Thursday, October 24, 2024
9:15 AM – 10:15 AM

Seminar 8

Percentage Rent, Radius, Continuous Operations and Kickout Clauses: Protecting the Train to Percentage Rent and Avoid Being Taken to the Train Station

Presented to:

2024 ICSC+U.S. LAW
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by:

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I.A.1. Gross Sales Definition / Exclusions

1. **Definition**: "Gross Sales" means the gross selling price of all goods, merchandise, food and services sold in or from the Premises, whether for cash or on credit, and whether made by store personnel or by orders taken in, at or from the Premises, whether the orders are made by telephone, mail or any electronic device; or from any vending or similar machines or devices, whether coin operated or otherwise in the Premises. All sales and orders originally made in, at or from the Premises shall be considered as made and completed therein, even though payment of the account may be transferred to some other office of Tenant for collection, or although delivery of goods, food or merchandise sold or the performance of services ordered in, at or from the Premises may be made from or at a place other than the Premises.

2. **Exclusions**: The term "Gross Sales" shall not include (or if included, there shall be a deduction to the extent of such inclusion) only the following:

1) Sales, excise, luxury, use or similar tax based upon the sale of merchandise and required by law, whether now or hereafter in force, but only if collected separately from the selling price of merchandise or services and collected from its customers or, if the current method of taxation is changed to a value added or similar tax where the tax is included or absorbed into the sales price (in lieu of being separately charged), the amount added to the selling price and paid to the taxing authorities by Tenant;

2) Transfers or exchanges of merchandise between stores or warehouses of Tenant, or between Tenant and stores affiliated with Tenant, where such transfers or exchanges of merchandise are made solely for the convenient operation of the business of Tenant and not for the purpose of consummating a sale which has been made in, at or from the Premises or for the purpose of depriving Landlord of the benefit of a sale which otherwise would be made in, at or from the Premises;

3) The sales price of all merchandise returned by customers and accepted for full credit, to the extent such sales were previously reported as Gross Sales [or the sales price of all merchandise returned by customers (regardless of the origin) so long as Tenant does not designate the Premises as a "return center"];

4) Returns to suppliers or manufacturers;

5) Reimbursement of amounts for postage, express or delivery services, including, but not limited to, United Parcel Service, incurred in delivering merchandise to customers, provided that such charges are at all times properly segregated from amounts includable in Gross Sales and so identified on Tenant's records;

6) Any sale at a discount to a bona fide employee of Tenant to the extent that such sales do not exceed 3% of the total Gross Sales in any Lease Year;

7) Receipts from vending machines or pay telephones but only with respect to vending machines which are made available solely for the use of Tenant's employees, it being agreed that revenues from vending machines made available for the public use shall be included only to the extent of the reimbursement or other payment which Tenant receives from the supplier of such machines;

8) Proceeds of catalogue or internet sales not processed or filled in the Premises [or sales from mail order catalogs, the internet, the telephone or pursuant to electronic and computer orders submitted by means of other technology based systems, whether now existing or hereafter developed, that are paid for on Tenant's website or at Tenant's other stores except to the extent such sales in this subsection (8) are attributed to the sales in the Premises in accordance with Tenant's global accounting standards (such as "digital assist" sales)];

9) The amount of gift certificates purchased at the Premises; provided, however, once any gift certificates are redeemed either at the Premises or elsewhere then the sales represented by the redemption of such gift certificates shall be included in Gross Sales hereunder;

10) The amount of any discount (including promotions) given to customers as represented by a coupon or other promotion, to the extent that such sales were actually included in Tenant's Gross Sales;

11) Finance, interest, service or carrying charges on credit cards or charges related to electronic fund transfers, check cashing, or returned checks provided such charges are not payable to Tenant or Tenant's affiliate(s);

12) Employee tips;

13) Receivables that are reported as bad debts by Tenant for federal and state income tax purposes, provided that: (i) Tenant has taken reasonable steps to collect such receivables; (ii) in any Calendar Year, Tenant's exclusions for bad debts shall not exceed 3% of Gross Sales for such Calendar Year; and (iii) any amount that is excluded from Gross Sales pursuant to this clause but is later collected by Tenant shall be included in Gross Sales for the Lease Year in which the amount is received by Tenant;

14) All sums and credits received in settlement of claims for loss or damage to merchandise;

15) Bulk sales or other such sales not in the normal course of business (e.g., sale of assets of business);

16) the amount of gift-wrapping charges offered to customers at cost separately stated in connection with sales of merchandise from the Premises;

17) Charges for other services provided for the convenience of customers at no profit to Tenant or Tenant's affiliate(s);

18) The value of all merchandise donated to charity; and

19) Rents, subrents, or other consideration received in connection with an assignment, sublet, license, concession, or other occupancy arrangement of all or any portion of the Premises (however, Gross Sales shall include all gross sales of the parties to such transactions).

