



902:Real Estate Basics: Negotiating & Structuring Commercial Leases & Subleases

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Faculty Biographies

Kimberly M.W. Gilpin

Kimberly M.W. Gilpin is vice president, assistant general counsel, lease administration at The Finish Line, Inc., an athletic footwear and apparel retailer located in Indianapolis. Ms. Gilpin is primarily responsible for the company's legal leasing functions including negotiating and drafting lease language and documents. In addition, she is responsible for supervising lease process flow and implementation as well as acting as a department head for the legal/lease administration department, managing company policy compliance issues, reviewing and negotiating third party vendor contracts, and providing legal support to other corporate departments on real estate activities and corporate compliance matters.

Prior to joining the Finish Line team, Ms. Gilpin served as a program director for the Paralegal Studies Program at International Business College. Her experience in the practice areas of real estate, probate, and estate planning, and working as an account representative for West Publishing Company led to her success in building the program and working with paraprofessional students. Ms. Gilpin continues to support the Paralegal Studies Program at International Business College as a member of the curriculum advisory board.

In addition to her membership with ACC, Ms. Gilpin is a member of the International Council of Shopping Centers (ICSC) and the National Retail Tenants Association (NRTA). Her prior speaking engagements include monitoring ICSC U.S. Shopping Center Law Conference Round Table Discussions, participating as a panelist at the 2003 and 2004 ICSC Ohio, Kentucky and Indiana Law Symposium, and presenting at the 2003 NBI seminar, "Drafting and Negotiating Indiana Commercial Real Estate Leases."

Angela L. Humphreys

Angela L. Humphreys is general counsel for Investco Financial Corporation (IFC) in Sumner, Washington. IFC is a real estate development and management company focused in the Puget Sound region. Ms. Humphreys oversees all legal work for IFC and its affiliate organizations and is responsible for overseeing the preparation and negotiation of leases for the commercial portfolio, which includes 19 properties totaling three million square feet of industrial, retail, and office space.

Prior to joining IFC, Ms. Humphreys was an associate with The Nathanson Group PLLC in Seattle, where her practice focused on commercial real estate and business asset acquisitions, dispositions, leasing, financing, and landlord/tenant matters.

Ms. Humphreys is a board member of ACC's Washington State Chapter.

Her education includes a JD from the University of Denver and a BBA in from the University of San Diego.

Carol D. Miller

Carol D. Miller is general counsel for Restaurants Unlimited, headquartered in Seattle. She is the legal department for the closely held company which operates 30 full-service restaurants in 13 states under a variety of brands, including Palomino and Kincaid's. She oversees all legal matters for the company, including real estate, corporate, human resources, compliance, and intellectual property.

Prior to joining Restaurants Unlimited, Ms. Miller was a partner in the Seattle law firm Ogden Murphy Wallace. Her practice focused on commercial leasing. She negotiated in-line mall leases for Cinnabon during its rapid expansion providing her experience with all national landlord groups. She also negotiated numerous leases for full-service restaurants located in stand-alone buildings, office buildings, and malls. Her long-standing relationships with these clients allowed her to deal with a multitude of lease related issues that arose during the lease terms. Ms. Miller also represented landlords and tenants in lease related bankruptcy proceedings.

She is a member of ACC and the Academy of Hospitality Industry Attorneys, and is active in restaurant associations both at the national level and in various states, particularly on pertinent legislative matters.

Ms. Miller received a BA from Boise State University and is a graduate of University of Puget Sound Law School.

Session 902
Real Estate Basics
Negotiating & Structuring Commercial Leases & Subleases

ACCA 2004 Annual Meeting
October 25-27, 2004
Sheraton Chicago

Presented By:

Carol D. Miller
General Counsel
Restaurants Unlimited

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V.P. Assistant General Counsel,
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The Finish Line, Inc.

Angela L. Humphreys
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- The following pages contain a full commercial lease for a new restaurant location.
- The base lease is as it was received from the landlord.
- The redlining shows tenant requests for modifications (insertions and deletions).
- Language that is *bold and italicized* are explanations to the landlord regarding some of the requested revisions.
- This is how Carol typically provides the first round of comments to landlord's counsel.

The comment boxes are explanations for seminar participants provided by Carol and Kimberly as to why the revisions were requested, some additional considerations and suggestions on how to handle sensitive issues.

Angela represents landlords in commercial lease negotiations. She joins the panel to provide a landlord perspective and typical landlord responses to and concerns regarding the requested modifications.

The panel anticipates selecting some of the more contentious provisions for the panel discussion and providing some middle of the road language that satisfies both parties' concerns. The goal of both attorneys must be to "get the deal done" while protecting their respective client's interests.

We hope the expansive materials will provide insight into the variety of matters in-house counsel should be considering when negotiating commercial leases for their clients' operations.

Requested revisions are redlined. *Comments are bolded and italicized.*

The Project

LEASE AGREEMENT

BETWEEN

PROJECT OWNER
as Landlord

and

RESTAURANT
as Tenant

Dated: as of October _____, 2004

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LEASE AGREEMENT

1. **BASIC LEASE PROVISIONS.** The words and figures as set forth in Paragraphs 1.1 through 1.21 and Exhibits A through E, both inclusive, are part of this Lease wherever appropriate reference is made thereto, unless they are expressly modified elsewhere in this Lease.

1.1 **DATE OF EXECUTION:** As of October _____, 2004.

Legal owner, not management company; confirm via title commitment.

1.2 **LANDLORD:** PROJECT OWNER, a Washington corporation

1.3 **TENANT:** RESTAURANT, a Washington corporation.

The legal name of the occupant; not a parent, affiliate or d/b/a.

1.4 **GUARANTOR(S):** _____ [To Be Determined] _____

Restaurant Parent is the parent corporation of Restaurant. Its sole asset is the stock of Restaurant. It will provide a guarantee.

1.5 **TENANT'S STORE NAME:** Restaurant DBA (hereinafter "**DBA**")

1.6 **THE PROJECT:** The property known as the "Project" and legally described in Exhibit A-1 located at:

City: City of Seattle
County: King
State: Washington
Nearest intersection: 1st and 1st

Seek a cap of 1-2% on deviation of space if a re-measurement is needed.

1.7 **PREMISES:** The area indicated by hatchmarks in Exhibit A located in Space C1.1, Block 105, Second Floor, and containing the following approximate measurements:

(a) approximately 9,1208,620 square feet of useable interior space (the "**Restaurant Space**").

(b) approximately 1,000 square feet of exterior patio space (the "**Patio Space**").

(c) approximately 1,000 square feet of non-contiguous storage space (the "**Storage Space**") to be located convenient to the Restaurant Space in another area of the Project to be designated from time to time by Landlord (it being agreed that Landlord may relocate the Storage Space from time to time within the Project in its sole discretion, upon not less than fifteen (15) days notice) provided such space has similar amenities (e.g. heat and lighting), is convenient to the Restaurant Space and

Landlord pays all costs incurred in preparing the space for Tenant's use and in moving Tenant's property then located in the Storage space).

Assure all intended uses are incorporated. Keep as broad as possible.

Balance landlord's desire to control the tenant mix and quality of operations with tenant's desire to control and adapt its business over a long lease term.

- 1.8 **PERMITTED USE:** The Restaurant Space shall be used solely for the operation of a restaurant, specializing in the sale of food and beverage generally of the type and price points set forth on the menu attached hereto as Exhibit G) for in-store consumption (the "**Primary Permitted Use**"), and for no other purpose. The Patio Space shall be used solely for outdoor dining in conjunction with the aforementioned Primary Permitted Use. The Storage Space shall be used solely for storage purposes (not of food), offices and employee lounge and dressing area.

