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Workshop 18

Rights and Remedies in Changing Times: Whose Default Is It Anyway?

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I. Introduction

With the world of retail real estate evolving in record time, should the lease language of covenants, defaults, occurrences, violations and remedies evolve too? Do routine landlord default provisions stand up under the growing weight of distressed or insolvent landlords? How do the views of landlords and retailers differ on these subjects? Is there common ground? Are there any effective remedy alternatives that can be employed to avoid or limit exposure to the expense and delays of litigation? Store and center closures, (re-)negotiations, and litigation during pandemic times brought into focus (and exacerbated) the rights and remedies of landlords and tenants in the event of a default. Because of the changes in brick and mortar use and occupancy it stimulated, there's more to come.

II. Landlord Default

What is a Landlord default and is it necessary to include a Landlord default provision in a commercial lease? Most Landlords would say no, but most Tenants (especially those with any negotiating leverage) would, of course, say yes. In simple terms, a Landlord default provision states what happens if the Landlord does not comply with, or otherwise fails to perform, its covenants and obligations under the lease. Many leases on the Landlord's form do not contain a Landlord default provision as most Landlords would prefer that Tenant does not have specific contractual remedies, but rather only its remedies at law and in equity. The primary objective of a Landlord default clause for Tenant, however, is to enumerate specific remedies for a Landlord default, which often include liquidated damages and reimbursement for reasonable legal fees, thereby cutting down on court costs (and time and effort) to litigate and enforce remedies for a Landlord default and minimize the Tenant's losses in case of a Landlord default.

A typical Landlord default clause specifies that Landlord's failure to perform or observe any condition or obligation of the Lease, which is required to be performed or observed by Landlord, within a certain number days (usually somewhere between ten (10) and thirty (30) days) following receipt of written notice by Landlord of such failure shall be a default; provided, however, that if the nature of the default is such that it reasonably requires

more than a certain number days to cure, then Landlord shall not be in default as long as Landlord promptly commences such cure and diligently prosecutes said cure to completion. For many Landlords that notice is critical as their headquarters may be located far from the shopping center and their local team may not keep them well-informed of any defaults. A sophisticated Tenant may also have the leverage to cap Landlord's time to cure in the latter situation particularly if Landlord insists that Tenant's time to cure any Tenant default be similarly capped. Additionally, if the default creates an emergency (i.e., poses an imminent danger to persons or property), then the period of time is reduced to a specified smaller number of days or to a time period that is reasonable in light of the circumstances.

The typical Landlord defaults that Tenants will want to address are as follows:

- Failure to deliver the premises and satisfy any delivery conditions (e.g., substantially complete any Landlord Work, obtain an SNDA etc.) by a certain, specified date;
- Failure to enforce any exclusive provision granted to Tenant;
- Failure to repair, replace or maintain the portions of the Premises that Landlord is required to maintain (e.g., structural portions) or common areas;
- Failure to comply with limitations on construction (e.g., black out periods) and with respect to any no-build or protected area; and
- Failure to provide any promised services or utilities which are controlled by Landlord.

If the lease includes a specific Landlord default provision, then, in the event of a Landlord default, the remedies will vary depending upon the Tenant's negotiating power. A typical Landlord default provision from a Landlord form just reiterates that the Tenant has all rights and remedies at law and in equity for a Landlord default. Some Landlords will even specify that a Landlord default in no event entitles Tenant to terminate the lease, which is clearly something a Tenant with negotiating leverage will delete. A less one-sided provision, will give Tenant self-help rights to cure certain defaults by Landlord and require that Landlord reimburse Tenant for the reasonable costs incurred in connection therewith within a certain time after notice. Most Landlords will not agree to allow Tenant's self-help rights to go beyond the premises, but Tenants with more leverage may get unlimited self-help rights, however, the more advisable compromise is to allow self-help outside of the Premises with respect to any Tenant protected portion of the common area (e.g., No Build Area, Primary Parking Area etc.). Without that limitation, Landlord runs the risk that this Tenant's exercise of self-help could violate another lease at the shopping center. Some Tenants will have the leverage to specify that certain Landlord Defaults (e.g., those that Tenant self-help cannot cure, or that self-help can cure but at too high of expense) entitle Tenant to an express right to terminate the lease and/or to a rent abatement. This provision is often heavily negotiated as Tenant should not be able to use a Landlord default that does not have a material and adverse effect on its business as an excuse to get out of the lease. As such, often the parties will compromise on an agreed upon threshold, which must be satisfied before the termination right is applicable and Landlord will insist that it receive notice (often two notices) and an opportunity to cure before any termination is effective. That said, even a heavily negotiated provision might be better than the standard for Tenant under existing case law (e.g., in order for a commercial tenant in Massachusetts to terminate a lease for constructive eviction, the Landlord's breach must be so material as to make the rental property unusable for the purpose for which it was leased and if Tenant can operate even though it is inconvenienced, such remedy is unavailable). [See Wesson v. Leone Enters, 774 N.E.2d 611 (Mass. 2002).] As will be discussed later in this workshop, often both parties will agree to mitigate their damages.