I.A.2 Gross Sales Reporting

1. **Monthly:** Tenant shall submit to Landlord on or before the fifth (5^{th}) day of each month of each Calendar Year during the Term, a written unaudited statement of Gross Sales showing Tenant's Gross Sales and itemized deductions and exclusions for the preceding calendar month which are permitted by this Lease, signed by Tenant, or in the event Tenant is a corporation, then by an officer of Tenant, (the "Monthly Sales Report"). On or before the thirtieth (30^{th}) day following the end of each Calendar Year during the Term, Tenant shall submit to Landlord a written statement of Gross Sales showing Tenant's Gross Sales and itemized deductions and exclusions for the preceding Calendar Year which are permitted by this Lease, signed by Tenant, or in the event Tenant is a corporation, then by an officer of Tenant, and certified under oath to be complete and correct (the "Annual Sales Report"). Each Monthly Sales Report and Annual Sales Report shall be accompanied with a copy of any filing the Tenant may make to state or local governments for reporting sales for sales tax purposes.

2. **Quarterly:** Tenant shall submit to Landlord on or before the fifth (5th) day of each April, July, October and January [or following the end of each calendar quarter] during the Term, a written unaudited statement of Gross Sales showing Tenant's Gross Sales and itemized deductions and exclusions for the preceding calendar quarter, which are permitted by this Lease, signed by the chief financial officer of Tenant (the "Quarterly Sales Report"). On or before the thirtieth (30th) day following the end of each Calendar Year during the Term, Tenant shall submit to Landlord a written statement of Gross Sales showing Tenant's Gross Sales, itemized deductions and exclusions for the preceding Calendar Year which are permitted by this Lease, signed by Tenant, or in the event Tenant is a corporation then by an officer of Tenant, and certified under oath to be complete and correct (the "Annual Sales Report"). Each Quarterly Sales Report and Annual Sales Report shall be accompanied with a copy of any filing the Tenant may make to state or local governments for reporting sales for sales tax purposes.

3. **Annually**: On or before the thirtieth (30th) day following the end of each Calendar Year during the Term, Tenant shall submit to Landlord a written statement of Gross Sales showing Tenant's Gross Sales, itemized deductions and exclusions for the preceding Calendar Year which are permitted by this Lease, signed by Tenant, or in the event Tenant is a corporation, then by an officer of Tenant, and certified under oath to be complete and correct (the "Annual Sales Report"). Each Annual Sales Report shall be accompanied with a copy of any filing the Tenant may make to state or local governments for reporting sales for sales tax purposes.

I.A.3. Gross Sales Audit Rights

1. **General Provisions:** If Tenant shall fail to prepare and deliver any statement of Gross Sales required herein, then Landlord, in addition to other rights or remedies it may have, and upon five (5) days' notice to Tenant, may elect to make an audit of all books and records of Tenant and to prepare the statement or statements which Tenant has failed to prepare and deliver. Such audit shall be made and such statement or statements shall be prepared by an accountant selected by Landlord, and the statement or statements so prepared shall be binding and conclusive on Tenant.

   Landlord may inspect and/or audit any or all of Tenant's sales records and those of Tenant's assignees, subtenants, licensees and concessionaires, if any, which shall be in any manner related to Gross Sales; and Tenant, upon 24 hours' prior notice from Landlord, shall make all such data available for Landlord's examination, where Tenant keeps the data, at such times as Landlord shall specify in such written request. If the Gross Sales shown by the Annual Sales Report for any Calendar Year are found to be understated by 5% or more [and such understatement results in Percentage Rent being due], Landlord may, at its option, terminate this Lease in addition to any other rights and remedies available under this Lease.

2. **Contingency Fee Basis:** Landlord may inspect and/or audit any or all of Tenant's sales records and those of Tenant's assignees, subtenants, licensees and concessionaires, if any, which shall be in any manner related to Gross Sales; and Tenant, upon 24 hours' prior notice from Landlord, shall make all such data available for Landlord's examination, where Tenant keeps the data, at such times as Landlord shall specify in such written request. The parties agree that such audit may be performed by a third-party consultant retained by Landlord on a contingency fee basis. If the Gross Sales shown by the Annual Sales Report for any Calendar Year are found to be understated by 5% or more [and such understatement results in Percentage Rent being due], Landlord may, at its option, terminate this Lease in addition to any other rights and remedies available under this Lease.