Be sure timelines work together and start from events that the party controls. If landlord is completing improvements prior to turning over for tenant improvements, tenant's buildout period should commence only after the landlord has completed its work.

- 1.9 **COMMENCEMENT DATE:** The date which is the later to occur of (a) the date the building permit is issued for Tenant to construct the Tenant Improvements (as defined in Exhibit B hereto), subject to the provisions of Paragraph 1.7 of Exhibit B hereto, or (b) the "Turn-Over Date" (as defined in Paragraph 4.2 of this Lease).

Anticipate possible delays based on construction process and the need for approvals – provide appropriate delay language. If based on landlord delivery, try for late delivery fee to cover costs that may be incurred.

RENT COMMENCEMENT DATE: The date which is the earlier of (a) the date Tenant opens for business in the Premises, or (b) one hundred eighty (180) days after the Commencement Date) subject to Section 37 of this Lease.

No rent for "x" number of days after commencement of construction.

1.10 **TERM:** Commencing on the Commencement Date plus a period of ten (10) years ~~commencing on~~ from the Rent Commencement Date plus, if the Rent Commencement Date occurs on a day other than the first day of a calendar month, the period of time from and including the tenth (10th) anniversary of the Rent Commencement Date to the end of the calendar month in which such anniversary occurs (the "Initial Term"). In addition, if the expiration date would otherwise occur during the calendar months of October, November or December, the term shall be extended so as to expire on the next succeeding January 31.

Provide for the parties to execute a mutual Certificate of Commencement Date once the actual date is known to assure all parties are on the same page regarding the dates.

1.11 **MINIMUM RENT:** for the Restaurant Space shall be as follows

Specify either a total dollar amount or a per square foot amount. Saying both can lead to confusion and disputes if the calculations are not 100% consistent. Reach a clear agreement on the area included in sq. ft. measurement

Year 1	\$\$\$\$ per year, \$\$\$ per month, \$ per useable rentable square foot of Restaurant Space per year.
Years 2-5	\$ per year, \$per month, \$ per useable rentable square foot of Restaurant Space per year.
Years 6-10	\$ per year, \$ per month, \$ per useable rentable square foot of Restaurant Space per year.

Spell out with actual dates if possible

Measure square footage for purposes of deviation language if desired.

Minimum Rent for the Storage Space shall be \$ per year, \$ per month, ~~\$ per square foot per year~~. There shall be no Minimum Rent for the Patio Space.

1.12 **INITIAL MONTHLY ADJUSTMENTS:** For the first Lease Year shall be ~~Presently estimated to be~~ \$4,834.05 (\$6.03 per square foot) per month.

1.13 **INITIAL PROMOTIONAL FUND DUES:** ~~To be determined by Landlord.~~ N/A.

1.14 **PREPAID RENT:** N/A.

1.15 **SECURITY DEPOSIT:** N/A

1.16 **PERCENTAGE RENT RATE:** Six Percent (6%). Percentage Rent shall commence for the period from and including the thirteenth (13th) full ~~fiscal calendar~~ month following the Rent Commencement Date (based on Tenant's fiscal periods).

1.17 **LANDLORD'S ADDRESS FOR NOTICES, AND TELEPHONE AND TELECOPIER NUMBERS:**

Landlord
 ##### Street
 Seattle, Washington 98103
 Attention: General Counsel
 Telephone Number: #####
 Telecopier Number: #####

Also get contact information if a construction allowance is part of the deal

1.18 **TENANT'S ADDRESS FOR NOTICES AND TELEPHONE AND TELECOPIER NUMBERS:**

Tenant
 ##### Street
 Seattle, Washington 98103
 Attention: Vice President Real Estate
 Telephone Number: #####
 Telecopier Number: #####

Send notices to headquarters, not lease location to ensure a default is not overlooked by the location manager.

With a copy to:

Tenant
Street
Seattle, Washington 98103
Attention: General Counsel
Telephone Number: ###
Telecopier Number: ###

Require General Counsel be copied to decrease potential for a critical notice to be overlooked.

1.19 **GUARANTOR'S ADDRESS FOR NOTICES AND TELEPHONE AND TELECOPIER NUMBERS:**

Restaurant Parent
Street
Seattle, Washington 98103
Attention:
Telephone Number: ###
Telecopier Number: ###

1.20 **BROKER:** None.

1.21 **ADDENDUM ATTACHED:** YES NO

EXHIBITS

- Exhibit A - Floor Plan
- Exhibit A-1 - Legal Description
- Exhibit B - Description of Landlord and Tenant Work
- Exhibit C - Sign Criteria
- Exhibit D - Form of Statement of Gross Sales
- Exhibit E - Guaranty of Lease
- Exhibit F - List of Other Tenants and Exclusives
- Exhibit G - Menu
- Exhibit H - Rules and Regulations
- Addendum

Request conflicts of documents language be added. Consider adding approved plans, tenant construction criteria manual

Depending on the type of lease, tenant may want to secure a title commitment. SNDAs are discussed separately.

2. **PREMISES.**

2.1 Description of Premises. Landlord hereby leases to Tenant and Tenant hereby leases from Landlord the Premises described in Paragraph 1.7 hereof, subject and subordinate to all liens, encumbrances, deeds of trust, easements, covenants, conditions, restrictions, underlying leases, zoning ordinances and any and all other governmental and quasi-governmental laws, statutes, rules, regulations and ordinances, now ~~or hereafter~~ affecting or governing the Project (as hereinafter defined). We will need SNDAs from all lessors and mortgage holders. Please provide us copies of all easements, covenants and CCRs affecting the property. It would also be helpful to our title company if you could provide us a copy of the most recent title policy you have on the property. Tenant has had an opportunity to carefully examine the Shell Plans (as defined in the Work Letter) delivered by Landlord to ensure that the Premises' dimensions are acceptable to Tenant. We have not yet reviewed the Shell Plans. Our Director of Construction may elect to have the space measured prior to Lease execution. It is critical that the square footage reflected be useable square footage. In no event shall the Minimum Rent be adjusted to reflect any re-measurement or actual dimensions of the Premises. We must confirm the useable square footage before we can accept this language.

Square footage is often critical because rent, CAM, real estate taxes may be based on this number. *All measurements shown by square foot – apply deviation language here.*

2.2 Description of the Project. As used herein, subject to Paragraph 10.2, the term "Project" means (i) the parcel(s) of land and improvements as generally depicted on Exhibit A, and described on Exhibit A-1, whether owned in fee, ground leased by Landlord, made available for use by a reciprocal operating, easement or license agreement or other similar agreement (hereinafter referred to as an "REA Agreement") Are there any REAs? If so, we will need to see copies of the documents., or any combination thereof; and (ii) any other parcel(s) of land, together with the improvements thereon, and any easement or right of way at any time designated by Landlord to be part of the Project; and (iii) any improvement or other facility serving any portion of the Project, whether or not such improvement or facility is located in the Project or on any other parcel(s) of land, including the facilities connecting any such improvement or facility to the Project. The Project as depicted on Exhibit A is a proposed general layout and Landlord neither warrants nor represents that the Project shall be constructed or maintained as indicated thereon or that a tenant or occupant designated by name or nature of business shall be a tenant or occupant in the Project during the term hereof.

Consider this provision carefully. If tenant is relying on the existence of an anchor tenant, being adjacent to a hotel, etc., tenant's obligation to construct and occupy should be contingent on that expectation being met. While a landlord cannot guarantee the future actions of a third party like an anchor tenant, it may be willing to provide a tenant the option of not proceeding or early termination if the expectation cannot be met.

