

**TENANT EXIT STRATEGIES –
THERE MUST BE 50 WAYS
TO LEAVE YOUR LANDLORD**

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I. INTRODUCTION

The recent woes of the commercial property leasing market have created a renewed interest among tenants in protecting themselves against the possibility that they may not require all or a portion of their leased space for the entire duration of their lease term. While a discussion of tenant exit strategies may make landlords and their lenders a bit uncomfortable, the discussion is a necessary one in today's market, particularly with tenants who have a certain degree of bargaining power.

A. What Is an Exit Strategy?

For purposes of this article, the term "exit strategy" is used quite liberally. While most people equate an "exit" with lease termination, this article will discuss a variety of strategies to minimize a tenant's exposure under the lease, ranging from termination, to cessation of operations, to assignment and subletting, to rent abatement. Lease termination, while perhaps the ultimate exit strategy for a tenant, is not always the most appropriate remedy. It is therefore imperative for both landlords and tenants to negotiate provisions in the lease which are acceptable to both parties, as well as their respective lenders and/or investors. In that regard, this article will address a variety of strategies available to tenants and will identify the most appropriate circumstances under which those strategies may be used. The article will also address common concerns the landlord may have relating to the strategies discussed. Where appropriate, sample provisions have been provided to illustrate how these issues might be handled in the lease document.

B. Why Is it Necessary to Have an Exit Strategy?

The reasons that a tenant's space needs might change during the course of a lease are quite varied. For example, a tenant may need to exit the lease or downsize because of a change in the tenant's financial circumstances, a change in the ownership of the tenant (including a merger or acquisition involving the tenant) or a change in the overall business climate in which the tenant participates. The tenant's space needs also may change due to an expansion or contraction of its workforce. In the retail context, the tenant's business simply may not be profitable in that

particular location. Failure of the landlord to perform certain obligations under the lease also may necessitate the exercise by the tenant of certain pre-negotiated rights and remedies. Finally, circumstances totally out of the control of either the tenant or the landlord (such as frustration of purpose or failure of co-tenancy requirements) may require the tenant to revisit its initial lease obligation.

While this paper primarily focuses on exit strategies from the tenant's perspective, the ability to replace the tenant may be a concern for the landlord as well. For example, if an anchor tenant in a retail center has gone dark (*i.e.*, vacated its premises), the landlord may want to terminate that lease and relet the space, even if the original tenant is still willing to pay rent on the dark store. The landlord may determine that the shopping center is better positioned with a tenant who is operating, even if paying less rent, than with the original tenant not operating.

C. When Should the Tenant Think About Its Exit Strategy?

From the tenant's perspective, an exit strategy is most effective if negotiated up front as part of the lease document. It is during this "courtship" process when the relationship between the landlord and the tenant is being formed that the tenant generally has the most leverage and the landlord generally is the most cooperative. While this paper will also discuss post-lease execution exit strategies, the options for the tenant in such cases are generally much more limited and the outcome much more uncertain.

II. PRE-NEGOTIATED EXIT STRATEGIES

A. Termination Right.

Perhaps the ultimate exit strategy for the tenant is the contractual right to terminate the lease. While such termination rights are typically linked to the occurrence of certain events or the failure of certain conditions, under the right circumstances a tenant may even be able to negotiate an unfettered right to terminate. With respect to the more prevalent conditional termination rights, the tenant should be careful to distinguish between an event or a condition that gives the tenant the right to terminate and an event or a condition that causes an automatic termination or gives both parties the right to terminate. In

general, if the event or condition is for the exclusive benefit of the tenant, then the termination right should be at the tenant's sole option (thereby preventing the landlord from causing an event or creating a condition which allows the landlord to exit the lease). If, on the other hand, the event or condition runs to the benefit of both parties (such as a total casualty or perhaps the failure to meet a sales hurdle in a percentage rent lease), then it may be appropriate to have an automatic termination or mutual right of termination.

This section explores the different termination rights that might be available to a tenant, depending upon the circumstances of the applicable lease.

1. Unfettered Right.

It is rare that a landlord in a typical lease will grant the tenant an unfettered right to terminate the lease at any time and for any reason. Such a provision would likely make the property subject to the lease unfinancable. Under the right circumstances, however, the landlord may agree to give the tenant an unconditional right to terminate on a more limited basis. For example, the landlord may agree that the tenant can terminate at a particular point in time during the lease term, such as at the end of the third year of a five-year lease term. While such a provision may not make the lease unfinancable, landlords and tenants must nevertheless understand that it will certainly affect the underwriting of the lease and, ultimately, the value of the property. As a result, a tenant who presses for a termination right may find itself in the unenviable position of being required to pay a higher rental rate. The tenant must weigh the cost of the termination right against the benefit derived from having such a right.

If the landlord agrees to give the tenant an unfettered right to terminate, the tenant should expect that the landlord will insist on certain requirements relating to such termination. For example, the landlord will probably require that the tenant provide landlord with several months' notice before the termination occurs, so the landlord can begin the search for a new tenant. The landlord may also ask for reimbursement of certain costs associated with the lease, such as the unamortized portion of any tenant improvement allowance paid by the landlord, the unamortized portion of any leasing commissions paid by the landlord and any other concessions or inducements granted by the landlord relating to the lease.

An unfettered termination right also may become much more palatable to the landlord if it is accompanied by some form of termination fee to compensate the landlord (at least in part) for the loss of the rental stream caused by the termination. This termination fee is typically stated in terms of a number of months' rent. Ultimately, the amount of the fee will be a function of the economics of the lease and the underwriting performed by the landlord and, if applicable, its lender. Landlords will generally begin the negotiation asking for a fee equal to the remaining rent due under the lease, but this defeats the tenant's purpose and is not practical given that such a fee may be higher than the amount the landlord would recover if the tenant simply defaulted under the lease (see Section II.E of this paper). Therefore, the parties usually agree on a fee which is less than the remaining rent payments, but still compensates the landlord at a level that satisfies the landlord and its lender.

2. Failure to Meet Sales Hurdle.

If a retail tenant's business is not particularly successful at the premises, the tenant may need the ability to terminate the lease and discontinue its unprofitable operations. The tenant's right to terminate in this regard is usually tied to the tenant's failure to meet a particular sales hurdle. For example, the lease might provide that if the tenant's gross sales from the premises do not reach \$2,000,000 during a given year, the tenant will have the right to terminate the lease. It should be mentioned that this right may not be available to every tenant. In fact, this right is most commonly reserved to major national retail tenants who may stretch their demographic requirements to open in a particular shopping center where the outcome is uncertain. In such a case, landlords may be willing to grant the termination right in order to induce the tenant to lease space in the development believing that the tenant will lend credibility and be a draw to the remainder of the center.

If the landlord is willing to grant a right to terminate based on gross sales, the landlord will usually require certain limitations on such right. First, the landlord will want to clearly define a measuring period for when the sales hurdle must be met. It may be a one-time right at the end of a certain lease year, or it may be at the end of every lease year. Generally, the landlord will want to wait until the tenant has operated for a few years, because gross sales in the first year may be artificially low. Tenants will generally accept this

limitation, because in most cases the tenant would not spend a large sum of money to open a store only to close it in the first twelve to twenty-four months of the lease term.

The landlord also may require that one or more of the following conditions to be satisfied before the tenant can exercise its termination right: (i) the tenant must have been operating a fully stocked store during the measuring period (even if the tenant does not have a continuous operations covenant); (ii) the tenant must have been operating for its permitted use only; (iii) the tenant must have been operating in the entire premises; and (iv) the tenant must have used commercially reasonable efforts to meet the sales hurdle. These provisions are necessary to ensure that the tenant does everything possible to make its business at the location successful. The landlord does not want to create a conditional termination right which the tenant can manipulate for its own benefit. Finally, the landlord will also want the right to audit the tenant's gross sales in order to satisfy itself that the sales hurdle has in fact not been cleared.