3. **Non-Contingency Fee Basis:** Landlord shall have the right to have any or all of Tenant's sales records and those of Tenant's assignees, subtenants, licensees and concessionaires, if any, which shall be in any manner related to Gross Sales, audited by a nationally recognized certified public accounting firm which is not paid on a contingency fee basis; and Tenant, upon 24 hours' prior notice from Landlord, shall make all such data available for Landlord's examination, where Tenant keeps the data, at such times as Landlord shall specify in such written request. If the Gross Sales shown by the Annual Sales Report for any Calendar Year are found to be understated by 5% or more [and such understatement results in Percentage Rent being due], Landlord may, at its option, terminate this Lease in addition to any other rights and remedies available under this Lease.

4. **Reimbursement:** If Tenant shall fail to prepare and deliver any statement of Gross Sales required herein, then Tenant shall pay on demand all expenses of such audit and of the preparation of any such statements of Gross Sales and all sums, if any, as may be shown by such audit to be due as Percentage Rent.

   If the Gross Sales shown by Tenant's statement for any Calendar Year are found to be understated by 2% or more, Tenant shall pay to Landlord the cost of such audit or inspection together with the deficiency in Percentage Rent determined as a result of such audit and interest thereon at the Default Rate from the date of the Annual Sales Report to the date the deficiency is paid.

I.B Breakpoint of Sales

1. **Natural:** In addition to Minimum Rent, during each Lease Year of the Term, Tenant agrees to pay to Landlord an amount ("Percentage Rent") equal to the product obtained by multiplying the amount of Gross Sales for a Lease Year that exceeds the "Breakpoint of Sales" (as defined hereinafter) for such

Lease Year (the "Excess Sales") by _____ percent (_____%) (the "Percentage Rent Factor"). As used in this Lease, the term "Breakpoint of Sales" for each Lease Year refers to the result obtained by dividing the Minimum Rent due and payable during the Lease Year in question by the Percentage Rent Factor. To determine a Breakpoint of Sales for a particular calendar month, the Breakpoint of Sales for the applicable Lease Year shall be divided by 12.

2. **Unnatural or Negotiated:** As used in this Lease, the term "Breakpoint of Sales" for the first Lease Year of the Primary Term refers to the amount of $__________, which such Breakpoint of Sales shall increase each Lease Year during the Primary Term and the Renewal Term(s) (if Tenant validly exercises its option(s) to the same) on the annual anniversary of the Commencement Date by _____% from the immediately preceding Lease Year [or refers to the amounts set forth in the table below]. To determine a Breakpoint of Sales for a particular calendar month, the Breakpoint of Sales for the applicable Lease Year shall be divided by 12.

3 **Pro-rated for Partial Year: Example at beginning of Primary Term with natural breakpoint:** As used in this Lease, the term "Breakpoint of Sales" for each Lease Year (and any partial Lease Year) refers to the result obtained by dividing the Minimum Rent due and payable during the Lease Year (or partial Lease Year) in question by the Percentage Rent Factor. To determine a Breakpoint of Sales for a particular calendar month, the Breakpoint of Sales for the applicable Lease Year shall be divided by 12 (or prorated for any Partial Lease Year as set forth below). For the purpose of determining Percentage Rent for any Partial Lease Year, Percentage Rent shall be based upon Tenant's Gross Sales for the twelve (12) month period immediately succeeding the Commencement Date. Percentage Rent due for such period shall be an amount equal to the product of: (i) the Percentage Rent Factor multiplied by Tenant's Gross Sales realized in the applicable twelve (12) month period in excess of the applicable Breakpoint of Sales, and (ii) a fraction, the numerator of which is the number of days in the Partial Lease Year and the denominator of which is three hundred sixty-five (365). Percentage Rent calculations for the first full Lease Year of the Term shall start anew on the _____ day following the Commencement Date.

Example at end of Primary Term with unnatural breakpoint: The Breakpoint of Sales for each Lease Year (and any Partial Lease Year) refers to [the amounts set forth in the table below]. To determine the Breakpoint of Sales for any particular calendar month, the Breakpoint of Sales for the applicable Lease Year shall be divided by 12; provided, however, during any Partial Lease Year, the Breakpoint of Sales shall be divided by the number of months in such Partial Lease Year.