2.3 Description of Common Areas . As used herein, subject to Paragraph 10.2, the term "Common Areas" means the Project except for those portions of the building(s) therein occupied or intended to be occupied by tenants in the Project. Common Areas include all parking and other commonly used facilities in the Project, including without limitation all interior, exterior and subterranean parking areas, parking garages, roadways, walkways, sidewalks,

Consider what is important to preserve for the tenant and limit the landlord's ability to adversely impact these elements.

aisles, service drives, driveways, loading areas and accessways, malls, hallways, toilet facilities, stairways, elevators, escalators, the Project signs (including, without limitation, multi-tenant signs), landscaping and curbcuts, within and/or serving the Project, and the exterior portion of the buildings in the Project. Landlord reserves the right in its sole discretion to modify, alter, remove, reduce, redesign or change the size, location, elevation, nature and/or purpose of all or any part of the Common Areas, to make installations or construct buildings, structures, booths, kiosks and/or improvements therein, and to use or permit the use of the Common Areas and each portion thereof for exhibits, sales, promotions or other activities. Landlord covenants that it will not exercise the rights reserved herein in such a manner as to impair access to, visibility of, view from, or utilities servicing the Premises.

2.4 **Reservations to Landlord.** The Premises shall include only the appurtenances specifically granted in this Lease and Landlord specifically excepts and reserves for Landlord, the roof (subject to Tenant's right to land equipment on the roof in areas reasonably acceptable to Landlord and provided Landlord will not interfere with Tenant's use and maintenance of such equipment), the air-space above the roof, the space below the floor, the exterior ~~walls-ports~~ of the Premises (subject to Tenant's right to place signage in areas reasonably acceptable to Landlord and provided Landlord will not place other signage on the exterior of the Premises or otherwise detract from Tenant's signage), and the right to install, maintain, use, repair and replace pipes, ductwork, conduits, utility lines, wires and similar items (collectively "utility lines") in the Premises (subject to Tenant's prior written approval, which will not be unreasonably withheld if such installation does not interfere with Tenant's operation, the improvements existing or planned within the Premises, the ceiling height of the Premises or the appearance of the area visible to Tenant's guests). Landlord agrees that ~~where possible~~ all work in the Premises shall be performed in a manner which shall not unreasonably interfere with the normal business operations of Tenant. Tenant acknowledges and agrees that Landlord may, at any time and from time to time during the Term of this Lease, determine that it is necessary or appropriate to perform substantial renovation work in and to the building, or the mechanical systems servicing the building, of which the Premises are a part (which work may include, but is not necessarily limited to, the repair or replacement of such building's exterior facade, exterior window glass, elevators, electrical systems, HVAC (as defined below) systems, plumbing systems, common hallways, lobbies and other areas), any of which work may require access to the same from within the Premises, and Tenant hereby grants such access to Landlord and acknowledges and agrees that the utilization by Landlord of such access shall not constitute a breach by Landlord of its covenant of quiet enjoyment or any other provision of this Lease, provided Landlord shall provide Tenant reasonable advance written notice of such work, will conduct such work in a manner as to avoid interruption of Tenant's business to the extent commercially reasonable, and will abate all Rent due under the Lease if such work causes Tenant to close its business or a significant portion thereof for more than twenty-four hours.

Consider what is important to protect for the tenant and limit the landlord's ability to adversely impact these elements.

Business interruption equals rent abatement after 48 hours.

Balance landlord's desire to control the tenant mix and quality of operations with tenant's desire to control and adapt its business over a long lease term.

3. **USE AND STORE NAME.**

Trade name

3.1 **Permitted Use, Store Name.** Subject to and in accordance with all ordinary and extraordinary rules, ordinances, laws, regulations, statutes and requirements of all governmental and quasi-governmental authorities having jurisdiction thereof (whether or not foreseeable), the Premises are to be used by Tenant solely for the purposes set forth in Paragraph 1.8 and for no other purpose, which use shall be conducted only under the store name set forth in Paragraph 1.5 and under no other name. Tenant may change the concept and trade name of the restaurant in accordance with Addendum Section 1.8(b).

3.2 Additional Covenants of Tenant Regarding Use of Premises, Standing. Tenant shall (i) operate any separate heating and air conditioning for the Premises during all hours that Tenant is open for business and during all hours that the heating and air conditioning units for the Common Areas, if applicable, are in operation, and keep the Premises and each part thereof sufficiently heated to prevent the freezing of water in pipes and fixtures, (ii) give Landlord prompt notice of any accident, fire or damage occurring on, or to, the Premises and each portion thereof, (iii) keep its display windows, including any window and window boxes in the Premises, dressed and illuminated and its exterior and interior signs and lights continuously well-lighted during Tenant's hours of operation every day during the Term, and during such times as Landlord reasonably may require, (iv) install such fire extinguisher and other safety equipment as Landlord may reasonably require from time to time, and comply with all reasonable recommendations of Landlord's insurance carriers and their rate-making agencies, ~~(v) refer to the name and address of the Project in all advertising, printed material, billboards, signs and other references to its business being conducted at the Premises;~~ (vi) use the Patio Space in compliance with the Rules and Regulations as set forth in Exhibit H, (vii) not perform or make any decorations, alterations, changes to the Patio Space and not install any fixtures, furniture and equipment in the Patio Space, except in compliance with and subject to the aforementioned Rules and Regulations, (viii) observe all reasonable and nondiscriminatory requirements promulgated by Landlord at any time and from time to time relating to delivery vehicles, the delivery of merchandise, and the storage and removal of trash, refuse and garbage, (ix) maintain its authorization to do business in Washington in good standing at all times during the Term hereof, ~~and (x) not use (or allow the use of) the Premises in a manner that could conflict with any exclusive use provisions or restrictions set forth in leases with other tenants at the Project (including, without limitation, those set forth on Exhibit F hereto).~~

A large retail tenant doing significant advertising or advertising of multiple units will want to revise this provision to reflect its normal advertising practice.

Always assure Rules and Regs are in written form.

Do not agree to language that states landlord's profitability is dependant upon tenant's use

Tenant cannot agree to not conflict with future restrictions. Existing restrictions should be disclosed and tenant can agree to not conflict with these. Balance landlord's desire to grant future exclusives with tenant's inability to make broad agreements. In other sections limit tenant's ability to change its use without landlord consent (reasonable for landlord to reject use that competes with existing use) and the section granting tenant exclusive on current use and on future approved use.

4. MINIMUM RENT; COMMENCEMENT DATE; COST OF LIVING INCREASES.

4.1 Payment of Minimum Rent. Tenant agrees to pay to Landlord, without demand, deduction or offset (except as specifically permitted herein), the Minimum Rent as set forth in Paragraph 1.11 of this Lease, in advance, in lawful money of the United States of America and at such place as Landlord may from time to time designate in writing, on the Rent Commencement Date and thereafter on or before the first day of each and every calendar month during the Term hereof, ~~except that the prepaid Minimum Rent set forth in Paragraph 1.14 of this Lease (as well as the Initial Monthly Adjustments set forth in Paragraph 1.12 of this Lease and the Initial Promotional Fund Dues set forth in Paragraph 1.13 of the Lease) shall be paid upon the execution of this Lease.~~ Minimum Rent for any period which is less than one (1) month shall be a prorated portion of the monthly installment of Minimum Rent herein based upon the number of days in the calendar month during which such period occurs.

Or based upon the number of days in a 365-days year—limits burden of February v. 30-day months in the calendar year.