Another issue the tenant might encounter during the process of negotiating the sales-hurdle termination right is the radius restriction. If the tenant requires a right to terminate if it does not meet its sales goal, then the landlord will want to ensure that the tenant does not open a store within a certain radius from the premises which would cannibalize sales from the premises. Why would a tenant want to compete with itself, the reader might ask? If the tenant knows it can terminate the lease based on gross sales, it may opt to relocate to the newer, better shopping center down the road and close its business at the premises as soon as its sales fall below the established threshold. A radius restriction protects the landlord against that practice of the tenant.

While a termination right is a powerful tool for a tenant, a tenant which has spent a significant sum of money finishing out its space and stocking its store may not be prepared to terminate its lease if it fails to meet the gross sales hurdle. Therefore, a preferable alternative to termination might be the right to reduce the tenant's rent until the sales goal is met. If the rental obligation is more commensurate with the tenant's actual sales, then both the tenant and the landlord may prefer the tenant to remain in occupancy.

3. Occurrence of Involuntary Events.

The tenant may wish to reserve the right to terminate upon the occurrence of certain events beyond the tenant's control which make it difficult or impossible for the tenant to continue operating in a profitable manner at the premises. Certain events which should be considered during the lease negotiation process include: casualty; condemnation; frustration of purpose; breach of the covenant of quiet enjoyment; and default by the landlord. In a retail context, the list might also include failure of co-tenancy requirements and a breach of the tenant's exclusive use provision. For each of these involuntary events which are capable of being cured, the prudent landlord will require certain cure rights, which is reasonable given the severity of the tenant's remedy.

a. Casualty.

Generally speaking, if the leased premises or the building(s) of which they are a part is damaged above a particular threshold (usually described in terms of the percentage damaged, the cost to restore, or the time required to restore), the tenant will want the right to terminate the lease. The threshold at which such termination right becomes effective is the subject for negotiation between the parties and will vary from lease to lease. The tenant will typically want this threshold to be as low as possible, in order to provide greater flexibility for the tenant. However, in most circumstances the landlord will also require the right to terminate the lease upon a major casualty, and will typically require that threshold to be the same as for the tenant.

b. Condemnation.

Similar to casualty, if a significant portion of the premises is taken by condemnation or some other governmental power, the tenant will want to be able to terminate the lease. Many of the same issues arise with respect to condemnation as casualty. How much of the premises must be subject to a taking before the tenant can terminate? How long will it take to restore the premises? Can both parties exercise the termination right? And lastly, how will the parties allocate the condemnation award?

c. Frustration of Purpose.

If certain circumstances exist that prevent the tenant from using the leased space for its intended use, it might be appropriate for the tenant to require the right to terminate. For example, if the tenant is a property management company which leases space in a building it has been hired to

manage, the tenant may require a right to terminate the lease should its property management agreement terminate. Likewise, if a tenant opens a liquor store in an area which subsequently prohibits the sale of alcoholic beverages, the tenant's purpose has been frustrated and the tenant would want the right to terminate the lease.

d. Breach of Covenant of Quiet Enjoyment.

The covenant of quiet enjoyment is implied in all leases in Texas, unless the lease provides otherwise. See *L-M-S, Inc. v. Blackwell*, 233 S.W.2d 286, 289 (Tex. 1950). While the common law implied covenant of quiet enjoyment provides a "special warranty" protecting the tenant from interference by the landlord or its agents, many tenants will attempt to negotiate a contractual covenant providing "general warranty" protection to the tenant against interference from any cause. In any event, the tenant should avoid waiving or otherwise impairing the covenant of quiet enjoyment, because a breach of the covenant may provide a right to terminate the lease for the tenant.

e. Default by Landlord.

While many landlord form leases fail to contain a landlord default section, tenants should strive to include a provision which provides that upon a default under the lease by the landlord, the tenant has the right to terminate the lease. Most landlords will insist on fairly generous notice and cure provisions for both the landlord and its lender, which in most cases are appropriate given the severity of the remedy.

f. Failure of Co-Tenancy.

Failure of negotiated co-tenancy requirements often give rise to tenant termination rights for the tenant. However, co-tenancy provisions are discussed more fully in Section II.C below because termination is only one of the common remedies available to tenants under such provisions.

g. Breach of Tenant's Exclusive.

A breach of the tenant's exclusive right to sell its product or service may also give rise to a termination right. The tenant's exclusive use rights are discussed further in Section II.G of this paper, since, like the co-tenancy provision, termination is only one remedy available for the violation of the exclusive.

4. Failure of Conditions Precedent.

In some leases, the tenant will want to establish certain conditions precedent to its obligation to perform under the lease, failing which the tenant will have the right to terminate the lease. Such conditions might include anything which would either prohibit or seriously hinder tenant's use of the premises, such as: (i) obtaining the proper zoning classification; (ii) obtaining all applicable licenses and permits (e.g., the liquor license for a restaurant); (iii) obtaining the necessary approvals for the tenant's plans and specifications; and (iv) obtaining a non-disturbance agreement from the landlord's lender. While most of these conditions are not unreasonable, the landlord will want to ensure that the tenant not be placed in a position to create its own right to terminate. As a result, the tenant can expect the landlord to require the tenant to use commercially reasonable efforts to satisfy those conditions which are in the tenant's control.

5. Sample Termination Provision.

A sample termination provision which incorporates many of the concepts discussed in this Section II.A is set forth in Appendix A, Sample "1".

6. Conclusion.

As previously mentioned, not all tenants will be able to negotiate all of the foregoing termination rights in their leases. Some of the factors that will determine a tenant's ability to pursue termination as a remedy include the size of the premises, the credit of the tenant, the use to be made of the premises, the landlord's desire to have the lease, and the relative bargaining position of the parties. However, a tenant which is not successful in obtaining the termination rights discussed in this Section II.A may be able to otherwise minimize its financial exposure under the lease by negotiating other provisions of the lease which provide the tenant with alternative relief. The remaining portions of Section II of this paper focus on several other strategies for tenants to minimize their losses when they no longer need all or a part of their leased space.

B. Operating Covenants.

Even if the tenant does not have the right to terminate the lease, it can still reduce its losses by ceasing its operations at the premises. While this may not be the ideal situation for the tenant, in

many cases the tenant would rather cease operations and continue to pay rent, than continue operating at a loss. In order to accomplish this objective, the tenant must negotiate for the removal of any covenant of continuous operations (or operating covenant) from the lease.

1. Forms of Operating Covenants.

Operating covenants usually take one of two forms in leases. The first is an explicit covenant which provides that the tenant will open and continuously operate its business in the premises for the entire lease term. The second, more subtle, form is a provision contained in the default section which provides that the tenant is in default if it "deserts," "abandons" or "vacates" the premises during the lease term. Many practitioners fail to appreciate the important distinction Texas case law has made between "deserting" or "abandoning" the premises, on one hand, and "vacating" the premises, on the other hand. See *Scot-Properties, Ltd. v. Wal-Mart Stores, Inc.*, 138 F.3d 571 (5th Cir. 1998).

In *Scot-Properties*, the court held that the tenant, Wal-Mart, did not "desert" the premises when it "removed its inventory, signs, fixtures and boarded up," but also retained control of the space and continued to meet all rent obligations, including the payment of rent. Likewise, it has been determined that a tenant who closes its business and moves out of the premises, but continues to pay rent, has not "abandoned" the premises. See *Lucky v. Fidelity Union Life Ins. Co.*, 339 S.W.2d 956, 958 (Tex. Civ. App.—Dallas 1960, no writ). Therefore, if a tenant agrees not to "desert" or "abandon" the premises during the lease term, the tenant is not necessarily prohibited from ceasing operations, so long as it continues to pay rent and otherwise performs its obligations under the lease.