Additionally, with respect to the exculpation of Landlord or Tenant from personal liability under the lease, it also is likely to be affected by statute and case law, however, Friedman on Leases goes on to state "There are few, if any, cases that consider the implications of these provisions. A controversial New York decision [Banc of Am. Sec., LLC v. Solow Bldg, Co. II, LLC, 47 A.D.3d 239 (N.Y. App. Div. 1st Dep't 2007)], however, analyzes a relatively common exculpatory clause contained in major commercial leases in that city and concludes, in a split decision, that even express language stating that landlord shall have no financial liability and limiting tenant's remedies to equitable relief will not be sufficient to insulate the landlord from liability for breach of the duty of good faith and fair dealing. Many commentators are split on whether such an exception to enforceability ought to exist….what constitutes 'good faith' or 'reasonable' behavior is necessarily in the eyes of the beholder." If the lease is a typical ground lease, where the Landlord has very little liability anyway, the provision should be upheld.

By limiting a Tenant's claim to Landlord's interest in the shopping center, arguably the claim must first get a judgment and then be enforced by levy of execution against the estate. The parties can argue over whether any release of Landlord should apply to money received from insurance or a condemnation award, but since the general personal exculpation clause is typically silent on these items, a Tenant is incentivized to specifically state the limitation does not apply to them or any claim by Tenant against Landlord's insurer.

III. Liquidated Damages.

There are, of course, many methods of calculating damages. Many leases contain a liquidated damages provision that specifies a predetermined amount the defaulting party must pay for its breach of the lease. Some advantages to liquidated damages provisions (provided that they are enforceable) are predictability, set remedies so a party knows the consequences of a particular action or breach, and no requirement to prove actual damages thereby potentially avoiding costly and time-consuming litigation. Unfortunately, the situation is not always that clear and straightforward. Most states have specific laws governing the enforceability of liquidated damages provisions in contracts. As a general matter, in order to be enforceable a liquidated damages provision should satisfy the following criteria: (1) the damages must be difficult to estimate when the lease is entered into either because the damages are uncertain or difficult to quantify, and (2) the amount must be reasonable and not a penalty (e.g., if the amount is greatly disproportionate to the actual harm, a court will likely see it as a penalty and will not enforce it). In some cases, courts consider whether it was reasonable at the time the contract was entered into instead of the time when the actual breach occurred. However, in other cases courts evaluate the reasonableness based on the actual harm at the time of the breach. [See "What Is a Liquidated Damages Provision? A liquidated damages clause can be a useful way to limit risk but they are not always enforceable" by Christine Mathias, Esq. in the Nolo Legal Encyclopedia]. A party looking to overturn a liquidated damages provision will argue that the figure is so high it constitutes an unenforceable penalty. We would be remiss if we didn't mention a recent Texas Supreme Court decision on this issue in Atrium Medical Center LP v. Houston Red C LLC, S.W.3d -, 2020 WL 596873 (Tex. Feb. 7, 2020), which confirms the court's earlier decision on when a liquidated damages provision is an unenforceable penalty and clarifies each side's burden of proof. The basic facts are that the Atrium Hospital entered into a contract with a laundry company, First Image, for a five year term and the hospital had financial difficulties and cancelled the contract after one year. First Image sued for liquidated damages totaling $700,000 and Atrium hospital argued this far outweighed their actual damages. The Court of Appeals enforced the liquidated damages provision and the Texas Supreme Court agreed. The Court relied on the test above noting that for the first two prongs, the burden of proof is on the party claiming the liquidated damages, but the court added an additional third factor, which is whether at the time of the breach (not the time the contract was entered into) were the actual damages significantly different than the liquidated damages. The court reaffirmed its position that a liquidated damages provision will not be enforced if there is an "'unacceptable disparity' between the liquidated damages and the actual damages" and found that the breaching party had the burden to prove that the liquidated damages greatly exceeded the actual amount of damages. Among other things, this case demonstrates that the court will carefully scrutinize any liquidated damages provision and that each side must adequately satisfy its burden of proof. It is also worth noting a recent New York case, Trustees of Columbia University in City of New York v. D'Agostino Supermarkets, Inc., N.E. 3d, 2020 WL 6875988 (N.Y. Nov. 24, 2020) where the court held that when the Tenant failed to timely make all of its surrender payments, the liquidated damages provision was an unenforceable penalty because the damages were grossly disproportionate to the Landlord's actual losses due to the breach and as such, the tenant was arguably not punished at all for its late payment (payment it offered only after the lawsuit was filed). In light of this case, landlords in New York will likely think twice about entering into a termination or surrender agreement with a tenant that has defaulted if their recovery is limited to the discounted amount regardless of whether it is timely paid.