4.2 Determination of Rent Commencement Date. The Rent Commencement Date for the payment of Minimum Rent shall be the date set forth in Paragraph 1.9 of this Lease, subject to **Paragraph 1.7 of Exhibit B** hereto. For the purposes of Paragraph 1.9, the term "Turn-Over Date" shall be ~~the date on which this Lease has been executed and delivered by Landlord or, if Exhibit B indicates that Landlord is to perform any Landlord's Work,~~ the date on which Landlord, its architect or other designated representative certifies to Tenant in writing that the items of Landlord's Work listed on Exhibit B have been completed to the extent necessary for Tenant to commence Tenant's Work in the Premises, as more particularly set forth in Exhibit B to this Lease. ~~Landlord anticipates that the Turn-Over Date will be August 1, 2005. The Turn-Over Date will be no earlier than August 1, 2001. If Landlord determines that the Turn-Over Date will be later than August 1, 2001, Landlord shall provide Tenant written notice of the revised anticipated Turn-Over Date not later than May 1, 2001 and shall in any event provide Tenant at least sixty days advance notice of the final anticipated Turn-Over Date. Landlord and Tenant shall schedule a walk-through of the Premises to confirm that Landlord's Work has been completed in conformance with Exhibit B to this Lease and shall develop a punchlist of any Landlord Work remaining to be completed along with a schedule for completion of such work. The parties may agree to Landlord completing such work concurrent with Tenant completing Tenant Work if Tenant determines that such concurrent work will not interfere with or delay the completion of Tenant Work. Certification by Landlord, Landlord's architect or another designated representative of completion of Landlord's Work as set forth above shall be conclusive and binding upon the parties hereto.~~

If there is risk of Landlord's timeline slipping, Tenant may need lengthy advance notice of tenant's construction start date to properly stage construction in conjunction with other projects. Tenant may also want protection against opening at certain times of the year (e.g. opening an in-line mall store in January is not optimal).

Protect against latent defects in landlord's work

4.3 Performance of Tenant's Work; Commencement of Business by Tenant. Tenant may not commence construction of Tenant's Work without Landlord's prior written consent, ~~which shall not be unreasonably withheld, conditioned or delayed.~~ Tenant shall commence the construction of Tenant's Work as described in Exhibit B promptly after receiving Landlord's consent ~~and required building permits, but in no event more than fifteen (15) days after receiving such consent,~~ shall diligently prosecute such construction to completion and shall open the Premises for business, fully fixturized, stocked and staffed, on or before the Rent Commencement Date, ~~subject to Section 37 of this Lease.~~

Consider deleting this section to the extent it restates other provisions in the Lease. Otherwise ensure that it does not conflict with those provisions or is subject to those sections.

5. **TERM.** The term of this Lease (the "**Term**") shall be as set forth in Paragraph 1.10 and shall commence on the Commencement Date as set forth in Paragraph 1.9. The parties hereto acknowledge that this Lease is effective as of the date hereof and that all of the obligations of Tenant ~~and Landlord~~ under this Lease commence prior to commencement of the Term, except for Tenant's obligation to operate the Premises as a retail store or to pay Minimum Rent, Percentage Rent, Monthly Adjustments or Promotional Fund Dues, ~~or to secure insurance Other sections???~~ ~~(other than the amounts payable on execution hereof).~~ The parties are bound hereby as of the date hereof, even though the Commencement Date has not occurred and the Term has not commenced.

~~6. **SECURITY DEPOSIT.** Concurrently with Tenant's execution of this Lease, Tenant shall deposit with Landlord the Security Deposit set forth in Paragraph 1.15. Said sum shall be held by Landlord as security for the faithful performance by Tenant of all the terms, covenants, and conditions of this Lease to be kept and performed by Tenant during the Term hereof. If Tenant defaults with respect to any provision of this Lease, including but not limited to the provisions relating to the payment of Minimum Rent, Additional Rent, and other amounts required to be paid by it when due, Landlord may (but shall not be required to) use, apply or retain all or any part of the Security Deposit for the payment of any rent or other sum in default, or for the payment of any amount which Landlord may spend or become obligated to spend by reason of Tenant's default, or to compensate Landlord for any other loss or damage which Landlord may suffer by reason of Tenant's default. If any portion of said Security Deposit is so used or applied Tenant shall, within five (5) days after written demand therefor, deposit cash with Landlord in an amount sufficient to restore the Security Deposit to its original amount (or any greater amount to which the Security Deposit would have grown pursuant to the terms of this Lease if it (or if a portion thereof) had not been so used or applied by Landlord) and Tenant's failure to do so shall be a default under this Lease. Landlord shall not be required to keep the Security Deposit separate from its general funds, and Tenant shall not be entitled to interest on such Security Deposit. If Tenant shall fully and faithfully perform each and every provision of this Lease to be performed by it, the Security Deposit or any balance thereof shall be returned to Tenant (or, at Landlord's option, to the last assignee of Tenant's interest hereunder) within thirty (30) days following expiration of the Term (or, if later, the completion of such performance by Tenant). In the event of assignment or termination of Landlord's interest in this Lease, Landlord shall transfer the unapplied balance of said Security Deposit to Landlord's successor in interest.~~

7. **ADDITIONAL CHARGES.**

7.1 Percentage Rent.

We report all Gross Sales based on our fiscal months. To do otherwise creates significant accounting issues. I have attached a schedule of our fiscal months. Also, I have changed all "calendar year" references in the Percentage Rent section to Lease Year. Use of Lease Years running 12 months from the Rent Commencement Date (or the first day of the month following) is necessary to track the deal negotiated and avoid confusion. We will need to insert a definition of Lease Year.

(a) Calculation of Percentage Rent. In addition to the Minimum Rent to be paid by Tenant pursuant to Section 4, Tenant shall pay to Landlord, at the time and in the manner herein specified, without demand, deduction or offset (except as specifically permitted in this Lease), additional rent in an amount equal to the product of the percentage rent rate set forth in Paragraph 1.16 (the "**Percentage Rent Rate**") multiplied by the dollar amount of Tenant's "Gross Sales" (as defined in Paragraph 7.1(d) below) made in, upon, or from the Premises during each calendar year of the Term, less the aggregate amount of the Minimum Rent, Tenant's Share of Adjustments (as set forth in Paragraph 7.2), and Tenant's Monthly Parking Fee (as set forth in Paragraph 25.3(b) of the Addendum), and Promotional Fund dues (as set forth in Paragraph 30), previously paid or payable by Tenant and allocable to said Lease Year calendar year ("Annual Breakpoint") (such additional rent is referred to herein as "**Percentage Rent**").

Clearly agree about what items can be offset against percentage rent. Minimum rent is common, but common area maintenance charges, taxes, promotion fund payments, etc. may also be offset.

(b) Periodic Reporting and Payment. Within ~~thirty-five~~ (30) days after the end of each ~~fiscal calendar~~ month following the first anniversary of the Rent Commencement Date, Tenant shall furnish to Landlord a written report in the form of Exhibit D attached hereto (a "Monthly Gross Sales Report"), certified by Tenant to be true, correct and complete, setting forth the Gross Sales made in, upon, or from the Premises during the preceding ~~fiscal calendar~~ month. Each Lease Year, commencing in the first fiscal month in which Gross Sales exceed the Annual Breakpoint, such ~~Each~~ Monthly Gross Sales Report shall be accompanied by a payment (a "Monthly Percentage Rent Payment") to Landlord equal to the product of the Percentage Rent Rate multiplied by the Gross Sales made in, upon, or from the Premises during the calendar month covered in the Monthly Gross Sales Report, less the ~~Annual Breakpoint aggregate of the Minimum Rent, Tenant's Share of Adjustments, Tenant's Monthly Parking Fee, and Promotional Fund dues (such aggregate being herein referred to as the "PR Base") for such calendar month, if previously paid~~. Each Monthly Gross Sales Report shall be furnished to Landlord, and each Monthly Percentage Rent Payment shall be paid to Landlord, not later than thirty (30) days after the last day of the ~~fiscal calendar~~ month covered by such Monthly Gross Sales Report.