2. Implied Operating Covenants.

Some courts have held that an *implied* covenant of continuous operation exists in percentage rent leases, meaning that a tenant who goes dark will be in default under the lease even though the lease did not contain an express continuous operation clause. In Texas, however, it appears that such an implied covenant of operation does not exist except in situations where the intent of the parties cannot be discerned from the lease itself and the tenant is only required to pay rent based on its gross sales (not based on any fixed rental amount). See *Nalle v. Taco Bell Corp.*, 914

S.W.2d 685, 688 (Tex. App.—Austin 1996, writ denied); *Marvin Drug Co. v. Couch*, 134 S.W.2d 356, 361 (Tex. Civ. App.—Dallas 1939, writ dism'd judgm't cor.).

3. Disclaimer of Operating Covenant.

If a tenant wants to ensure that it has no operating covenant requirement, it should specifically disclaim any covenant in the lease. See Appendix A, Sample 2 for a sample provision expressly negating a covenant of operation. However, at a minimum, the tenant should carefully analyze the lease to ensure that no operating covenant exists unless it is expressly intended by the parties.

4. Retail Landlord Concerns.

Except in the retail context, landlords are generally receptive to a request to remove the operating covenant from the lease. However, in the retail context, the failure to have an operating covenant provides an additional advantage to the tenant. If the tenant is happy with its sales from a particular location but has been dissatisfied with the landlord or the shopping center in which it is currently located, the tenant without an operating covenant could close its store and relocate to a newer or better shopping center in the same market area. However, as previously mentioned, a landlord might try to prevent this by including a radius restriction in the lease, which tenants will usually resist unless they are in a percentage rent lease. In any event, retail landlords are very reluctant to remove operating covenants from their leases because of co-tenancy concerns and the effect a dark store has on the image of and traffic to and from its center.

5. Limited Operating Covenants.

If the landlord insists on some form of operating covenant, then a compromise might be for the tenant to agree to open and operate for a limited period of time, after which the tenant may go dark. This approach at least provides the landlord some comfort that the tenant must spend the money to finish the premises and open and stock the store, but allows the tenant to retain the flexibility to go dark should the need arise in the future.

6. Recapture Right.

If the tenant is successful in negotiating a lease without an operating covenant or with a

limited operating covenant, the landlord may insist on a recapture right similar to the one discussed in the assignment and subletting provision of this paper. In this case, the landlord might require the right to recapture the premises if tenant closes its business for more than a specified period of time. The tenant will want to ensure that the recapture provision excludes temporary closures for remodeling, reconstruction after casualty and similar reasons, and that it can void the landlord's recapture right by re-commencing operations prior to the effective date of the termination.

7. Conclusion.

Regardless of the type of lease, the tenant should anticipate that it may need to cease operations at some point in the future. With that in mind, the tenant should attempt to minimize the consequences of such action when it is negotiating the lease.

C. Co-Tenancy Requirements.

A co-tenancy requirement is another tool by which a tenant (typically in the retail context) can negotiate certain remedies to protect itself against a disaster scenario.

1. Co-Tenancy Defined.

A standard co-tenancy provision makes some or all of the tenant's obligations under the lease contingent upon the occupancy by one or more other tenants of their premises in the same development. For example, in a typical regional mall, many of the in-line tenants will negotiate provisions in their leases that at least a certain number of "anchor" tenants must be open and operating during the lease term, failing which the tenant may exercise certain remedies ranging from termination, to cessation of operations to rental reduction. These provisions are critical to protect tenants from being stranded in a dying shopping center. However, the severity of the co-tenancy provision the tenant is able to negotiate will be directly proportionate to the tenant's bargaining power.

2. The "House of Cards" Scenario.

While the landlord may need to agree to certain co-tenancy provisions in order to obtain its desired tenant mix, it must be careful to avoid the "house of cards" scenario, whereby certain tenants' co-tenancy rights create a ripple effect which ultimately leads to the landlord's worst nightmare -

a shopping ghost town. Landlords should therefore take great care in the lease negotiation process to ensure that the co-tenancy provisions of the various leases operate in such a manner as to avoid a scenario whereby the cessation of operations by one tenant could ultimately lead to a substantially dark shopping center.

3. Opening vs. Operating Requirements.

As a way to possibly avoid or at least mitigate the potential for the disaster scenario referenced above, some landlords in new shopping centers will agree to opening co-tenancy requirements, without exposing themselves to the ongoing risk of an operating covenant. Under this scenario, a tenant's obligations might be conditioned upon a certain percentage of the shopping center being occupied as of the tenant's commencement date. The condition might even specifically name certain co-tenants which are required to be open. This limits the landlord's exposure because it will know at the commencement of the lease whether it has satisfied the initial co-tenancy requirements and it will not have any ongoing requirement to worry about during the remainder of the term.

4. Duration of Violation.

Regardless of the remedy available to the tenant, the landlord will want to limit the duration of the remedy to a reasonable period of time. For example, if the tenant is provided the opportunity to terminate the lease as a result of the violation of the co-tenancy provisions, the landlord may require the tenant to exercise such remedy within a specified period of time, failing which the tenant would waive its right to such remedy.

If rent reduction is a remedy for the tenant under its co-tenancy provision, the landlord may also attempt to limit the duration of the rent reduction, so that if the violation continues beyond a specific period of time, the tenant will have to choose between terminating the lease or resuming payment of the original rental amount.

5. Sample Co-Tenancy Provision.

A sample provision containing both an opening requirement and an ongoing requirement is set forth in Appendix A, Sample 3.

D. Assignment and Subletting.

Another section of the lease which is critical to maintaining flexibility for the tenant is the

assignment and subletting provision. It is extremely important that the tenant pay attention to this provision during the lease negotiation process because most landlord form leases strictly prohibit assignment and/or subletting by the tenant. In addition, under Texas law, if the lease does not provide otherwise, an assignment or subletting always requires the prior consent of the landlord. TEX. PROP. CODE § 91.005 (West 2002).

Landlords are understandably concerned about who is occupying their space and, therefore, will be reluctant to grant the tenant broad assignment and subletting rights. However, in most cases landlords will agree to allow certain limited transfers without their consent and to otherwise not unreasonably withhold their consent to a proposed assignment or sublease, so long as certain conditions are satisfied. This section will discuss the assignment and subletting provision in more detail.

1. The Right to Transfer.

An obvious tension exists between the landlord and tenant with respect to the tenant's right to transfer. While the tenant will strive for an unrestricted right to assign or sublease, the landlord will want a complete prohibition on transfers without the landlord's consent. Generally, more sophisticated lease negotiations lead to a compromise somewhere in the middle of these two extreme positions whereby the tenant retains the right to assign the lease or sublease the premises without the landlord's consent only in very limited circumstances, and in all other cases the landlord agrees not to unreasonably withhold, condition or delay its consent.

Those circumstances in which the tenant should require no landlord approval for a transfer include (i) transfers to "affiliated" entities (such as corporate siblings, parents or subsidiaries of the tenant), and (ii) transfers which are incidental to a sale of the tenant's business or other corporate transaction (such as the sale of all or substantially all of the tenant's stock or other equity interests, the sale of all or substantially all of the tenant's assets, a merger, consolidation, initial public offering, or similar transaction).

Another issue the tenant should address in the assignment provision is the right to obtain a leasehold mortgage. In many jurisdictions, a leasehold mortgage is considered an assignment, and, therefore, will be prohibited under the lease

unless the lease specifically allows such a transaction.