Typically a liquidated damages provision is only included for specific breaches (e.g., for a Landlord's failure to timely deliver or on the other side, a Tenant's failure to comply with certain lease provisions such as common area restrictions – a monetary penalty often is a better incentive to stop a violation than sending a default notice). To the extent that a commercial lease is negotiated by two sophisticated parties, courts tend to uphold these provisions. Furthermore, it is very appropriate to fix damages where indirect damages (e.g., business loss to other percentage rent paying tenants where a tenant breaches its covenant to continuously operate) is pretty much impossible to determine so the liquidated damages clause agrees upon an amount that approximates the damage. From a landlord perspective, it is also very important to try to make sure that the

liquidated damages provision expressly states that it is the sole remedy for the particular breach – without this, a tenant is likely to claim (and potentially succeed in collecting) additional damages. There is typically a presumption that provisions specifying remedies are not exclusive but rather cumulative. As such, if the contracting parties intend that the specified remedy be the sole remedy, then they must clearly state it is the sole and exclusive remedy. [See article "Drafting Exclusion of Consequential Damages Clauses", posted on 12-18-2018 on LexisNexis which references M.G.A., Inc. v. Amelia Station, Ltd., 2002 Ohio App. LEXIS 5177 (Sept. 27, 2002); Advanced BodyCare Sols., LLC v. Thione Int'l, Inc.,615 F.3d 1352 (11th Cir. 2010); Consolidation Coal Co. v. Marion Docks, Inc., 2010 U.S. Dist. LEXIS 32524 (W.D. Pa. Feb. 22, 2010); Philip Morris USA, Inc. v. Appalachian Fuels, LLC, 2009 U.S. Dist. LEXIS 31765 (E.D. Va. Apr. 15, 2009); Lowe v. Smith, 2016 Tenn. App. LEXIS 689 (Sept. 19, 2016); Canterbury Apartment Homes LLC v. La. Pac. Corp., 2014 Wash. App. LEXIS 1804 (July 22, 2014)].