This section requires percentage rent payment only when the sales actually exceed the Annual Breakpoint. Often leases will require monthly payments, e.g. by breaking the Annual Breakpoint into 12 equal amounts and measuring each month's sales against that monthly amount.

(c) Annual Reporting and Payment. Within thirty (30) days after the end of each partial or whole ~~Lease Year calendar year~~ during the Term of this Lease after the first Lease Year, Tenant shall furnish to Landlord a written report (an "Annual Gross Sales Report"), in such form and with such detail as Landlord shall deem necessary or desirable, certified by Tenant to be true, correct and complete, setting forth the Gross Sales made in, upon or from the Premises during the preceding Lease Year

Be sure landlord requirements for reporting are reasonable for your business practice.

~~calendar year~~ ("Tenant's Annual Gross Sales") and the Monthly Percentage Rent Payments made by Tenant to Landlord during the preceding Lease Year calendar year. Tenant shall deliver a payment (an "Annual Percentage Rent Payment") to Landlord together with each Annual Gross Sales Report, which payment shall be equal in amount to the product of the Percentage Rent Rate multiplied by the Gross Sales made in, upon, or from the Premises during such ~~Lease Year calendar year~~, less the Annual Breakpoint PR Base and Monthly Percentage Rent Payments actually paid by Tenant with respect to such ~~Lease Year calendar year~~. In the event that the Annual Breakpoint PR Base and Monthly Percentage Rent Payments actually paid by Tenant with respect to such ~~Lease Year calendar year~~ exceed an amount equal to the product of the Percentage Rent Rate multiplied by Tenant's Annual Gross Sales, the amount of such excess (but not an amount greater than the aggregate of such Monthly Percentage Rent Payments actually paid by Tenant with respect to such ~~Lease Year calendar year~~) shall be applied in payment of the next ensuing payment Monthly Percentage Rent Payments due under this Lease hereunder.

DO NOT permit artificial monthly or quarterly break points

(d) Definition of "Gross Sales". The term "Gross Sales" as used in this Lease shall mean the entire gross receipts of every kind and nature from sales and services made in, upon, or from the Premises, whether upon credit or for cash (and, if the value received therefor is paid in property or services rather than cash or credit, the fair market value thereof), in every department operating in the Premises, whether operated by the Tenant or by a subtenant or subtenants, or by one or more licensees or concessionaires, excepting only

(i) Sums and credits received in the settlement of claims for loss of or damage to merchandise, inventory or equipment owned by Tenant;

(ii) The amount of credit for discounts and allowances in lieu of acceptance thereof ~~whether to guests or crew, provided the actual amount collected is included in Gross Sales, but only if and to the extent the amount of credit so given previously was included in the computation of Gross Sales;~~

Consider benefits provided employees and discount programs to ensure these are exempted from the gross sales definition.

(iii) ~~Cash Refunds~~ made to customers in the ordinary course of business; ~~provided, however, that this exclusion shall not apply to amounts rebated or paid, or value given for what are commonly referred to as trading stamps or prizes, nor shall it apply to other promotional payments to, or promotional coupons or credits used by, customers;~~

Returns: landlord typically wants to restrict returns to those previously included in gross sales. Try to eliminate this restriction. If necessary, restrict returns of items purchased at our brick & mortar locations.

We can usually obtain an exemption for promotions because the only reason we do them is to increase overall sales, which benefits the landlord.

(iv) Receipts from public telephones, stamp machines, public toilet locks, or vending machines ~~installed solely for the use of Tenant's employees;~~ and

We receive a minimal amount of revenues from pay phones and other vending machines, don't want to be responsible for tracking the minimal receipts and usually get this exclusion. Businesses relying more heavily on these receipts will not be able to get this revision.

(v) Amounts received from the sale of furniture and equipment not in the ordinary course of Tenant's business.

(v) Sales taxes, so called luxury taxes, consumers' excise taxes, gross receipts taxes and other similar taxes now or hereafter imposed upon the sale of merchandise or services, ~~but only if collected separately from the selling price of merchandise or services and collected from customers;~~

- (v) Amounts received from the sale of gift certificates, provided the value of all gift certificates redeemed at the Premises shall be included in Gross Sales at the time of redemption;

This can be a critical exclusion for tenants with multiple operations that permit a certificate to be purchased in one location and redeemed in another – consistency is important. If the lease for one location requires reporting at the time the certificate is sold and another lease calls for reporting upon redemption, the same certificate could be included in gross sales under both leases. We insist upon including in gross sales upon redemption. The sale of certificate does not produce income because there is a corresponding outstanding obligation. It becomes a sale only upon redemption and is included in gross sales by the redeeming location.

- (vi) Amounts reversed on Tenant's books due to uncollectable checks or credit card charges;

- (vii) Gratuities paid employees including amounts withheld by Tenant for employee taxes and amounts contributed to a tip pool provided Tenant does not retain these amounts for its benefit;

- (viii) Amounts credited to guests or employees pursuant to promotion coupons and other promotional credits, provided the actual amount of consideration received by Tenant shall be included

- (ix) Employee meals provided employees in connection with a shift worked.

Landlord concerns about excessive dollars being exempted may be overcome by limiting the amount exempted under a particular category to a set percentage of the total gross sales. Some of the exemptions are requested to be consistent with the way we typically track gross sales so we don't have to make numerous adjustments to our records.
Additional exclusions: credit card fees and postage.

Notwithstanding the foregoing, for all purposes of this Lease, a "sale" shall be deemed to have been consummated, and the entire amount of the sale price shall be included within "Gross Sales", ~~at~~ such time as (i) the sale transaction initially is reflected in the books or records of Tenant, or any sublessee, assignee, concessionaire or other user of the Premises or any portion thereof directly or indirectly by or through Tenant, or (ii) Tenant or such other person or entity receives all or any portion of the sales price, or (iii) the applicable goods or services are delivered to the person or entity to which they are required or intended to be delivered pursuant to the sale transaction, whichever first occurs, and without regard to whether payments are to be made in installments, the sale is for cash, credit or otherwise, or all or any portion of the sales price has actually been paid at the time of inclusion thereof in "Gross Sales". Tenant shall cause all sales made from the Premises to be recorded in a cash register or cash registers that are capable of recording a cumulative total of sales, which shall be sealed ~~in a manner approved by Landlord and which shall possess such other features as shall be required by Landlord from time to time.~~ Tenant shall include gross receipts generated from sales of lottery tickets and transaction checks and from credit card sales in the computation of "Gross Sales". No deduction shall be made for direct or indirect discounts, rebates or other reductions in sale, unless generally offered to the public on a uniform basis or as provided above. ~~No deduction shall be permitted for discounts, rebates or other reductions provided~~

In a manner consistent with tenant's business practice.

~~to employees with respect to sales made to them or at their direction. No deduction shall be allowed for uncollected or uncollectible credit accounts, or for trade ins or other credits on sales made to employees or others.~~

Given constant changes in technology, the landlord should not dictate the equipment to be used, so long as necessary audit information is available to landlord. This provision is more directed to small ma and pa shops that don't have other critical tracking requirements that mandate that cash sales are not made under the table.

Avoid this type of acknowledgment if possible. Rents may be structured so that landlord receives all \$\$ from base rent without intent of break point being reached. Also, you do not want to assist landlord in driving damages based on a radius restriction.