Depending on its bargaining power, the tenant might also consider pressing for the absolute right to transfer to another tenant so long as the transferee satisfies a net worth requirement and other appropriate restrictions. These restrictions will generally relate to the financial responsibility, character, operating history and proposed use of the proposed assignee or subtenant. In the retail context, the restriction also might relate to the number of stores then being operated by the transferee. These requirements should be objective and quantifiable, so that no dispute will arise in the future. The tenant should therefore avoid requirements that the proposed transferee be "creditworthy" or that the tenant fit in with the "tenant mix" of the shopping center. Instead, the tenant should require that the landlord define what type of tenant the transferee must be (such as a certain type of retailer), or should focus on prohibited uses that such transferee must not be in violation of.

2. Landlord's Consent.

In situations where the landlord's consent is required for a transfer, the tenant should pay careful attention to the standard used for determining the landlord's discretion. This standard is often set forth in the lease itself, which will provide either that the landlord may withhold its consent in its "sole and absolute discretion" or that the landlord "may not unreasonably withhold, condition or delay its consent." Most courts will give effect to the intent of the parties if such intent is clearly demonstrated in the lease document.

If the landlord agrees to a "reasonableness" standard with respect to its consent, it may nevertheless attempt to define that standard by imposing subjective conditions on its consent. The tenant should be careful to ensure that any attempt to define the "reasonableness" standard does not lead to a more subjective standard on the part of the landlord.

If, on the other hand, the lease fails to provide the standard for the landlord's discretion in providing its consent, courts are split as to whether a standard is implied. In many states, courts will imply a reasonableness standard to the landlord's consent obligation. In Texas, however, courts have held that there is no implied reasonableness standard with regard to the landlord's consent. See *Reynolds v. McCullough*, 739 S.W.2d 424, 429

(Tex. App.—San Antonio 1987, writ denied). Given the split of authority, it is therefore in both the landlord's and the tenant's best interest for the contract to clearly specify the standard to which the landlord will be held.

3. Tenant's Continuing Liability.

In most cases, the tenant (and any guarantor) will continue to remain liable on the lease after an assignment or sublease, even if the landlord consented to such assignment/sublease. However, in certain circumstances where the transferee is as financially strong as or stronger than the transferor, the landlord may agree to release the tenant (and any guarantor) from liability under the lease. Under Texas law, if the lease is silent on the issue, the assignor/sublessor will remain liable on the lease. See *Martinez v. Ball*, 721 S.W.2d 580, 581 (Tex. App.—Corpus Christi 1986, no writ).

4. Excess Rent.

Another issue that often arises during the negotiation of the assignment and subletting provision is the determination of which party will have the right to keep any excess rent paid under a sublease. A landlord will argue that it leased the space to the tenant for tenant to use during the term and that the tenant should not "profit" from the landlord's real estate. The tenant, on the other hand, will argue that the tenant bears the risk of a market decline during the lease and it should also enjoy the benefit of an upswing should it desire to assign the lease or sublet the premises. Since both parties have compelling arguments, this issue is often the subject of a compromise, whereby the parties agree to share in any excess rents. This solution makes sense from both parties' standpoint because if the tenant does not at least share in some portion of the profit from the sublease, the tenant will have no incentive to sublet the premises at the highest rate possible. The landlord, on the other hand, will want the tenant to sublet at the highest possible rate so as not to create the impression that rents in the development are lower than they actually may be.

5. Landlord's Recapture Right.

Many landlords will reserve the right to recapture the premises if the tenant attempts to assign the lease or sublet the premises. While at first blush this may appear to be an insignificant issue to the tenant (since the tenant is attempting to exit the lease anyway), it can quickly become

problematical for the tenant. For example, the tenant may be experiencing a temporary contraction in its workforce, and may want to sublet a portion of its premises for a short period of time until it needs the space again. In such a scenario, a landlord recapture right would prevent the tenant from generating additional revenue from the empty space in its premises through subletting. In addition, recapture rights affect the ability of the tenant to market the premises for assignment or sublease. If a prospective subtenant or assignee knows that the lease contains a recapture right, it may be less willing to spend the time and effort needed to negotiate an assignment or sublease with the tenant. In addition, the recapture right could effectively undermine the agreement between the landlord and the tenant relating to excess rent, because the landlord could potentially exercise its recapture right and turn around and relet the premises to the prospective transferee that the tenant secured. In essence, this results in the tenant becoming the landlord's marketing department.

On the other hand, if the tenant is truly looking to exit the lease permanently, a recapture right may be preferable for the tenant, since the tenant will be released from its obligation under the lease with respect to the space recaptured. Therefore, most tenants will accept a recapture right subject to certain limitations which are intended to address the concerns referenced in the preceding paragraph. First, the recapture right should not apply to transfers to affiliated entities or the types of corporate transfers discussed in Section II.D.1 above. In addition, the lease should provide that the tenant can void the landlord's recapture right by withdrawing its request for consent. This allows the tenant to maintain the flexibility it may need with respect to future space needs. In order to keep the landlord honest, the lease should provide that if the landlord waives or is deemed to have waived its right to recapture, the landlord is not entitled to share in any profits or excess rent.

Finally, the recapture provision should provide that the tenant is not required to disclose to the landlord the terms of the proposed assignment or sublease. This protects the tenant from becoming the landlord's "marketing department" by forcing the landlord to decide based on the qualities of the proposed transferee alone, not on the deal being negotiated between the transferee and the tenant. Alternatively, the tenant might attempt to get the landlord to agree that if the landlord elects to exercise its recapture

right, the landlord cannot turn around and relet the premises to the proposed transferee offered by the tenant.

6. Other Lease Provisions.

The right to assign and/or sublease may be useless if certain other provisions of the lease are not also addressed. In that regard, the final portion of this section will discuss other provisions of the lease which, if not handled properly, might limit or affect the tenant's ability to assign the lease or sublet the premises.

a. Permitted Use.

The permitted use provision should be as broad as possible to allow for another tenant to assume the lease. Ideally, the provision would allow tenant to use the premises for any lawful purpose. That way the tenant would not be limited in which types of subtenants or assignees it could approach and potentially assign or sublet to. However, most landlords, especially in the retail context, will require that the tenant lease the premises subject to a more narrow permitted use.

b. Signage.

The tenant must also consider its signage rights when negotiating the lease. For example, most national retail tenants place a particular emphasis on obtaining approval of their signage package prior to execution of the lease. Because landlords are understandably concerned about the external appearance of the building, most landlords reserve strict approval rights over any changes in the exterior building signage. Therefore, if a tenant has negotiated the right to assign or sublet the premises, but the landlord has strict approval rights over any signage, the landlord effectively has strict approval rights over the assignment or subletting, because the potential transferee will not agree to move forward until its signage is approved. Therefore, the tenant should ensure that the signage provisions of the lease allow for a change in exterior signage in connection with an assignment or sublease.

c. Option Rights.

Many landlord form leases provide that any renewal rights or options granted to the tenant are personal to the tenant and will not be applicable to any subtenant or assignee. The landlord's rationale for such a provision is that the landlord granted such rights with the understanding that the tenant was going to occupy the space and if the tenant does not occupy the space, the landlord would prefer to choose who does. However, these rights

become valuable to the tenant, particularly if the tenant needs to assign the lease or sublet the premises late in its initial term. Most assignees or subtenants will not spend the money necessary to finish the space for their use if only a couple of years remain on the lease. Therefore, the space becomes unmarketable for assignment or sublease purposes if the renewal rights or options are not attached.

d. Alterations.

Similar to the signage provision, the tenant must ensure that its potential subtenant/assignee has the ability to make the necessary alterations to the premises for its use. Once again, it does the subtenant/assignee no good to have the right to use the premises if it cannot tailor the premises to its use. Therefore, the tenant should ensure that, in connection with any assignment or sublease, the proposed transferee has the ability to alter the premises as necessary.