IV. Landlord Exculpation Provision

Most leases contain a provision whereby Landlords expressly seek to exempt themselves from tort liability even when it may arise from their own negligence. See samples clauses which include the typical language that Landlord is not liable for failure of utilities, leaks, breakage etc. whether caused by the negligence of Landlord or its agents or employees or not. Some clauses go even further and also exculpate Landlord from liability (to the extent enforceable under applicable laws) for business interruptions. As a general matter, most states enforce these types of exculpatory clauses, however, caveats to their enforcement abound and in pretty much every state where these clauses are upheld, they tend to be strictly interpreted against the Landlord. As such, if a Tenant with leverage pushes back on this clause, it merits considering the particular state law and any case law with respect to the enforcement of such clauses to determine whether the provision is even worth continuing to fight about. Per Friedman on Leases Section 17-1: "In some states, the enforceability of exculpatory clauses is qualified. In others, exculpatory clauses are enforced with respect to 'passive', but not 'active' negligence. [See Queen Ins. Co. v. Kaiser, 135 N.W.2d 247 (Wis. 1965) where leaving the door to the roof open, which led to freezing and bursting pipes and water damage was held to be passive negligence, however, Landlord's failure to repair the metal piece that holds a window unit air conditioner in the wall, despite tenant's repeated requests to do so, was held to be active negligence.] In California, the clause is valid except where the landlord is guilty of 'willful or active negligence', but has been invalidated as to leases on dwellings. Tennessee has also invalidated exculpatory clauses in residential premises. In Kentucky, where the law is said to be chaotic, liability may be contracted away if the negligence is moderate or gross, not wanton, and does not involve personal injury. Nebraska upholds exculpatory clauses, at least in commercial leases, except in the case of 'willful or wanton' negligence…In Pennsylvania, the clause is said to be valid except where public policy is offended. Under this rule, a court refused to apply an exculpatory clause to a landlord's violation of a fire law affecting multiple dwellings." Furthermore, with respect to New York, N.Y. Gen. Oblig. Law Section 5-321 (McKinney) states that any agreement "in any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees…shall be deemed to be void as against public policy and wholly unenforceable." In Meridian N. Invs. LP v Sondhi, 26 N. E.. 3d 1000 (Ind. Ct. App. 2015), the court found that although the lease contained a specific exculpation provision from Tenant in favor of Landlord that did not relieve the Landlord from liability to the president of the Tenant (who had even signed the lease for the Tenant) when the president slipped and fell while on the property because the president and the Tenant/company are separate legal entities. Similarly and more concerning for many Landlords, In White Sturtevant, LLP v. NC Plaza LLC, 43 N.E.3d 19 (Ohio Ct. App. 2015), the court held that the typical provision whereby Tenant waives any right to bring an action against the individuals executing the lease on behalf of Landlord and agrees to look solely to Landlord's interest in the property for the enforcement of any claim, does not act to protect the Landlord's agent from tort liability with respect to acts carried out in the course of performance under the lease. One of the primary reasons so many courts rely on strict construction or otherwise do not enforce these clauses, is that they perceive them as excusing the Landlord from maintaining reasonable standards of care. In Topp Copy Prods., Inc. v. Singletary, 591 A.2d 298, 301 (Pa. Super. Ct. 1991), the court found as follows: "After a complete review of the law relevant to the interpretation and application of exculpatory clauses, and after careful scrutiny of the clause and lease in question, we find the clause in this lease does not exculpate the landlord from liability based upon his own negligent conduct." The court employed a two part analysis: (1) consideration of whether the exculpatory clause was valid, and (2) whether the clause should be interpreted and construed to relieve the contracting part from

liability for its own negligence. The court found that the following three conditions to determine validity of the clause had been satisfied: "(1) the clause 'does not contravene any policy of law, that is,…it is not a matter of interest to the public or State;' (2) the 'contract is between persons relating entirely to their own private affairs;' and (3) 'each party is a free bargaining agent...[in that the agreement] is not in effect a mere contract of adhesion.'" The court went on to say that even if the foregoing conditions are met and the clause is found to be valid, the contract must still satisfy the following four additional conditions in order to relieve a party from his/her own negligence: "(1) the contract immunizing a party from liability for negligence must be construed strictly, 'since they are not favorites of the law;' (2) the contract must state the intention of the parties 'with the greatest particularity,...beyond doubt by express stipulation, [and] no inference from words of general import can establish it;' (3) the contract must be construed against the party seeking immunity from liability; and (4) the burden of establishing the immunity is upon the party seeking protection of the clause." The court overturned the trial court's holding in favor of the landlord and found that the exculpatory clause which released the Landlord "from any and all liability for damages that may result from the bursting, stoppage and leakage of any water" contained words of general import and would not be enforceable to immunize the landlord against his own negligent acts unless negligence was expressly stipulated in the clause.