I.C. Conversion of Percentage Rent to Minimum Rent

1. **One Time**: Notwithstanding anything to the contrary contained herein, upon the expiration of the third Lease Year of the Term, Percentage Rent will be converted into Minimum Rent one time, pursuant to which the annual Minimum Rent due and payable by Tenant for the fourth Lease Year shall be increased based upon the Percentage Rent payable by the Tenant during the second and third Lease Years, according to the following formula:

(a) Commencing in the fourth Lease Year of the Term, the annual Minimum Rent due and payable by Tenant for the remaining Term shall be adjusted one time by increasing it to an amount equal to the sum of (i) the annual Minimum Rent due and payable for such fourth Lease Year, and (ii) ninety percent (90%) of the average of the Percentage Rent, if any, which was due and payable by Tenant for the second and third Lease Years of the Term (such sum referred to herein as the "Converted Rent"). Such annual Minimum Rent for the fourth Lease Year as increased by the Converted Rent shall be the new annual Minimum Rent and thereafter shall be adjusted according to the Minimum Rent escalation schedule set forth in this Lease.

(b) By way of example only, if during the second and third Lease Years, the Percentage Rent due and payable by Tenant was Fifty Thousand and No/100 Dollars ($50,000.00) and One Hundred Thousand and No/100 Dollars ($100,000.00), respectively, and the unconverted Minimum Rent during the fourth Lease Year is Three Hundred Forty Thousand and No/100 Dollars ($340,000.00), then the Converted Rent for the fourth Lease Year would be Four Hundred Seven Thousand Five Hundred Dollars ($407,500.00), which amount would be calculated as follows: $340,000 plus [90% x ($50,000 + $100,000) / 2] = $407,500. The sum of $407,500 would become the Minimum Rent for the fourth Lease Year and such Minimum Rent would thereafter be adjusted according to the Minimum Rent escalation schedule set forth in this Lease.

2. **At Different Intervals over Lease Term**: Commencing in the third Lease Year of the Term and thereafter every _____ Lease Years throughout the Term, the annual Minimum Rent shall be increased by an amount equal to the sum of (i) the annual Minimum Rent payable in the prior Lease Year, and (ii) seventy-five percent (75%) of the average of Percentage Rent, if any, which was due and payable by Tenant for the prior two Lease Years. For example, if during the first and second Lease Years, the Percentage Rent due and payable by Tenant was Fifty Thousand and No/100 Dollars ($50,000.00) for the first Lease Year and One Hundred Thousand and No/100 Dollars ($100,000.00) for the second Lease Year, respectively, and the annual Minimum Rent for the second Lease Year was Ninety Thousand and No/100 Dollars ($90,000.00), then the annual Minimum Rent for the third Lease Year would be One Hundred Forty-Six Thousand Two Hundred Fifty and No/100 Dollars ($146,250.00), which amount would be calculated as follows: $90,000 + [75% x ($50,000 + $100,000) / 2] = $146,250. Following the recalculation of annual Minimum Rent for the third Lease Year, the annual Minimum Rent shall be subject to further increase every _____ Lease Years as provided herein, and as adjusted pursuant to the formula and provisions associated with the conversion of Percentage Rent described above.

I.D. Default Rent (if heavily weighted toward Percentage Rent)

1. **Specified Amount per Day**: For purposes of calculating Rent under this Lease, in the event of a Default involving Tenant's failure to (i) open the Premises for the Permitted Use on or before the Required Opening Date, or (ii) operate during the hours required pursuant to the terms and provisions of this Lease, Landlord and Tenant agree that, for each day (x) that Tenant fails to open the Premises for the Permitted Use after the Required Opening Date, or (y) that Tenant is not operating during the hours required pursuant to this Lease, the daily Rent obligations payable by Tenant shall be __________ Dollars ($__________) per day (the "Default Rent").

2. **Specified Amount per Hour:** If Tenant's business is closed for any reason not permitted by this Lease, such closure shall constitute a Default by Tenant which may not be cured by Tenant, thus entitling Landlord to immediately exercise its rights under this Lease. In the event that Tenant fails to open the Premises for business to the public during the Minimum Operating Hours, then in addition to Landlord's other rights and remedies set forth in this Lease, Tenant hereby agrees to pay to Landlord, as liquidated damages (not a penalty), the amount of $100.00 per hour for each hour the Premises was not open to the public during the Minimum Operating Hours, but in no event more than $1,000 per day.