7. Sample Assignment and Subletting Provisions.

See Appendix A, Sample 4 for sample assignment and subletting provisions which address many of the issues described in this section.

8. Conclusion.

The ability to assign the lease or sublet the premises can be a valuable tool for the tenant which finds itself in the position of needing to exit its lease. The need to assign or sublet may not be apparent at the lease negotiation stage, when the tenant is trying to get into the premises, but the tenant should anticipate that it may later want a way out. The tenant should therefore pay careful attention to this exit strategy not only when negotiating the assignment and sublease provisions, but also when negotiating other provisions of the lease which affect the tenant's ability to make a transfer.

E. Default and Remedies.

Many tenants gloss over the default and remedy provisions of a lease because no tenant enters into a lease with the intention of defaulting. However, the landlord's remedies can vary significantly from lease to lease and a well-negotiated lease on behalf of the tenant will provide greater flexibility and bargaining power in the future should circumstances change. This section will discuss the common law remedies

available to the landlord for an anticipatory breach, as well as certain issues the tenant should consider when negotiating the default and remedies provisions of the lease.

1. Common Law Remedies.

Most often, a tenant's default under a lease comes in the form of an "anticipatory breach", whereby the tenant fails to pay rent and abandons the leased premises. See *Early v. Isaacson*, 31 S.W.2d 515, 517 (Tex. Civ. App.—Amarillo 1930, writ ref'd). Texas common law historically provided for four remedies available to a landlord upon a tenant's anticipatory breach: (a) the landlord could decline to repossess, elect instead to keep the lease in full force and effect, and sue month to month for contractual rent as it came due; (b) the landlord could repossess the property for its own purposes, and recover the present value of future lease payments less the reasonable market value for the unexpired term; (c) the landlord could repossess the premises, relet to another tenant for the benefit of the original tenant, and recover from the original tenant the difference between the rent under the original lease and the rent under the new lease; and (d) the landlord could declare the lease forfeited, thus releasing the tenant of the obligation to pay unaccrued rent. See *Speedee Mart, Inc., v. Stovall*, 644 S.W.2d 174 (Tex. App.—Amarillo 1983, no writ).

In 1997, the Texas Supreme Court recognized a duty on the part of a landlord to mitigate its damages upon an anticipatory breach by the tenant, thereby rendering the first of the aforementioned common law remedies invalid in most instances. See *Austin Hill Country Realty, Inc., v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 299-300 (Tex. 1997). The *Austin Hill Country* case was quickly followed by an addition to the Texas Property Code codifying the landlord's duty to mitigate upon an abandonment of the premises by the tenant. TEX. PROP. CODE ANN. §91.006 (West 2002). While the *Austin Hill Country* case and the resulting statute affected the ability of the landlord to keep the lease in effect and sue the tenant for its monthly rental obligations, the other traditional common law remedies available to the landlord appear to remain unaffected by these recent developments.

2. Contractual Remedies.

Many landlord form leases contain default and remedy provisions which are much more

harsh than are otherwise provided at common law. For example, many landlord leases contain a remedy that allows the landlord to accelerate the remaining rent due under a lease without taking into account the landlord's duty to mitigate or the fair market value for the remainder of the term. While certain of these provisions may be unenforceable now under Texas law, that may not necessarily be the case in other jurisdictions. Therefore, the goal of the tenant in negotiating the lease should be at least to have the lease mirror those remedies now available to the landlord at common law. Careful drafting can also produce a document which makes the enforcement of the landlord's remedies less unpredictable, less time consuming and less expensive.

While the parties' right to negotiate default and remedies provisions in a lease is broad, it is subject to certain limitations. For example, even though a lease may state that the landlord's remedies are cumulative, a court may limit the landlord's ability to exercise cumulative remedies if they are clearly inconsistent or would permit the lessor a measure of recovery far in excess of just compensation. In any event, the tenant should pay close attention when negotiating the default provisions of a lease, understanding that it may be able to significantly reduce its exposure under the lease if it understands the relationship between the lease provisions and the common law remedies available to a landlord.

F. Exclusive Use Rights.

Often, particularly in retail/restaurant/entertainment leases, the landlord will grant a tenant the exclusive right to sell its product or service in the development of which the premises is a part. Prudent landlords will grant the exclusive subject to the rights of the tenants already existing in the development and will ensure that any future leases executed in the development will prohibit the tenants under such leases from violating the exclusive. However, many landlords will resist termination as a remedy for the violation of the exclusive, particularly if the breach is the result of a renegade tenant who is breaching the terms of its own lease by violating the exclusive. In such cases, the tenant with the exclusive will generally give the landlord time to bring the renegade tenant in line, while settling for a reduction in rent as its primary remedy. If the landlord is unable to solve the problem within a reasonable period of time or the breach is the result of the landlord's action (e.g., failing to contractually prohibit other tenants from violating

the exclusive), then termination becomes a more appropriate remedy.

It should be noted that the tenant's exclusive use right is not so much an exit strategy as it is a tool to ensure the tenant will not need to later exit the lease. If the tenant has the exclusive right to operate and sell its products or services, the probability that the tenant will need to close due to a competitive environment or unprofitable business is reduced. While it is generally in the tenant's best interest to have the exclusive use provision as broad as possible, the provision will generally relate only to the tenant's "bread and butter" offerings. The tenant should expect that the landlord will attempt to narrow this use as much as possible, in order to ensure flexibility in leasing the remainder of the shopping center. In that regard, it is not unusual for an exclusive to carve out a "de minimis" exception which allows other tenants to sell the same product or service as the tenant who holds the exclusive, so long as such offerings are not a significant portion of the business of the other tenant.

The tenant should also expect the landlord to limit the effectiveness of the exclusive to only that period in which the tenant is operating for its permitted use. In other words, if a tenant with an exclusive stops selling the items which are the subject of the exclusive or, worse, goes dark, the landlord will want the ability to lease other space in the shopping center for a use which may overlap the previously granted exclusive. See [Appendix A, Sample 5](#) for a sample provision granting tenant exclusive rights.

G. Identity of Tenant.

If a tenant operates its business from multiple locations, one way to minimize the exposure that a particular location may not be successful is to create separate legal entities to serve as the tenant in each respective location. However, if the landlord is relying on the tenant's credit to support the lease, the landlord will require the creditworthy entity to either execute the lease or guaranty the obligations of the tenant under the lease. Nevertheless, many national tenants have created separate legal entities when entering a new market in order to minimize the exposure to the tenant's operations elsewhere. In such cases, the landlord may be willing to sacrifice a little with respect to the tenant's balance sheet in order to get a well known tenant in its development.

III. POST EXECUTION STRATEGIES

While all tenant lawyers would love the opportunity to negotiate each lease on the front end with a view towards exit strategies, the reality is that many times such attorneys are asked to review an already executed lease in which the tenant put little or no forethought to exit strategies, with a view towards "getting the tenant out of" the lease. If little attention was paid to the exit strategies at the time of negotiation of the lease, the options for exiting the lease may be quite limited. Nevertheless, this section will discuss the three primary options available to the tenant in such event: (i) a negotiated lease termination, (ii) bankruptcy; and (iii) an anticipatory breach.

A. Negotiated Lease Termination.

While the tenant most certainly will have less leverage negotiating a lease termination at the time of the exit rather than up front, the consequences may still be better than defaulting or filing for bankruptcy protection. The tenant should be able to discuss its plight with the landlord and very quickly determine whether or not the landlord would be willing to accept a buyout of the tenant's obligations under the lease. Sophisticated landlords will understand that such a buyout is a better option than suing the tenant for a default under the lease or dealing with the consequences of a tenant bankruptcy. Therefore, the tenant may have a better opportunity to strike a deal with an educated landlord. If the landlord is amenable to working with the tenant, the tenant can expect to pay a termination fee which is similar to the fee discussed in [Section II.A.1](#) of this paper. See [Appendix A, Sample 6](#) for a sample Lease Termination Agreement.