V. Waiver of Consequential and Other Related Damages.

I think a lot of transaction lawyers (or perhaps it is just me) have gotten so used to seeing this provision that we have stopped analyzing what really constitutes a consequential damage rather than a direct damage and therefore, we have, unfortunately, grown complacent about the protection we assume this provision is imparting. In fact, it was only my research for this workshop that reminded me of one of the most well-known cases from law school, Hadley v. Baxendale, where the court found that rather than being liable for all consequences resulting from a breach, the breaching party is only liable for those that are reasonably foreseeable either because (i) they would ordinarily and naturally result from the breach of a similar contract and therefore should be obvious (i.e., direct damages), or (ii) are the result of special circumstances that were specifically communicated or otherwise known by the breaching party (i.e., special or consequential damages). So it is a good reminder (for me at least) that consequential damages do not typically include those damages which are not reasonably foreseeable. One of the problems is that the word "consequential" is vague so, of course, lawyers can argue ad nauseum about what is, and is not, consequential and this problem is also evident in the determinations of courts and arbitrators. For example, some courts hold that lost profits are the natural consequence of a breach of contract so they can be collected, but others hold that they are too remote and as such, not recoverable. "In general, the precise demarcation between direct and consequential damages is a question of fact, and the commercial context in which a contract is made is of substantial importance in determining whether particular items of damages will fall into one category or the other." Amer. Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435, 459 (S.D. N.Y. 1976). For this reason, the sample clauses we have included at the end specify that lost profits will not be recoverable and this applies regardless of whether lost profits are consequential or not. The article "Drafting Exclusion of Consequential Damages Clauses", posted on 12-18-2018 on LexisNexis argues that "Too often, our contracts resort to generic, cookie-cutter language that excludes consequential, special and indirect damages without further explanation. This practice is fraught with peril and demonstrates an indifference to the caselaw that exposes our clients to unnecessary risk. We need to rethink the way we approach drafting these clauses." This article makes a great point that we certainly do not want courts or juries determining what damages are direct or consequential, but also notes that listing every type of damage is also not realistic and suggests agreeing upon a damages cap, which I promise you will not see in most leases. [See Consequential damages: Is Your Waiver 'Inconsequential'" dated May 19, 2021 by Taft Stettinius & Hollister LLP and also Ken Adams, New Article on Consequential Damages, Adams on Contract Drafting (July 23, 2008) where he states that whenever "you see in a contract a term of art such as 'consequential damages,' you're inviting confusion: any two people might have different ideas to what it means, assuming they given the matter any thought."].

Schedule 1

SAMPLE LEASE PROVISIONS:

1. Tenant Favorable Landlord Default Clause

a. **Landlord's Default**. If Landlord violates or fails to perform or observe any of the representations, covenants, provisions, or conditions contained in this Lease on Landlord's part to be performed or observed and such default continues for thirty (30) days or more after receipt of written notice from Tenant specifying such default, or if such default is of a nature to require more than thirty (30) days to cure and continues beyond the time reasonably necessary to cure (provided Landlord must undertake to cure the default within such thirty (30) day period and thereafter diligently pursue such cure to completion), then Tenant has the option [(in addition to all other rights and remedies provided Tenant at law, in equity or hereunder)], to either (x) terminate this Lease upon written notice to Landlord, or (y) exercise its self-help remedies under this Lease upon additional written notice to Landlord of Tenant's intention to do so [and provided Landlord does not cure within an additional thirty (30) days after receipt of such notice] and incur, and bill Landlord for, any reasonable expense incurred in connection with such self-help. The foregoing notice and cure period for Landlord defaults shall not be applicable to any Landlord defaults in this Lease which provide Tenant with the express right to terminate this Lease as a result thereof. Further, notwithstanding the foregoing, if in Tenant's reasonable judgment, an emergency exists, Tenant may cure such default with only reasonable notice, if any, under the circumstances, to Landlord. If Landlord has not reimbursed Tenant within thirty (30) days after receipt of Tenant's bill and provided Landlord is not contesting such default, then Tenant may deduct the reasonable cost of such expense from the Base Rent next becoming due. Tenant's self-help remedy hereunder shall not release Landlord from its obligation to perform the terms and conditions herein provided to be performed by Landlord or deprive Tenant of any legal rights which it may have by reason of any such Landlord default. [Tenant hereby indemnifies Landlord for any loss, cost, expense, or damage to Landlord resulting from Tenant's or its agents', contractors' or employees' negligent exercise of Tenant's self-help remedies.]