3. **Gross Rent based on Percentage of Gross Sales**: During the first (1^{st}) and second (2^{nd}) Lease Years of the Primary Term, in lieu of the Minimum Rent, Tenant's Share of Costs and Percentage Rent otherwise set forth in this Lease, Tenant shall pay eight percent (8%) of Gross Sales each month. It is the intention of the parties that the monthly installments of Gross Rent set forth above include Tenant's Share of Costs, and the same will not be billed to Tenant in addition to the monthly installments of Gross Rent. Landlord, in Landlord's sole discretion, shall have the right to apportion any part (or none) of the monthly installments of Gross Rent, as Landlord deems advisable, toward Tenant's Share of the Costs. Notwithstanding anything in this Lease to the contrary, except for Permitted Closures, if Tenant is not open and operating in the Premises at any time during the first (1^{st}) and second (2^{nd}) Lease Years of the Primary Term, as required pursuant to the terms of this Lease, then Tenant shall be obligated to pay to Landlord the Minimum Rent and Tenant's Share of Costs that Tenant is obligated to begin paying in the third (3^{rd}) Lease Year during such period in which the Premises remains closed for business to the public.

II. Kick-out / Termination Clauses

1. **Specific Year**: If after the expiration of the _____ Lease Year of the Term of this Lease: (i) Tenant has not been in default of this Lease beyond any applicable notice and cure periods; (ii) Tenant's Gross Sales have not met or exceeded __________ Dollars ($__________) (the "Gross Sales Threshold") during the _____ Lease Year of the Term (the "Gross Sales Measuring Period"); and (iii) no later than sixty (60) days after the expiration of the _____ Lease Year of the Term (the "Gross Sales Termination Notice Deadline"), Tenant provides certified evidence to Landlord that Tenant's Gross Sales have not met or exceeded such Gross Sales Threshold (the "Gross Sales Threshold Report") (collectively, the "Gross Sales Termination Conditions"); then Tenant is hereby granted the one-time right to terminate this Lease by delivering written notice to Landlord (the "Gross Sales Termination Notice") together with the "Gross Sales Termination Payment" (as such term is defined below) no later than the Gross Sales Termination Notice Deadline. As used herein, the "Gross Sales Termination Payment" shall be

defined as an amount equal to one hundred percent (100%) of the unamortized portion of the Tenant Allowance and any brokerage commissions, amortized on a straight-line basis over the Term of this Lease.

In the event that (i) any of the Gross Sales Termination Conditions are not satisfied, or (ii) Tenant fails to deliver the Gross Sales Termination Notice together with the Gross Sales Termination Payment to Landlord by the Gross Sales Termination Notice Deadline, then Tenant shall be deemed to have waived its right to terminate this Lease pursuant to this Article __. In the event that (x) all of the Gross Sales Termination Conditions are satisfied, and (y) Tenant delivers the Gross Sales Termination Notice together with the Gross Sales Termination Payment to Landlord by the Gross Sales Termination Notice Deadline, then this Lease shall terminate effective upon the one hundred eightieth (180th) day following the date Landlord receives the Gross Sales Termination Notice and the Gross Sales Termination Payment (the "Gross Sales Termination Date"), and Tenant shall surrender the Premises to Landlord in the condition required under this Lease. From and after the Gross Sales Termination Date, neither party shall be obligated to the other under the terms of this Lease; however, both parties shall remain responsible and liable to each other for their respective obligations under this Lease which accrue up to the Gross Sales Termination Date. Notwithstanding the foregoing, Tenant shall be obligated to pay Tenant's Share of Costs which accrue up to the Gross Sales Termination Date, but Landlord and Tenant expressly waive all their respective rights and obligations with respect to reconciliation of the Costs as described in this Lease.

2. **Any Consecutive 12 Month Period:** If following the commencement of the _____ Lease Year of the Term: (i) Tenant has not been in default of this Lease beyond any applicable notice and cure periods; (ii) Tenant's Gross Sales have never met or exceeded __________ Dollars ($__________) (the "Gross Sales Threshold") during any twelve (12) month period prior to the commencement of the _____ Lease Year (the "Gross Sales Measuring Period"); and (iii) no later than sixty (60) days after the commencement of the _____ Lease Year (the "Gross Sales Termination Notice Deadline"), Tenant provides certified evidence to Landlord that Tenant's Gross Sales have never met or exceeded such Gross Sales Threshold (the "Gross Sales Threshold Report") (collectively, the "Gross Sales Termination Conditions"); then Tenant is hereby granted the one-time right to terminate this Lease by delivering written notice to Landlord (the "Gross Sales Termination Notice") together with the "Gross Sales Termination Payment" (as such term is defined below) no later than the Gross Sales Termination Notice Deadline. As used herein, the "Gross Sales Termination Payment" shall be defined as an amount equal to one hundred percent (100%) of the unamortized portion of the Tenant Allowance and any brokerage commissions, amortized on a straight-line basis over the Term of this Lease.