(e) Sales Within Specified Radius. It is understood and agreed that Percentage Rent is a material consideration of this Lease, and that Landlord's obtaining a fair and equitable rental is dependent on Tenant concentrating all of its business efforts within the geographical area in which the Project is located at the Premises so as to maximize Gross Sales. Tenant acknowledges that if it conducts business activities within the geographic area of the Project other than at the Premises consisting of operating (or participating in the operation of) a competing business, such activities will have an adverse effect on Tenant's Gross Sales at the Premises to the detriment of Landlord and deprive Landlord of a fair and equitable rental. In order to achieve maximum sales volume, Tenant covenants during the term of this Lease that if Tenant or any affiliate directly or indirectly controlling, controlled by or in common control with Tenant ~~(and if Tenant (a) is a corporation, the officers, directors and stockholders of Tenant and any such affiliate, and any of their affiliates, or (b) is any other type of entity, the principals of such entity or of any such affiliate)~~, or its franchisor or franchisee, or its licensor or licensee, shall directly or indirectly, individually or as a partner, stockholder or otherwise, own, operate, manage or have any interest in the profits of any store or business (excluding a XXXX or XXXXX concept as those concepts evolve) the operation of which is similar to the operation being or to be conducted by Tenant in the Premises within a distance of five (5) miles from any point along the perimeter boundary of the Project, then the Gross Sales of any such business within said distance shall be included in the Gross Sales made from the Premises and the Percentage Rent computed hereunder shall be computed based upon the aggregate of the Gross Sales made from the Premises and by any and all such other businesses conducted within said distance. Tenant shall keep records of all sales and other activities by all such other businesses and provide to Landlord and its agents access to all such records, all in the manner specified in Paragraph 7.1(f), below.

Carefully consider this provision. Balance the landlord's interest in limiting truly competing businesses against the long term possibilities that tenant may be develop noncompeting concepts or be "acquired" by an entity that has other existing concepts.

Provide for sales test prior to the inclusion of gross sales based upon a radius violation. The existence of a "violating store" does not alone equal reduced sales.

(f) Tenant's Books and Records. Tenant shall keep at the Premises or at Tenant's executive offices within the continental United States full, complete and accurate books, records, and accounts of its daily Gross Sales, whether for cash, on credit, or for barter, as well as, if applicable, daily Gross Sales of each separate department, subtenant, licensee, and concessionaire operating at any time in the Premises. Tenant's books, records and accounts shall also include its daily purchases and receipts of merchandise and inventories. Such records shall include, but not be limited to, daily dated register tapes, including those from temporary registers, serially pre-numbered sales slips, mail

Consider where these records are normally kept.

orders, telephone orders, settlement report sheets of transactions with sublessees, concessionaires and licensees, detailed original records showing that merchandise returned by customers was purchased by such customers at or from the Premises, receipts or other detailed original records of merchandise leased, licensed or taken out on approval, and such other records as normally would be required to be kept in accordance with the generally accepted accounting principles or would be kept by a person or entity engaged in a business similar to that being or to be conducted at or from the Premises. Tenant shall keep or cause to be kept all of such books, records and accounts for at least three (3) years following the end of each ~~Lease Year~~ calendar year ending during the Term. Landlord and its agents and employees shall have the right at any and all times, during Tenant's regular business hours, to examine and inspect all of the books, records and accounts of Tenant that relate to the Premises, including sales and other tax returns and reports, pertaining to the business of Tenant, its licensees and concessionaires, conducted in, upon, or from the Premises, only for the purpose of investigating and verifying the accuracy of Monthly and Annual Gross Sales Reports. Landlord may ~~once twice~~ in any calendar year cause an audit of the business of Tenant to be made by an accountant or auditor of Landlord's selection, and if any Monthly or Annual Gross Sales Report shall be found to have understated Tenant's Gross Sales to the extent percentage rent was owed Landlord and not paid, then and in that event, Tenant shall pay to Landlord, on demand, an amount equal to the product of the Percentage Rent Rate multiplied by such understatement of Gross Sales, together with interest thereon at the lesser of fifteen percent (15%) per annum or the maximum rate permitted by law computed from the date on which such payment should have been made. If (a) Landlord's audit shall disclose an understatement of Gross Sales of greater than ~~three one~~ percent (3+%) of Tenant's actual Gross Sales for the period covered by the Monthly or Annual Gross Sales Report audited by Landlord, or (b) Tenant has failed to submit to Landlord one or more Monthly or Annual Gross Sales Reports required to be submitted by Tenant, or has failed to pay Percentage Rent when due and such failure to submit or pay continues for more than ten days following written demand therefor, or (c) Tenant shall fail to make the books and records available to Landlord at the required time, or (d) Tenant fails to keep books and records in the manner reasonably required in this Section 7, then, in addition to the foregoing, Tenant shall pay to Landlord the reasonable cost of such audit immediately upon demand; otherwise, the cost of such audit shall be paid by Landlord. If ~~(i) Gross Sales vary from those reported by three percent (3%) or more in any one calendar year, or (ii) Gross Sales vary from those reported by two percent (2%) or more for any two calendar years out of any five (5) calendar years, or (iii)~~ such audit shall disclose any willful or substantial inaccuracies, Landlord may cancel and terminate this Lease by giving notice thereof to Tenant. If Tenant shall fail timely to submit any report required to be submitted by it to Landlord pursuant to this Paragraph 7.1, then, in addition to all other remedies that Landlord may have under this Lease, at law, in equity or otherwise, Tenant shall pay to Landlord on demand a late fee of Fifty Dollars (\$50.00) per late report as Additional Rent.

I have provided Section 7.1 and Exhibit D to our V.P. of Finance for review and comment. I will let you know if she raises any additional concerns.

Revise these provisions to ensure that inadvertent errors and consistent good faith errors in calculations do not cause an incurable default, lease termination and loss of substantial investment or significant monetary damages.

7.2 Adjustments.

(a) Pro Rata Share. In addition to the Minimum Rent, commencing on the Rent Commencement Date, subject to the provisions of Paragraphs 7.2(b) and 7.2(c), Tenant shall pay to Landlord, without demand, deduction or offset (except as specifically permitted herein), its pro rata share, in accordance with the total useable floor area of the Restaurant Space Premises as it relates to the total leasable floor area of the buildings within the Project which are from time to time completed as of the first day of each calendar quarter ~~and occupied by tenants which are open for business~~, of the items set forth in clauses (i), (ii) or (iii) of this Paragraph 7.2(a) (said items are herein called "Adjustments" and Tenant's pro-rata share of Adjustments is herein called "Tenant's Share of Adjustments"). Adjustments may, at Landlord's option, include the cost of such items allocable to the Project which relate to contracts or cost pools covering not only the Project but also other property owned by Landlord or affiliates of Landlord and in the immediate vicinity of the Project (provided the leasable floor area of such property is included in the total leasable floor area of the buildings within the Project for purposes of determining the allocation described above), as well as charges imposed on the Project pursuant to any CC&R's. ~~If Landlord hereafter develops all or any portion of the Project for non retail uses, the non retail portion of the square footage contained in any multi story buildings will not be included in the total leasable floor area of the Project for the purposes of computing Tenant's Share of Adjustments pursuant to this Paragraph 7. 2(a).~~

Balance landlord's desire to spread the common area maintenance expenses among rent paying tenants against tenant's unwillingness to pay increased costs when occupancy levels are reduced.