b. The occurrence of any one or more of the following shall constitute a default and breach of this Lease by Landlord; (a) Landlord's failure to observe, keep and perform any of the terms, covenants, conditions, agreements or provisions of this Lease required to be done, observed, kept or performed by Landlord, within thirty (30) days after written notice by Tenant to Landlord of said failure (except when the nature of Landlord's obligation is such that more than thirty (30) days are required for its performance, then Landlord shall not be deemed in default if it commences performance within the thirty (30) day period and thereafter diligently pursues the cure to completion); (b) the failure of any representation or warranty to be true when deemed given hereunder. Notwithstanding the foregoing, if Landlord's breach creates an emergency, or impairs Tenant's ability to operate in the Premises (such as, by way of example and not limitation, obstructions or disruptions to: parking, access to the Premises, the Building, or the Shopping Center, visibility, utilities, roof leaks, health and safety and quiet enjoyment), then Landlord shall be required to remedy such breach as soon as commercially reasonable and in any event without delay. In the event of a default by Landlord, Tenant, at its option, without further notice or demand, shall have the right to any one or more of the following remedies: (w) to remedy such default and deduct the costs thereof (including attorneys' fees) from the installments of Base Rent and periodic Additional Rent next falling due; (x) to pursue the remedy of specific performance; (y) to seek money damages for loss arising from Landlord's default and (z) following an additional thirty (30) days' notice to Landlord, to terminate this Lease. Nothing herein shall relieve Landlord from its obligations hereunder and this Section shall not be construed to obligate Tenant to perform Landlord's repair obligations.

c. If Landlord shall be in default or breach of any express or implied obligation, assumption, warranty or representation made hereunder, at Tenant's option, Tenant may terminate this lease upon no

less than thirty (30) days written notice to Landlord and thereafter be released of all obligations hereunder unless said default or breach is remedied within ninety (90) days thereafter, or within such additional period as may be reasonably necessary to remedy such default if the same is of such character to require more than ninety (90) days to remedy and Landlord promptly commences, and diligently prosecutes to completion, remedying such default.

2. Landlord Favorable Landlord Default Provision.

a. If Landlord shall be in default or breach of any obligation, assumption, warranty or representation made hereunder, then Tenant shall send Landlord written notice thereof and if Landlord fails to cure such default within thirty (30) days after receipt of such notice (except when the nature of Landlord's obligation is such that more than thirty (30) days are required for its performance, in which case, Landlord shall not be deemed in default if Landlord commences performance within the 30-day period and thereafter diligently pursues the cure to completion), Tenant shall have all rights and remedies at law and in equity with respect to such default; provided, however, Tenant shall have no right to terminate the Lease as a result thereof.

b. Excluding Landlord's failure to perform its maintenance and repair obligations, which failure and Tenant's remedies therefor governed by Section [__] of this Lease, if Landlord fails to perform any other covenant, provision, or condition contained in this Lease on Landlord's part to be performed within thirty (30) days after Landlord receives written notice of such default from Tenant (or if more than thirty (30) days is required because of the nature of the default, if Landlord fails to commence to cure the default within the initial 30-day period and thereafter diligently prosecute the cure to completion) [(or if Landlord's failure causes an emergency and such failure is not cured within seventy-two (72) hours following receipt of notice thereof], then Tenant shall have the right to (a) pursue the remedy of specific performance, or (b) seek other remedies available to Tenant under this Lease and applicable Laws.