In the event that (i) any of the Gross Sales Termination Conditions are not satisfied, or (ii) Tenant fails to deliver the Gross Sales Termination Notice together with the Gross Sales Termination Payment to Landlord by the Gross Sales Termination Notice Deadline, then Tenant shall be deemed to have waived its right to terminate this Lease pursuant to this Article __. In the event that (x) all of the Gross Sales Termination Conditions are satisfied, and (y) Tenant delivers the Gross Sales Termination Notice together with the Gross Sales Termination Payment to Landlord by the Gross Sales Termination Notice Deadline, then this Lease shall terminate effective upon the one hundred eightieth (180th) day following the date Landlord receives the Gross Sales Termination Notice and the Gross Sales Termination Payment (the "Gross Sales Termination Date"), and Tenant shall surrender the Premises to Landlord in the condition required under this Lease. From and after the Gross Sales Termination Date, neither party shall be obligated to the other under the terms of this Lease; however, both parties shall remain responsible and liable to each other for their respective obligations under this Lease which accrue up to the Gross Sales Termination Date. Notwithstanding the foregoing, Tenant shall be obligated to pay Tenant's Share of Costs which accrue up to the Gross Sales Termination Date, but Landlord and Tenant expressly waive all their respective rights and obligations with respect to reconciliation of the Costs as described in this Lease.

3. **Violation of Radius Restriction:** In the event that Tenant violates the Radius Restriction set forth in this Lease at any time during the Term of this Lease, then Tenant shall be deemed to have waived the corresponding right to terminate this Lease for failure to satisfy the Gross Sales Termination Conditions (including the Gross Sales Threshold).

4. **Proration/Reduction in Sales Threshold for Closures:** In addition, the parties agree that if Tenant fails to open and operate during the Minimum Operating Hours for the Permitted Use at any time during the Gross Sales Measuring Period, then the Gross Sales Threshold for the applicable Gross Sales Measuring Period shall be reduced in the same proportion as the number of days

which Tenant failed to open and operate for the Minimum Operating Hours. For example, if during the Gross Sales Measuring Period, Tenant failed to be open and operating for the Permitted Use and in accordance with the Minimum Operating Hours for a total of 60 days, then the Gross Sales Threshold for the applicable Gross Sales Measuring Period shall be reduced by multiplying the Gross Sales Threshold by a fraction, the numerator of which is 60 and the denominator of which is 365 [or the total number of days in such Gross Sales Measuring Period].

5. **Tenant-Friendly Kickout Clause**: If Tenant's gross sales at the Premises do not exceed _____________ ("Gross Sales Threshold") during the period beginning on the first day of the 61st full calendar month following the Rent Commencement Date and ending on the last day of the 72nd full calendar month following the Rent Commencement Date (the "Determination Period"), Tenant shall have the one-time right to terminate this Lease by delivering written notice to Landlord (the "Gross Sales Termination Notice") at any time following the last day of the Determination Period and prior to the last day of the 78th full calendar month following the Rent Commencement Date, such termination to be effective as of the last day of the 84th full calendar month following the Rent Commencement Date. The Gross Sales Termination Notice shall include supporting documentation providing reasonable evidence of Tenant's gross sales for the Determination Period.

   Tenant's right to terminate the Lease pursuant to this section shall be conditioned upon (a) Tenant continuously having its business open to the public during the Determination Period *(optional if requested by Landlord [with a fully-stocked and fully-staffed store operated in a manner consistent with the operation of the majority of Tenant's other ___________ stores])*, except to the extent Tenant is prevented from operating due to Force Majeure (as hereinafter defined) or a casualty described in Paragraph ___ of this Lease, and (b) neither Tenant nor any person or entity affiliated with Tenant shall have operated a store for any of the purposes described in Paragraph ___ of this Lease within a ____ mile radius of the Premises. If during any portion of the Determination Period Tenant is prevented from operating due to Force Majeure or a casualty described in Paragraph ___ of this Lease, then for purposes of determining whether Tenant has the right to terminate the Lease pursuant to this Paragraph ___, the gross sales that shall be used to determine whether the Gross Sales Threshold is satisfied shall be Tenant's gross sales for the twelve (12) month period immediately preceding the casualty or event of Force Majeure.

