent and Additional Rent shall be reduced in proportion to such restricted use. To calculate such reduction, Tenant's gross sales for the restricted period will be compared to Tenant's sales for the same month immediately prior to the restricted period and the percentage difference will be the percentage abatement (i.e. if the restricted period occurs during the month of October, gross sales for such period shall be compared to the gross sales made by Tenant during October of the prior year).

Appendix 2

Standard Co-tenancy language for a tenant:

There shall be an opening co-tenancy requirement such that unless and until at least four (4) of five (5) of the following tenants: Ross Dress For Less, DSW, Ulta, Burke's Outlet and Bed, Bath & Beyond (the "Original Named Tenant(s)") are open and operating in the Shopping Center on the date the Commencement Date would otherwise occur pursuant to Paragraph 4(a) above, the Commencement Date shall not occur until one hundred twenty (120) days after the date all of the Original Named Tenants are subsequently open and operating for business in the Shopping Center (the "Opening Co-Tenancy"); provided, however, that should Tenant, in its sole discretion, elect to open for business within the Premises at such time as the Opening Co-Tenancy remains unsatisfied, then upon the later of the Commencement Date (as determined pursuant to Paragraph 4(a) above), as its sole remedy, Tenant shall pay to Landlord, in lieu of Base Rent, an amount equal to twenty percent (20%) of the Base Rent that would then otherwise be due hereunder until the date that the Original Named Tenants so open for business; provided Tenant shall at all times remain responsible for one hundred percent (100%) of the additional rent due hereunder.

If, at any time after the Opening Co-Tenancy is satisfied, two (2) or more of the Original Named Tenants (or a like replacement for any of them, meaning a national or regional retail tenant operating from within all or substantially all of the Original Named Tenant's premises, except as to Bed, Bath & Beyond, in which case a like replacement shall mean a national or regional retail tenant operating from at least eighty percent (80%) of the Bed, Bath & Beyond premises (the "Comparable Tenants") are not open and operating for a period in excess of ninety (90) consecutive days, subject to temporary disruptions due to casualty, condemnation or Force Majeure (a "Co-Tenancy Failure"), then Tenant shall be entitled to pay in lieu of Base Rent an amount equal to fifty percent (50%) of the Base Rent that would otherwise be due hereunder until such time as at least four (4) of the Original Named Tenants or the Comparable Tenants are again open and operating in the Shopping Center. In the event a particular Co-Tenancy Failure persists for a period in excess of three hundred sixty (360) days then Tenant shall either terminate this Lease upon not less than thirty (30) days' prior Notice to Landlord or resume the payment of full Base Rent. In the event Tenant fails to make such election to terminate this Lease in writing within thirty (30) days after the expiration of said three hundred sixty (360) day period, Tenant shall be conclusively deemed to have elected to commence the payment of full Base Rent. Landlord acknowledges and agrees that the co-tenancy requirements set forth herein are a material inducement for Tenant to enter into this Lease and a failure of same will materially adversely affect Tenant's business operations in the Premises. Landlord and Tenant further acknowledge and agree that it is impossible to determine the exact extent of the damage Tenant would suffer (due to, among other things, lost foot traffic) in the event of a failure of the co-tenancy requirements and therefore have negotiated and agreed on the foregoing rent abatement as a reasonable estimation of the daily losses Tenant might suffer due to the failure of the required co-tenancy condition. Landlord and Tenant acknowledge and agree that Tenant's right to pay such alternate rent in lieu of Base Rent shall be effective as of the date any such ongoing Co-Tenancy Failure becomes applicable regardless of the date Tenant becomes aware of same (and Tenant shall be entitled to retroactively adjust its payment of such rent and Base Rent in the event Tenant pays Base Rent following the date such ongoing Co-Tenancy Failure becomes applicable but Tenant is not aware of same until a later date [i.e., Tenant may take a credit against the Base Rent due under this Lease to effectuate the correct payment of Base Rent due under this Lease after taking into account the date upon which such ongoing co-tenancy condition becomes applicable]).