3. Compromised Landlord Default Provisions.

a. If a Landlord Event of Default (i.e., beyond notice and any applicable cure period(s)) renders all or any material portion of the Premises untenantable for the use permitted under this Lease and such Landlord Event of Default (i) adversely and materially affects Tenant's business operations for more than forty-five (45) days after Landlord receives a second (2nd) notice thereof, and (ii) is either incurable by Tenant, or is curable, but only by the expenditure of an amount reasonably expected to be in excess of [_____] and 00/100 Dollars ($[_____]), then Tenant shall have the express right to terminate this Lease, in which event Tenant shall have no further rights, duties or obligations hereunder.

b. If Landlord fails to commence the making of any repairs or the performance of any maintenance required to be performed by Landlord pursuant to Section __ of this Lease, subject to force majeure, within thirty (30) days after Landlord's receipt of written notice from Tenant thereof, and such default by Landlord materially and adversely impacts the normal conduct of the Permitted Use in the Premises pursuant to this Lease (provided, however, that if an emergency situation exists and the immediate curing of such failure is necessary to prevent imminent injury or damage, then the 30-day grace period shall be reduced to seventy-two (72) hours), then [if Tenant elects to exercise its rights under this Section, the rights hereunder shall be] Tenant's sole right and remedy for such failure [shall be], after an additional written notice to Landlord, to cause such repairs to be made or maintenance to be performed in compliance with the other terms and conditions of this Lease and to make a claim against Landlord for the Reimbursable Costs (as hereinafter defined) (provided, however that in no event shall Tenant be permitted to withhold payment of any Rent on account of such costs except as hereinafter expressly set forth). Tenant's right hereunder to cure any breach or failure on behalf of Landlord in an emergency situation shall be limited to such actions that are necessary to alleviate the emergency situation. Landlord shall reimburse Tenant for the reasonable and actual out-of-pocket cost paid by Tenant to unaffiliated third parties for any maintenance or repairs Tenant is entitled to perform on Landlord's behalf pursuant to this Section within thirty (30)

days after receipt from Tenant of a detailed statement of such costs, accompanied by reasonably satisfactory supporting documentation (the "Reimbursable Costs"). Notwithstanding anything to the contrary set forth in this Lease, Tenant's rights hereunder shall be limited to performing repairs or maintenance in the Premises, it being understood and agreed that Tenant has no right to perform any of Landlord's obligations with respect to the Common Areas or in a manner which might adversely affect, any other premises in the Shopping Center. [Consider adding offset right if Tenant isn't timely reimbursed for the Reimbursable Costs].

4. Landlord Exculpation Provisions

a. Example from Friedman on Leases Section 17:1: "As consideration for the making of this lease the Landlord shall not be liable for any failure of water supply or electric current, nor for injury or damage which may be sustained to person or property by the Tenant and any other person caused by or resulting from steam, electricity, gas, water, rain, ice or snow which may leak or flow from or into any part of said building or from the breakage, leakage, obstruction or other defect of the pipes, wiring, appliances, plumbing or lighting fixtures of the same, the condition of said premises or any part thereof, or through the elevator, if any, or from the street or subsurface, or from any other source or cause whatsoever, whether the same damage or injury shall be caused by or be due to the negligence of the Landlord, the Landlord's agent, servant, employee, or not, nor for the interference with light or other incorporeal hereditaments, provided such interference is caused by anybody other than the Landlord or caused by operations by or for the City in the construction of any public or quasi-public work, neither shall the Landlord be liable for any defect in the building, latent or otherwise and there shall be no allowance to the Tenant for a diminution of rental value and no liability on the part of the Landlord by reason of inconvenience, annoyance or injury to business arising from Landlord, Tenant or others failing to make any repairs, alterations or improvements in or to any portion of the building or the demised premises or in or to the fixtures, appurtenances or equipment thereof."

b. The liability of Landlord under this Lease shall be limited solely to the then interest of Landlord in the land and the buildings which comprise the Shopping Center. No officer, director, agent, general partner or employee of Landlord shall be personally liable with respect to any claim arising out of or related to this Lease. Further, Landlord shall be liable under this Lease only for obligations accruing while it is the owner of a fee or leasehold estate in the Shopping Center. If Landlord should sell or otherwise transfer Landlord's interest in the Shopping Center, then it shall be deemed without further documentation that the purchaser or transferee has assumed Landlord's obligations under this Lease from and after the date of transfer.