III. Radius Restrictions

1. **No Exception:** Tenant acknowledges and agrees that, during Primary Term of the Lease and any exercised renewals or extensions thereto, Tenant shall not operate another store [restaurant] owned, franchised or licensed under the same trade name as the Premises or which operates for the Permitted Use within a _____ mile radius of the [Premises (the "Radius Restriction").

2. **With Exceptions:** Tenant acknowledges and agrees that, during Primary Term of the Lease and any exercised renewals or extensions thereto, Tenant shall not operate another store [restaurant] owned, franchised or licensed under the same trade name as the Premises or which operates for the Permitted Use within a _____ (_____) mile radius of the Premises, excluding any existing locations open and operating as of the Effective Date of this Lease [or a relocation of an existing location or acquisition of an existing location as part of a corporate acquisition] (the "Radius Restriction").

6. **Remedies:** In the event Tenant violates the Radius Restriction and such violation shall continue beyond the expiration of any applicable notice and cure periods (the "Radius Restriction Violation"), then, in addition to any other rights or remedies Landlord may have under this Lease, at law or in equity, any Gross Sales generated from any stores [restaurants] opened in violation of the Radius Restriction shall be included in the definition of Gross Sales hereunder for the purposes of calculating Percentage Rent.

   In addition, in the event that Tenant violates the Radius Restriction set forth in this Lease at any time during the Term of this Lease, Tenant shall be deemed to have waived the corresponding right to terminate this Lease for failure to satisfy the Gross Sales Termination Conditions (including the Gross Sales Threshold).

IV. Continuous Operations

1. **General Operating Requirements:** During the Term of the Lease, the Premises shall be continuously operated, used and occupied only for the Permitted Use and for no other purpose, and operated under the Permitted Name and no other trade name. Tenant agrees that it shall at all times during the Term: (i) Keep the Premises open for business at a minimum during the hours of 11 a.m. to 7 p.m. Eastern Time on Monday through Thursday; 11 a.m. to 8 p.m. Eastern Time on Friday through Saturday; and 12 p.m. to 6 p.m. Eastern Time on Sunday (the "Minimum Operating Hours") or such other business hours and days designated by Landlord from time to time as the hours for the Property; and (ii) Operate its business in the entire Premises in a high grade and reputable manner, maintaining in the Premises an adequate staff of employees and a full and complete stock of merchandise, and in general shall employ its best business judgment, efforts and abilities to operate Tenant's business in an efficient and businesslike manner, and to achieve the maximum possible volume of sales.

2. **Permitted Closures:** Notwithstanding anything to the contrary contained in this Lease, Tenant may close the Premises due to: (i) damage and destruction or condemnation; (ii) events caused by force majeure; (iii) the observance of New Year's Day, Independence Day, Labor Day, Thanksgiving and Christmas or such other federally recognized holidays observed by Tenant; (iv) renovation as permitted hereunder for reasonable periods of time not to exceed 30 days for each closure; (v) renovation associated with a Permitted Transfer not to exceed ___ days; and (vi) the conducting of inventory as permitted hereunder not to exceed 2 days for each closure (collectively, "Permitted Closures"). If Tenant's business is closed for any reason not permitted by this Lease, such closure shall constitute a Default by Tenant which may not be cured by Tenant, thus entitling Landlord to immediately exercise its rights under this Lease.

3. **Right of Recapture:** Notwithstanding anything contained in this Lease to the contrary, in the event that at any time during the Term, Tenant ceases to operate in the Premises (except for Permitted Closures) for a period in excess of sixty (60) days (the "Closure Period"), then Landlord shall have the right at any time after the expiration of the Closure Period to terminate this Lease upon thirty (30) days written notice to Tenant (the "Landlord's Recapture Notice"). In the event Landlord exercises its right to terminate this Lease pursuant to the Closure Period, Tenant shall be obligated to pay to Landlord the "Recapture Termination Fee" (as defined hereinafter), and this Lease shall terminate on the thirtieth (30th) day after Landlord delivers the Landlord's Recapture Notice. Thereafter, neither party shall have any further obligations or liabilities with regard to this Lease, however, both parties shall remain responsible and liable to each other for all of their respective obligations hereunder which accrue up to the date of termination of this Lease, including payment of the Recapture Termination Fee. As used herein, the "Recapture Termination Fee" shall be defined as an amount equal to one hundred percent (100%) of the unamortized portion of the Tenant Allowance and any brokerage commissions, amortized on a straight line basis over the Term of this Lease.