(i) All taxes, assessments (special or otherwise), water and sewer rents and other governmental levies, fees and charges of any and every kind, nature and description whatsoever, ordinary and extraordinary, foreseen and unforeseen, increases therein for any reason, and substitutes therefor, including the costs to Landlord of all actions taken (such as, by way of example only, any appeals) in an attempt to reduce any such taxes, assessments, levies, fees or charges (but not including any inheritance, estate, succession, transfer or gift tax imposed on Landlord or any net income tax specifically payable by Landlord as a separate tax-paying entity without regard to Landlord's income source as arising from or out of the Project or rental real estate activities generally, and any of the lease taxes referred to in Paragraph 7.2(c) (which shall be paid by Tenant in accordance with said Paragraph)) attributable in any manner to the Project, or the rents receivable therefrom, or any part thereof or any use thereof or any facility located therein or used in conjunction therewith including land intended for future development, or any charge or other payment required to be paid to any governmental or quasi-governmental authority (including, without limitation, any district fees or charges) relating to the Project, whether or not any of the foregoing shall be a so-called "real estate tax". In this regard, Landlord and Tenant acknowledge that the adoption of Proposition 13 by the voters of the State of California in June, 1978 may give rise to the imposition of assessments, taxes, fees, levies and charges imposed by governmental agencies for such services as fire protection, street, sidewalk and road maintenance, refuse removal and other governmental services formerly provided without charge to property owners or occupants (it being the intention of Tenant and Landlord that any and all such new and increased assessments, taxes, fees, levies and charges be included within the items set forth in this subparagraph (a), of

which Tenant is required to pay to Landlord its pro rata share). All taxes and other amounts which are levied on a fiscal year basis shall be deemed to apply 1/12th to each calendar month in such fiscal year and shall be charged to Tenant accordingly.

(ii) All costs and expenses of every kind and nature paid or incurred by Landlord, its agents and designees in connection with the following:

(aa) The operation, maintenance, landscaping, repair and replacement of the Common Areas of the Project including without limitation, the gardening, sweeping, rubbish removal, sanitary control, irrigation system, snow removal, re-striping, resurfacing, painting, valet parking service, utilities and all other services, costs and expenses for the maintenance and operation of the Common Areas as Landlord determines from time to time to be necessary and appropriate, including reasonable reserves for all of the foregoing;

(bb) The maintenance, repair and replacement of all portions of the buildings, structures, improvements and equipment in or forming a part of the Project, including the roof, exterior walls and surfaces (including, but not limited to periodic painting and re-staining, cleaning and resealing, and the maintenance and repair of gutters and downspouts, and the monitoring of the sprinkler system (if any), and the heating, air conditioning, water, sewer, and other utility systems, in the Project), including reasonable reserves for all of the foregoing, except that there shall be excluded from the foregoing, ~~the proceeds of insurance received by Landlord for any said items~~, the cost of such maintenance, repairs and replacements as Landlord may perform to the interior of any tenant's premises in the Project and the costs and expenses of any of the foregoing which any occupant of the Project performs at its own cost and expense;

(cc) The salaries and other compensation of the personnel and outside contractors that implement the aforesaid maintenance, security, operation, replacement, and repair of the Project and related costs, including worker's compensation insurance and the cost of office space, supplies and equipment, provided, however, that the foregoing shall include Landlord's home office personnel and other home office administrative expenses only to the extent equitably allocable to the Project;

(dd) The maintenance of all insurance (including but not limited to fire, broad form extended coverage, rent, liability, etc., and the insurance described in Paragraph 14.3 of this Lease), carried by and in the prudent discretion of Landlord or its mortgagee or lender covering the Project, buildings and improvements, the Common Areas and every other facility or property used or required, or deemed necessary, in connection with any of them, including reasonable reserves for all of the foregoing; and

No administrative fee on third party services that have likely been inflated and already include an administrative fee

~~(ee) — (ee) — The cost of or analysis or removal of any hazardous substance not known to exist on or under the Project as of the date hereof, and the cost, maintenance and operating expense of all monitoring and other equipment measuring air and/or water quality; extraordinary waste disposal facilities or equipment, and waste or waste water treatment facilities and equipment installed at or in connection with the Project, and similar costs and expenses.~~

(iii) An amount equal to ten percent (10%) of all Adjustments set forth in the foregoing clauses (aa) and (bb) to cover Landlord's administrative and overhead costs.

(b) Excluded Charges. Notwithstanding anything to the contrary contained in Paragraph 7.2(a), the following (collectively, the "Excluded Charges") shall be excluded from the items set forth therein: (i) any costs and expenses paid or incurred by Landlord in discharging its obligations under the provisions of Paragraph 11.2 of the Lease; and (ii) in the event that Landlord, in its reasonable judgment, determines at any time during the term of this Lease that it is more appropriate and/or equitable that all or any portion of the charges set forth in Paragraph 7.2(a), whether for existing or additional items includible in Adjustments as provided in said Paragraph, be chargeable exclusively to the tenants or occupants of a particular building in the Project or to a particular tenant or group of tenants or occupants in the Project, such charges shall be excluded in determining the aggregate amount of the Adjustments a pro rata share of which Tenant is obligated to pay as provided in said Paragraph 7.2(a). In the event that any of the Excluded Charges are chargeable to Tenant, either by reason of the Premises being located in the particular building to which such Excluded Charges relate, or by reason of the fact that such Excluded Charges relate to Tenant or a group of tenants and occupants which includes Tenant, commencing with the first (1st) calendar month following the calendar month in which Landlord gives Tenant written notice of the amount of such Excluded Charges and Tenant's share thereof in accordance with Paragraph 7.2(d), Tenant shall be obligated to pay a share of such Excluded Charges calculated as follows:

We need to discuss how this determination is made and to what types of charges it may apply. In any event, it must be clear that the first year cap and the 3% increase cap apply to any charges imposed pursuant to this Section as well.

We typically negotiate some type of cap on CAM (at least "controllable, i.e. excluding real estate taxes, ground rent) so aren't too concerned about what can be included in the allocation. If there is no cap, what costs are included and how they are allocated becomes more of a concern. Watch for capital expenditures, duplicate charges (especially in management fees and administrative fees).

(i) If the Excluded Charges relate to the building in which the Premises are located, Tenant shall pay a pro rata share of such Excluded Charges in accordance with the total floor area of the Premises as it relates to the total leasable floor area of the building in which the Premises are located;

(ii) If the Excluded Charges relate to a group of tenants and occupants which includes Tenant, Tenant shall pay a pro rata share of such Excluded Charges in accordance with the

total floor area of the Premises as it relates to the total leasable floor area of the premises (including the Premises) of all tenants and occupants comprising the group to which the Excluded Charges relate;

(iii) If the Excluded Charges relate solely to Tenant, Tenant shall pay the entire amount of the Excluded Charges; and

(iv) In the event that Tenant is obligated to pay all or any portion of any Excluded Charges in accordance with one or more of clauses (A), (B) and (C) of this Paragraph 7.2(b), Tenant shall pay to Landlord an amount equal to ten fifteen percent (10+5%) of the amount of Excluded Charges payable by Tenant to cover Landlord's administrative and overhead costs.

(c) Rent and Lease Taxes. In addition to the foregoing, in the event that there is at any time during the term of this Lease a tax, levy or fee imposed upon and/or measured by the rental payable by Tenant under this Lease, whether by way of a sales or use tax or otherwise, or otherwise in connection with Tenant's, its employees' or customers' use of the Premises and/or the activities conducted therein, including without limitation so-called "trip fees" what is this???, Tenant shall be solely responsible for the payment of and shall pay all of such taxes when due, provided, however that the foregoing shall not include any inheritance, estate, succession, transfer or gift tax imposed on Landlord or any net income tax specifically payable by Landlord as a separate tax-paying entity without regard to Landlord's income source as arising from or out of rental real estate activities or the Project. All such taxes shall be paid by Tenant separately from the other taxes described in Paragraph 7.2(a)(i) and shall be paid monthly without demand, deduction or offset together with Tenant's monthly payments of Minimum Rent, or as otherwise required by the taxing authority.