Appendix 4

Co-tenancy language applicable to office occupancy:

(a) Subject to the terms and conditions of this Section 13.38(a), if, as of the Commencement Date, the occupancy of the office space within the Building is less than thirty percent (30%) of Full Occupancy (as defined below) relative to the Building (an "Opening Co-Tenancy Failure"), then, Landlord, as Tenant's sole and exclusive remedy, agrees to abate Tenant's obligation to pay monthly Basic Rent then due and payable as provided hereunder ("Opening Co-Tenancy Basic Rent Abatement") until the occupancy of the office space within the Building is thirty percent (30%) or more of Full Occupancy relative to the Building. In such event, the Initial Term shall be automatically extended by the same number of days in which Tenant received Opening Co-Tenancy Basic Rent Abatement on the same terms and conditions of this Lease (at the same Basic Rental rate for current last year of the Initial Term – e.g., \$35.20 per rentable square foot of the Premises). Furthermore, the Outside Opening Date shall be similarly extended by the same number of days in which Tenant received Opening Co-Tenancy Basic Rent Abatement. Provided, however, notwithstanding the foregoing to the contrary, Tenant rights to abate Basic Rent under this Section 13.38(a) shall only be applicable for so long as there is not an Event of Default by Tenant hereunder. For clarity, as soon as the occupancy of the Building is at thirty percent (30%) or more of Full Occupancy at any time on or after the Commencement Date, Tenant shall have no further right to abate Basic Rent pursuant to this Section 13.38(a).

(b) Subject to the terms and conditions of this Section 13.38(b), if, at any time during the Term, the occupancy of the office space within the Building and/or Building 3 is less than seventy percent (70%) of Full Occupancy (as defined below) for more than ninety (90) consecutive days (excluding closures or changes in occupancy due to refurbishing, condemnation or casualty) (each an "Ongoing Co-Tenancy Failure"), then, Tenant, as its sole and exclusive remedy, shall be entitled to pay to Landlord, in lieu of full monthly Basic Rent, an amount equal to twenty-five percent (25%) of the monthly Basic Rent then due and payable as provided hereunder until such Ongoing Co-Tenancy Failure ceases. From and after the cessation of the Ongoing Co-Tenancy Failure and for so long as a subsequent Ongoing Co-Tenancy Failure does not occur, Tenant shall make the regular payments of Basic Rent as provided in this Lease without offset or abatement. If an Ongoing Co-Tenancy Failure continues for a period in excess of twelve (12) consecutive months, then Tenant shall either (i) terminate this Lease within thirty (30) days after the expiration of such twelve (12) month period upon thirty (30) days prior written notice to Landlord, or (ii) revert to full Basic Rent for the remainder of the Term, effective as of the first day of the thirteenth (13th) month after the commencement of such Ongoing Co-Tenancy Failure. Provided, however, notwithstanding the foregoing to the contrary, Tenant rights under this Section 13.38(b) shall only be applicable for so long as (x) there is not an Event of Default by Tenant hereunder, or (y) Tenant is open for business for the Permitted Use.

(c) For purposes of this Section 13.38, "Full Occupancy" shall mean (A) with respect to the Building, 2,500 individuals occupying office space in Building in the ordinary course of the applicable occupant's business, and (B) with respect to Building 3, 2,000 individuals occupying office space in Building 3 in the ordinary course of the applicable occupant's business, all as reasonably determined by Landlord.

Tenant's Early Termination Right. If Tenant elects to not renew its franchise agreement with Franchisor beyond the fifth (5th) year of the Initial Term, Tenant shall have the one-time option (the "Early Termination Option") to accelerate the expiration of the Initial Term to 11:59 p.m. on the day immediately preceding the sixth (6th) anniversary of the Commencement Date (the "Accelerated Expiration Date")