B. Bankruptcy.

If the landlord is not willing to work with the tenant on a negotiated lease buyout, the tenant might explore the option of filing for bankruptcy protection. While this paper is not intended to be an exhaustive study on tenant bankruptcies, it should be pointed out that the bankruptcy trustee is afforded a great deal of discretion in dealing with the debtor's lease obligations. This is obviously not an option for a tenant who otherwise has a profitable business, but it may be an argument for tenants with multiple locations to operate their businesses as separate legal entities at their various locations in an effort to isolate their risk. It should be mentioned, however, that a tenant bankruptcy will not affect a guarantor's obligations under a

lease guaranty, even if the bankruptcy trustee rejects the lease pursuant to its rights under the Bankruptcy Code.

c. Tenant's Most Valued Right – Anticipatory Breach.

If the tenant's bid for negotiated lease termination fails and bankruptcy is not an option, then the tenant may be required to resort to perhaps its most valued right under the lease – the right to commit an anticipatory breach. Given the obligation of the landlord to mitigate its damages in Texas and many other jurisdictions, a default by the tenant may not be as costly as the tenant might expect. However, a careful analysis should be made of the remedies available to the landlord under the lease and common law in order to understand the potential exposure resulting from such a tactic. The tenant should also look outside its lease to determine whether or not a default under its lease would constitute a default under other documents relevant to the tenant, such as documents with the tenant's lender. Needless to say, an anticipatory breach can be a risky tactic, but it is one that a tenant must consider when other options are not available.

IV. CONCLUSION

This paper provides an overview of various exit strategies that may be available to a tenant who is looking to exit its lease obligations. While in many instances the right to terminate provides the ultimate exit for the tenant, there are a variety of other strategies which may be more appropriate under the circumstances. In all cases, the tenant's ability to minimize its exposure under the lease is significantly enhanced when care is taken at the lease negotiation stage to protect the tenant's downside.

APPENDIX A

Sample Lease Provisions

Please note that the provisions which follow are merely examples of lease provisions granting a tenant certain termination/exit rights and other remedies upon the occurrence of various circumstances. These provisions should obviously be carefully and thoroughly reviewed in any instance where utilized, and additional or alternative provisions and/or revisions should be considered in order to address the specific terms and circumstances of each particular transaction.

SAMPLE "1": EARLY TERMINATION RIGHT

Section _____. Termination Right.

(a) Tenant shall have the one (1) time right to terminate (the "Termination Right") this Lease effective on the date (the "Early Termination Date") which is _____ () months after the Commencement Date, provided each of the following conditions has been satisfied: (i) Tenant has given Landlord written notice (the "Termination Notice") of such termination at least _____ () days prior to the Early Termination Date and Tenant is not in default hereunder at the time Tenant gives such notice to Landlord or at any time thereafter prior to the Early Termination Date; (ii) Tenant has been engaged in the normal operation of its business during the twelve (12) months immediately preceding Tenant's notice of termination and Tenant's Gross Sales for such period were less than \$_____ (provided that such figure shall be reduced by 1/360th for each day Tenant was not engaging in the normal operations of its business due to an event of force majeure), as evidenced by a statement of Gross Sales conforming with the requirements of Section _____ to be delivered concurrently with the Termination Notice; and (iii) Tenant has paid to Landlord, on or before the Early Termination Date, the sum of the following: (A) the unamortized value of Landlord's Contribution (as hereinafter defined), amortized over the Original Term, (B) the unamortized value of commissions paid to Broker by Landlord in connection with this Lease, amortized over the Original Term, and (C) a termination fee in an amount equal to _____ () months of Base Rent and _____ () months of the other amounts owed by Tenant to Landlord under this Lease (in each case, for the _____ () month period immediately preceding the Early Termination Date).

(b) In the event Tenant exercises the Termination Right pursuant to this Section _____, Tenant shall vacate the Demised Premises no later than _____ () days after the Early Termination Date. Tenant will remove all of Tenant's Fixtures and Equipment (as hereinafter defined) and Tenant will, at its own cost and expense, repair any damage that Tenant may cause to the Demised Premises by such removal.

(c) Landlord's and Tenant's obligations which have accrued under this Lease prior to the Early Termination Date shall survive the termination of this Lease.

(d) In the event Tenant fails to surrender possession of the Demised Premises no later than _____ () days after the Early Termination Date, Tenant shall be subject to Section _____ hereof [*insert section reference to the lease's holdover provision*].

(e) Upon Tenant's performance of each of the obligations contained in this Section _____, neither Landlord nor Tenant shall have any further obligations or liabilities under this Lease, except for those which by their express terms survive termination of the Lease.

(f) Landlord shall have the right to audit Tenant's statement of Gross Sales for such period within ninety (90) days of Landlord's receipt of Tenant's termination notice hereunder, and Landlord shall provide Tenant with the results of such audit. If Landlord's inspection or audit reveals that Tenant's Gross Sales are in excess of the amount required for the exercise of the Termination Right, then Tenant shall have the right to contest such audit or inspection. If Landlord and Tenant each dispute the other's findings, then Landlord and Tenant jointly shall elect an independent auditor to determine the actual Gross Sales for the relevant period. The costs of the third-party audit shall be borne by the non-prevailing party. In the event the independent auditor determines that Tenant's Gross Sales were understated to the extent that Tenant is not entitled to exercise the Termination Right, then Tenant's termination notice shall be withdrawn and this Lease shall continue in full force and effect. All audits and inquiries performed by or on behalf of Landlord (including the third-party audit) must be completed prior to the Early Termination Date.

SAMPLE "2": OPERATING COVENANT

Section _____. No Express or Implied Covenant of Continuous Operation. Nothing set forth in this Lease shall be construed, in any manner whatsoever, as an express or implied covenant on the part of Tenant to commence business operations or to thereafter continuously operate any business operations on the Demised Premises, and Landlord specifically acknowledges that there is no covenant of initial or continuous operation on the part of Tenant, express or implied. In that regard, it is hereby expressly agreed that Tenant shall have no obligation (i) to initially open for business upon the Demised Premises, or (ii) to continue any business operations at the Demised Premises for any specific period of time. In the event Tenant does not initially open for business at the Demised Premises on or before _____, 20__, or if (once open) Tenant thereafter ceases Tenant's business operations for a period of twelve (12) consecutive months or more (excepting temporary closings for remodeling, alterations or restoration work and further excepting Tenant's closing business operations in conjunction with an assignment or subletting permitted under this Lease), neither such event shall be deemed to be a Tenant Default, but Landlord shall, after the occurrence of either such event and following the aforesaid date for opening of business or the expiration of any such twelve (12) month period (as the case may be), have the option in either such event of recapturing the Demised Premises and terminating this Lease pursuant to the further provisions of this Section ____ hereinbelow. If Landlord elects in either such circumstance to terminate this Lease and recapture the Demised Premises, Landlord shall provide Tenant with no less than sixty (60) days' prior written notice of such election, which notice must be given, however, prior to Tenant's commencement or resumption (as the case may be) of business operations at the Demised Premises. Upon any such recapture and termination, Tenant shall be relieved of and from any and all liability or obligation to Landlord. During any such sixty (60) day notice period, however, Tenant shall have the option of continuing this Lease (and negating any such notice of recapture and termination of this Lease by Landlord) by notifying Landlord within such period of Tenant's bona fide intent to commence or resume business operations at the Demised Premises (provided such commencement or resumption of business operations occurs within one hundred eighty [180] days after such sixty [60] day period).