4. **Force Majeure:** Either party hereto shall be excused from performing any obligation provided in this Lease, except the obligation of Tenant to pay Rent under the provisions of this Lease (unless such obligation is abated or modified pursuant to the express provisions of this Lease), in the event and for so long as the performance of any such obligation is prevented or delayed, retarded or hindered by an act of God, fire, earthquake, flood, explosion, action of the elements, war, invasion, insurrection, riot, mob violence, sabotage, inability to procure or a general shortage of labor, equipment, facilities, materials or supplies in the open market, failure of transportation, strike, lock-out, action of labor unions, condemnation, requisition, law, order of government or civil, military or naval authorities, a declared state of emergency or public health emergency or pandemic (including, without limitation, Covid-19), government mandated closures, quarantines or travel bans, or any other cause whether similar or dissimilar to the foregoing, or not within the reasonable control of such party. Notwithstanding the foregoing, the lack of funds required to perform an act or to pay for the material, workmen or other items required for such action shall never be an excuse for non-performance of any obligation by either party.

   Notwithstanding anything to the contrary contained herein, Landlord and Tenant hereby agree that if, as the result of a pandemic, any governmental authority with jurisdiction over the Premises issues an order whereby the Premises is required to be closed, and Tenant is in fact completely closed for business (meaning no business is being generated from the Premises via dine-in, drive-through, take-out, delivery or mobile orders), and insurance coverage is not available to cover Tenant's losses as a result of such closure, then Minimum Rent will be abated one hundred percent (100%) for the period of closure not to exceed thirty (30) days (the "Pandemic Minimum Rent Abatement"). Provided, however, if as a result of a pandemic as outlined above, business is being generated from the Premises via drive-through, take-out, delivery or mobile orders, then Minimum Rent instead will be abated by fifty percent (50%) for the period of closure not to exceed thirty (30) days (the "Pandemic Minimum Rent Reduction").

5. **Tenant-Friendly - No Continuous Operating Requirement/Landlord Recapture**: Subject to Force Majeure, Tenant shall be required to open for business to the public (as a ______ retail store) for at least one (1) day within 180 days of the Rent Commencement Date ("Outside Opening Date"). Landlord shall have, as its sole and exclusive remedy for Tenant's failure to open by the Outside Opening Date, the right (by providing Tenant with thirty (30) days prior written notice) to terminate this Lease at any time after the Outside Opening Date, but prior to the date Tenant opens the Premises for business to the public (provided, further, that Landlord's termination right shall be null and void if Tenant then opens for business to the public during the thirty (30) day period following receipt of the notice). After Tenant satisfies the one (1) day opening obligation set forth herein, Tenant shall have no obligation to continuously operate at the Premises. Notwithstanding the foregoing, in the event that Tenant shall discontinue the operation of Tenant's business in the Premises for a period of at least 180 consecutive days (excluding periods of closure reasonably required to perform restoration of casualty or condemnation, repair or remodeling, closures for transitioning (diligently being pursued to completion) an assignee or sublessee under a fully executed assignment or sublease, or closures for other reasons beyond Tenant's control that prevent use of the Premises for Tenant's then use (but excluding any decision by Tenant to not operate within the Premises for economic reasons)), Landlord may, as its sole remedy, upon thirty (30) days written notice to Tenant (at any time after the end of the 180 day period and continuing for as long as Tenant is not operating), terminate this Lease; provided, however, that Tenant may nullify such termination by reopening for business in the Premises within thirty (30) of receipt of Landlord's termination notice.

6. **Tenant-Friendly – No Opening or Operating Requirement**: Notwithstanding anything contained in this Lease to the contrary, nothing herein shall be construed as an obligation by Tenant to open or operate its business in the Premises. Tenant has the right to remove Tenant's Property and to cease operations in the Premises at any time and in Tenant's sole discretion; provided, however, that the right to cease operation of its business does not affect Tenant's obligation to pay all amounts due hereunder and to perform all other covenants and obligations hereunder. During any period that Tenant operates its business in the Premises, Tenant agrees to conduct its business in a first-class manner, consistent with reputable business standards and practices. Further, in no event will Tenant be liable to Landlord for damages or otherwise as a result of operating other stores in the vicinity surrounding the Shopping Center or any other area, nor is Tenant limited or restricted in any way from opening or operating other stores in the vicinity surrounding the Shopping Center or in any other area.