5. Liquidated Damages Provisions

a. In favor of Tenant:

i. The parties have agreed to certain restrictions with respect to the Common Areas (the "Common Area Restrictions") If any violation of the Common Area Restrictions occurs within [_____] (____) feet of the Premises, the parties acknowledge that the damages which Tenant will suffer are difficult to ascertain, and Landlord further acknowledges that such damages include, but are not limited to, interference with the use of the Common Areas and disturbance to Tenant's business conducted at the Premises. Therefore, after negotiation, Landlord and Tenant have made their best reasonable estimate of such damage and agreed that immediately upon the occurrence of such violation, Tenant shall be entitled to offset _____ Dollars ($[_____]) from its rent for each day of such violation, as liquidated damages.

ii. If the Date of Delivery does not occur on or before the Estimated Date of Delivery (as hereinafter defined), then such failure shall not be deemed to be a breach or default by Landlord hereunder[, and as Tenant's sole remedy for the delay (other than Tenant's right to terminate this Lease as hereinafter set forth)], for each day elapsing after the

Estimated Date of Delivery until the date upon which the Date of Delivery occurs, Tenant shall receive a credit against Base Rent [and recurring Additional Rent] in an amount equal to one (1) day's Base Rent at the rate in effect upon the Rent Commencement Date. [Base Rent credits are not transferable, nor payable in cash, and may only be credited against Base Rent. The "Estimated Date of Delivery" means [_____] ([__]) days after the Date of Lease. Additionally, if the Date of Delivery does not occur on or before the Outside Delivery Date (as hereinafter defined), then Tenant shall have the right, as its sole remedy hereunder, to terminate this Lease effective as of the date (the "Early Termination Date"), which is [_____ (__)] days after Landlord receives written notice of such termination from Tenant ("Tenant's Termination Notice"); provided that the termination right set forth in this Section shall not be available to Tenant, and shall automatically be null and void, if the Delivery Date occurs within [_____ (__)] days after Landlord's receipt of Tenant's Termination Notice [or Landlord does not receive Tenant's Termination Notice on or before the date, which is thirty (30) days after the Outside Delivery Date]. The "Outside Delivery Date" means [_____] ([__]) days after the Date of Lease. Notwithstanding anything to the contrary set forth herein, the Estimated Date of Delivery and the Outside Delivery Date shall each be extended by one (1) day for each day of delay, which is due to a Tenant Delay and/or Force Majeure. In the event of termination under this Section, neither party shall have any further liability or obligation to the other hereunder except pursuant to any term or provision of this Lease, which by its specific terms shall survive termination of this Lease.

b. In favor of Landlord: In addition to any other rights and remedies which Landlord may have at law, in equity or under this Lease, if Tenant (i) does not timely deliver to Landlord evidence it has obtained the insurance required under this Lease; (ii) Tenant fails to timely deliver statements of its gross sales to Landlord, (iii) Tenant fails to timely deliver Tenant's Plans; and/or (iv) Tenant uses the Common Areas for a purpose not permitted in this Lease or otherwise violates the Rules and Regulations; Tenant shall pay to Landlord, upon demand, a charge of _____ Dollars ($_____) for each day during which any such failure shall continue. Tenant agrees that if Tenant fails to comply with the provisions set forth above, the damages accruing to Landlord will be difficult to determine and that the charge set forth herein is a reasonable, partial damage for such failure.

6. Waiver of Consequential Damages

a. Mutual Waiver: Notwithstanding any provision to the contrary in this Lease, in no event shall either party be liable to the other for any consequential, incidental, punitive or indirect damages including but not limited to loss of income or loss of profits. [Potential carve-outs for Landlords to consider include liability under the holdover and environmental provisions].