SAMPLE "3": CO-TENANCY

Section _____. Co-Tenancy Requirements.

(a) Opening Requirements. As a condition precedent to the Rent Commencement Date, Landlord must have entered into fully executed leases or operating agreements with the Key Tenants (as defined herein), each for a term not less than ____ () years and with requirements to open. The Key Tenants are the following retailers occupying the floor area indicated:

<u>Tenant</u>	<u>Minimum Floor Area</u>
<i>[insert names of Key Tenants]</i>	<i>[insert floor area]</i>

Tenant, in its sole discretion, may elect to open prior to the fulfillment of the Opening Requirements. Under such circumstances, **[rent will continue to abate] [Tenant will pay substitute rent in the amount of ____ percent (__%) of Tenant's gross sales from the Demised Premises]** until all of the Opening Requirements have been met. If the Opening Requirements have not been met within ____ () months after the expiration of the Construction Period, regardless of whether Tenant has opened for business within the Demised Premises, Tenant will have the right for a period of ____ () months thereafter and prior to the Opening Requirements being met to terminate the Lease upon ____ () days' notice to Landlord.

(b) Operating Requirements. If, at any time during the Term of this Lease, a Key Tenant's store is not open for business for a period of ____ () days (the "Operating Requirement"), Tenant will have the remedies set forth in this Section _____. A Key Tenant's store is not considered "open for business" unless it is open and operating (i) during the hours of the shopping center established by Landlord, or in the case of restaurants, at least 50 hours per week, and (ii) in substantially all of its leased space. Landlord must immediately notify Tenant if a Key Tenant's store is not "open for business" and thus a violation of the Operating Requirement has occurred. If a violation of the Operating Requirement occurs and continues for another ____ () days, Tenant, at its option, may (a) remain open and pay substitute rent in the amount of ____ percent (__%) of Tenant's gross sales from the Demised Premises during the period that the Operating Requirement is not met, (b) close the Demised Premises for business during the period that the Operating Requirement is not met, or (c) terminate the Lease upon ____ () days' notice to Landlord. Tenant's right to exercise the remedies in the preceding sentence continue until the Operating Requirement is met.

SAMPLE "4": ASSIGNMENT/SUBLETTING

Section _____. Transfers.

(a) Transfers by Tenant.

(i) Tenant may not assign this Lease or sublease the Demised Premises or any part thereof (any such assignment or sublease by Tenant is referred to in this Section _____ as a "Transfer") without the prior written consent of Landlord, which consent will not be unreasonably withheld, conditioned or delayed. Without limiting the foregoing, Landlord and Tenant acknowledge that it would be reasonable for Landlord to withhold its consent in any of the following instances: (1) The proposed assignee or sublessee is a governmental agency; (2) in Landlord's reasonable judgment, the use of the premises by the proposed assignee or sublessee would entail alterations which would reduce the value of the leasehold improvements in the Premises, or would require increased services by Landlord; (3) Landlord has received from any prior landlord to the proposed assignee or subtenant a materially negative report concerning such prior landlord's experience with the proposed assignee or subtenant; (4) Landlord has experienced previous defaults by or is in litigation with the proposed assignee or subtenant; (5) the proposed assignee or subtenant's anticipated use of the Premises involves the generation, storage, use, treatment or disposal of Hazardous Substances; or (6) either an "Event of Default" exists under this Lease or there exists an event or circumstance which with the passage of time or the giving of notice would constitute an "Event of Default" under this Lease.

Any attempt to effect a Transfer in violation of this paragraph will be void and of no effect.

(ii) To make a Transfer, Tenant must request in writing Landlord's consent at least thirty (30) days in advance of the date on which Tenant desires to make a Transfer. The request must include the name of the proposed transferee, current financial information on the proposed transferee, the terms of the proposed Transfer, and, if the Transfer pertains to only a portion of the Demised Premises, information regarding access or construction issues that must be addressed to facilitate the Transfer. Landlord will, within fifteen (15) days following receipt of such request, notify Tenant in writing that Landlord elects (a) to terminate this Lease as to the space so affected as of the date so specified by Tenant, in which event Tenant will be relieved of all further obligations hereunder as to such space, (b) to permit Tenant to assign or sublet such space in accordance with the terms provided to Landlord, or (c) to refuse consent to Tenant's requested Transfer and to continue this Lease in full force and effect as to the entire Demised Premises. If Landlord elects to terminate the Lease in accordance with option (a) above, Tenant may withdraw its request for the transfer, within five (5) days following receipt of Landlord's notice, thereby rendering Landlord's termination of the Lease null and void. If Landlord elects to refuse consent to Tenant's request to Transfer pursuant to option (c) above, Landlord must provide specific reasons for such refusal. If Landlord fails to notify Tenant in writing of such election within the 15-day period, Landlord will be deemed to have elected option (b) above.

(iii) The consent by Landlord to a particular Transfer will not be deemed a consent to any other subsequent Transfer. If this Lease, the Demised Premises or the Tenant's leasehold interest, or any portion of the foregoing, is transferred, or if the Demised Premises is occupied in whole or in part by anyone other than Tenant without the prior consent of Landlord as provided herein, Landlord may collect rent from the transferee or other occupant and apply the net amount collected to the Rent payable hereunder. Such collection or application of rent by Landlord, however, will not be deemed a waiver of the provisions hereof or a release of Tenant from the further performance by Tenant of its covenants, duties and obligations hereunder.

(iv) The prohibition against a Transfer contained in this Section _____, will not be construed to include a prohibition against any transfer by merger, sale of assets, sale of a controlling interest in stock or other ownership interest or by like manner or operation of law, so

long as [the guarantor remains liable under the Guaranty] [the surviving entity maintains a net worth of at least \$_____].

(b) Permitted Transfers. Tenant has the right, subject to Section (c), without Landlord's consent, to (i) assign this Lease or sublet all or any portion of the Premises to any person or entity who controls, is controlled by, or is under common control with the original Tenant named in this Lease, or (ii) mortgage Tenant's leasehold interest (a "Permitted Transfer"). The term "control" means, with respect to a corporation, the right to exercise, directly or indirectly, more than 50% of the voting rights attributable to the shares of the controlled corporation, and, with respect to a person or entity that is not a corporation, the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of the controlled person or entity. Tenant must provide Landlord with written notice of any Permitted Transfer within ten (10) days after the effective date of such Permitted Transfer.

(c) Transfer Requirements. The following requirements apply to all Transfers (including Permitted Transfers):

(i) Tenant must, in the case of an assignment, cause the assignee to expressly assume and agree to perform, all of the covenants, duties and obligations of Tenant under this Lease.

(ii) Except in the case of a Permitted Transfer, if the rent or other consideration payable by a sublessee or assignee under any such permitted sublease or assignment exceeds the Rent for the portion of the Demised Premises so transferred, Tenant must pay to Landlord, as additional Rent, 50% of all such excess rental and other consideration, immediately upon receipt thereof by Tenant.

(iii) The use of the Demised Premises by the assignee or transferee must be consistent with the terms of this Lease. All of the terms and provisions of this Lease will continue to apply after a Transfer, unless otherwise expressly provided herein.

(iv) Tenant will remain directly and primarily liable for the performance of all the covenants, duties and obligations of Tenant under this Lease (including, without limitation, the obligation to pay Rent), unless the transferee expressly assumes the obligations of Tenant in writing.

(d) Defined Terms. Without limiting the provisions of this Lease (including, without limitation, this Section), the terms "Landlord" and "Tenant" will be construed to include the original Landlord and Tenant and their respective permitted successors and assigns.

SAMPLE "5": EXCLUSIVE PROVISION

Section _____. Tenant's Exclusive Use.

(a) Landlord must not operate, lease, or permit any other store located within the Shopping Center or any other property owned or leased by Landlord within a one (1) mile perimeter of the Shopping Center (the "Restricted Area") to be used for the sale of _____ ("Tenant's Exclusive Items"), so long as Tenant is operating a store at the Demised Premises which sells such items. This covenant runs with the land comprising the Shopping Center. Landlord agrees to enforce this restriction against all other tenants of the Restricted Area using reasonable legal means. Notwithstanding the foregoing, the restriction contained in this Section _____ does not apply to the ancillary sale of Tenant's Exclusive Items by any occupant of the Restricted Area in an area not to exceed the lesser of 500 square feet of floor area or 5% of such occupant's floor area.

(b) If any tenant or occupant of the Restricted Area violates the foregoing Tenant's exclusive, then Tenant, in addition to all other remedies available at law or in equity, may have the right exercisable by written notice to Landlord to either (i) terminate this Lease or (ii) reduce its obligation for Base Rent, Percentage Rent, and Additional Rent to fifty percent (50%) of the Base Rent otherwise required to be paid by Tenant ("Reduced Rent"), which Reduced Rent will be retroactive to the date the violation of Tenant's Exclusive commenced and will continue until such violation is remedied. Notwithstanding the foregoing, if the violation was not due to the act or omission of Landlord, Tenant must forbear from exercising its right to terminate this Lease for up to ____ () days from the date Tenant notifies Landlord of such violation, provided that Landlord undertakes immediate action to stop the violation of Tenant's Exclusive. If the violation does not cease after such ____ ()-day period, the Tenant will have the ongoing right (in addition to the remedy listed in clause (ii) of this Section _____ (b)) to terminate this Lease on thirty (30) days' notice to Landlord. At such time as the violation of Tenant's Exclusive ceases, and provided Tenant has not terminated this Lease, Tenant must resume payments of regular Base Rent, Percentage Rent, and Additional Rent then applicable under the terms of this Lease.

SAMPLE "6": LEASE TERMINATION AGREEMENT

LEASE TERMINATION AGREEMENT

THIS LEASE TERMINATION AGREEMENT ("Agreement") is made and entered into effective as of the ____ day of _____, 20__, by and between _____, a Delaware limited partnership ("Landlord"), and _____, a _____ ("Tenant").

RECITALS:

A. Landlord and Tenant entered into that certain Lease dated _____ (as same may have been otherwise amended, the "Lease"), which Lease sets forth the terms and conditions of the lease and demise of certain leased premises (the "Demised Premises") located in _____ County, _____ as described and defined in the Lease.

B. Landlord and Tenant mutually desire to terminate the Lease prior to the scheduled expiration date, all upon and subject to the terms and conditions of this Agreement.

AGREEMENTS:

NOW, THEREFORE, for and in consideration of the above and foregoing premises and the mutual covenants and agreements set forth hereinbelow, together with other good and valuable consideration, the receipt and sufficiency of which consideration is hereby acknowledged by each of the parties hereto, Landlord and Tenant do hereby agree as follows:

1. Defined Terms. Terms defined in the Lease and delineated in this Agreement by initial capital letters have the same meanings ascribed thereto in the Lease, except to the extent that the meaning of any such term is specifically modified by the provisions of this Agreement.

2. Termination of Lease. The Lease Term is hereby amended to terminate and expire effective on _____, 20__ (the "Termination Date"), and Landlord and Tenant accordingly hereby agree that (except as is otherwise set forth expressly in this Agreement), effective as of 12:01 a.m. (_____, ____ time) on the Termination Date, (i) the Lease will be and hereby is agreed and declared in all respects, without limitation (except as is otherwise set forth expressly in this Agreement) terminated and the Lease Term thereof ended, and (ii) each of Landlord and Tenant will be completely discharged of and from any and all obligations under the Lease accruing from and after such Termination Date, except as is otherwise set forth expressly in this Agreement. On the Termination Date, the Demised Premises will be deemed surrendered by Tenant to Landlord. Tenant must fully comply with all obligations of Tenant under the Lease through the Termination Date.

3. Payments. As additional consideration for this Agreement, Tenant must pay Landlord the following amounts:

(a) Rent. The Base Rent and Additional Rent, if any, for that period of time through the Termination Date payable on or before the Termination Date.

(b) Termination Fee. A termination fee in the amount of _____ Thousand _____ Hundred _____ and ___/100 Dollars (\$ _____), payable in ____ () equal monthly installments beginning on _____, 20__, and continuing on the first day of each subsequent calendar month through _____, 20__.

4. Removal. Tenant may remove any or all of the Tenant's Fixtures and Equipment from the Demised Premises within fifteen (15) days from the Termination Date. Upon such removal, Tenant shall, at its own cost and expense, repair any damage Tenant may have caused to the Demised Premises by such removal.

5. Mutual Releases. Except as is otherwise expressly provided under this Agreement, in consideration of Landlord releasing Tenant from the obligation to pay the balance of the rentals due under the Lease (as set forth hereinabove) and executing this Agreement, and in consideration of Tenant's agreement to pay each of the amounts described in Paragraph 3 of this Agreement, and in consideration of the representations and other agreements contained in this Agreement, Landlord and Tenant hereby release and forever discharge each other, and their respective partners, officers, directors, agents, trustees, beneficiaries, and employees, of and from any and all claims, acts, damages, demands, rights of action and causes of action which each such party ever had, now has, or in the future may have, against the other party hereto, arising from, under or in any way connected with the Lease and/or Demised Premises.

6. No Admission of Liability. Landlord and Tenant understand and agree that by execution of this Agreement, the other party and its partners, officers, directors, agents, trustees, beneficiaries and employees do not admit any liability of any nature whatsoever, it being hereby agreed that this Agreement is made entirely as a compromise and for the purpose of terminating the Lease and settling and extinguishing the respective claims, acts, damages, demands, rights of action or causes of action of the parties hereto, except as is otherwise expressly stated or reserved under this Agreement.

7. Representations. Landlord and Tenant each represent to the other party that it has full power and authority to execute this Agreement, and that it has not made any assignment, sublease, transfer, conveyance or other disposition of the Lease or any interest in the Lease or the Demised Premises.

8. Entire Agreement. The mutual obligations of the parties hereto as provided herein are the sole consideration for this Agreement, and no representations, promises or inducements have been made by the parties hereto other than as appear in this Agreement. This Agreement may not be amended except pursuant to writing signed by both parties hereto.

9. Miscellaneous. All warranties, representations, agreements and obligations contained in this Agreement will survive the execution and delivery of this Agreement and will survive any and all performances in accordance with this Agreement. If either of the parties hereto brings an action to enforce the terms of this Agreement or to declare rights hereunder, the prevailing party in any such action, on trial or appeal, will be entitled to recover its costs and reasonable attorneys' fees incurred in connection with any such action from the non-prevailing party. This Agreement may be executed in multiple counterparts, each of which, when so executed, will be an original and fully binding on the parties so executing, and all such counterparts will together constitute but one and the same agreement. This Agreement and the terms and provisions of this Agreement inures to the benefit of and be binding upon each of the parties hereto and their respective successors and assigns.

[The Remainder of this Page Intentionally Left Blank]

IN WITNESS WHEREOF, Landlord and Tenant have each caused this Agreement to be duly executed, intending thereby to be legally bound, effective as of the day and year first written above.

LANDLORD:

WITNESS:

_____,
a _____

By: _____
Name: _____
Title: _____

TENANT:

ATTEST:

_____,
a _____

Printed Name: _____
Title: _____

By: _____
Name: _____
Title: _____