Documentation should be provided to support and substantiate costs and pro rata share calculations – get a gross leaseable area.

(d) Landlord's Statements of Adjustments. ~~Until such time as Landlord has furnished Tenant with Landlord's estimate of the anticipated monthly Adjustments for the period between the Commencement Date and the following January,~~ Tenant shall pay the Initial Monthly Adjustments set forth in Paragraph 1.12 for the first twelve months following the Rent Commencement Date. Tenant shall continue to make said monthly payments until notified by Landlord in writing of a change in the amount of monthly Adjustments (which shall not be early than the first anniversary of the Rent Commencement Date), whether based upon increased costs or upon additional work and/or services, in which event, commencing with the first (1st) calendar month following the calendar month in which Landlord gives Tenant written notice of the change in monthly Adjustments, Tenant shall pay the amount set forth in the written notice to Tenant setting forth such change, provided that concurrently with the first such monthly payment after receipt by Tenant of written notice to Tenant setting forth such change, Tenant shall also pay to Landlord the difference between (i) the aggregate amount of monthly payments for Adjustments that Tenant would have paid during the then current calendar year if the amount of such monthly payments would have been determined based upon ~~Tenant's~~ such written notice, and (ii) the aggregate amount of monthly payments for Adjustments actually made by Tenant for

No duplication of costs elsewhere in the lease.

the then current calendar year. By April 1 of each year, Landlord shall ~~endeavor to~~ give Tenant a statement showing the total Adjustments for the prior calendar year and Tenant's pro rata share thereof, prorated for the first year from the commencement of Tenant's obligation to pay Adjustments, and prorated for the last year through the expiration of Tenant's obligation to pay Adjustments. In the event the total of the monthly payments which Tenant has made for the prior calendar year are less than Tenant's actual share of such Adjustments, then Tenant shall pay the difference in a lump sum within ~~thirty ten (3040)~~ days after receipt of such statement from Landlord ~~and concurrently shall pay to Landlord the difference between (iii) the aggregate amount of monthly payments for Adjustments that Tenant would have paid during the then current calendar year if the amount of such monthly payments would have been determined based upon Tenant's actual payment obligation with respect to Adjustments for the then prior calendar year, and (iv) the aggregate amount of monthly payments for Adjustments actually made by Tenant for the then current calendar year.~~ Any overpayment by Tenant shall be credited towards any payment obligation the monthly Adjustments next coming due. The actual Adjustments for the prior calendar year shall be used for purposes of calculating the anticipated monthly Adjustments for the then current calendar year, with the actual determination of such Adjustments to be made by Landlord after the end of such calendar year as above provided; excepting that in any year in which resurfacing or any other expenses or other Adjustments described in clauses (i), (ii) and/or (iii) of the proviso to Paragraph 7.3 hereof is contemplated, Landlord shall be permitted to include the anticipated cost of same as part of the estimated monthly Adjustments. ~~Any failure by Tenant to object in writing to such statement within thirty (30) days after receipt conclusively shall be deemed approval of such statement.~~ Even though the term has expired and Tenant has vacated the Premises, when the final determination is made of Tenant's share of said Adjustments for the calendar year in which this Lease terminates, Tenant shall immediately pay any amount by which Tenant's share thereof exceeds the estimated Adjustments previously paid by Tenant and, conversely, any overpayment thereof made by Tenant immediately shall be rebated by Landlord to Tenant. ~~Failure of Landlord to submit statements in the manner set forth herein shall not be deemed to be a waiver of Tenant's requirement to pay all amounts as herein provided. All charges assessed under this paragraph shall be subject to Section 7.2(e) of the Addendum.~~

...provided tenant has received requested documentation

Particularly if there is no cap, tenant will want the landlord to be required to make and notify it of any adjustments in a timely manner. Otherwise tenant risks large unbudgeted surprises. Tenant needs a reasonable period to review and object to allocations – taking into consideration notices of changes may come during vacations, year-end pressures, etc.

7.3 **Additional Rent.** Every payment required to be made by Tenant pursuant to this Lease, including, without limitation, Percentage Rent, Adjustments, payments of and reimbursements for actual or estimated costs or expenditures as provided for in this Lease, late fees, and liquidated or compensatory damages as provided for in this Lease, shall be deemed to be "**Additional Rent**" due to Landlord hereunder, whether or not expressly designated as Additional Rent, and Tenant's failure to pay such Additional Rent to Landlord when due without demand, deduction or offset (except as specifically permitted herein) shall entitle Landlord to exercise all rights and remedies provided to it for failure by Tenant to pay Minimum Rent.

8. **USES PROHIBITED.** Tenant shall not use the Premises or any portion thereof, nor do, or permit anything to be done, in or about the Premises or any portion thereof, nor bring or keep anything therein, which either (i) is not within the permitted use of the Premises set forth in Paragraph 1.8, or (ii) is in violation of Paragraph 3.1 or 3.2 or any other provision of this Lease, or (iii) in any way will or could increase the existing rate of or affect any fire or other insurance upon the Project or any part thereof or any of its contents, or cause a cancellation of any insurance policy covering the Project or any part thereof or any of its contents other than as would occur with the normal operation of a restaurant in the Premises. Except as contemplated herein, Tenant shall not do or permit anything to be done in or about the Premises which will in any way or to any extent obstruct or interfere with the rights of other tenants or occupants of the Project or the activities being conducted by them, or injure or annoy them or use or allow the Premises to be used for any unlawful purpose or in any unlawful manner, nor shall Tenant cause, maintain or permit any nuisance in, on or about the Premises or any use that could diminish the reputation or attractiveness of the Project. Tenant shall not allow floors within the Premises to be overloaded (provided that weight up to 100 p.s.i. shall not be considered overloading), nor shall Tenant commit or allow to be committed any waste in or upon the Premises. Subject to Landlord's obligation to adequately exhaust the Premises, Tenant shall prevent any and all odors (other than ordinary cooking and normal restaurant odors), flashing or blinking lights, noises, vibrations, smoke and fumes from emanating from the Premises. ~~Tenant shall prevent the Premises and each portion thereof from being used for the manufacture, sale, barter, gift or service of intoxicating liquors or other beverages, or, except as otherwise expressly set forth herein, beverages, food or food products in any form.~~ Tenant shall not use any space outside the Premises for any sales, storage or other activities, and shall not use the plumbing facilities in the Premises for any purpose other than that for which they were constructed, nor dispose of any foreign substances therein. Tenant shall not ~~cause permit~~ the loading dock or service elevator, if any, used by Tenant to be in other than a neat, clean, safe and sanitary condition. Tenant shall not store or stock in the Premises any goods, wares or merchandise other than items that Tenant intends to offer for sale at or from the Premises; provided, that this sentence shall not preclude occasional emergency transfers of merchandise from the Premises to other stores of Tenant, if any, not located in the Project. Tenant shall not display or sell merchandise or place carts, portable signs, devices or any other objects outside the defined exterior walls, or on the roof or permanent doorways, of the Premises without the consent of Landlord, which will not be unreasonably withheld, delayed or conditioned. Tenant shall not enter upon, or have access to, the roof of the Premises, and Tenant shall not permit aerial or antenna or other device to be erected on the roof or exterior walls of the Premises except as otherwise provided herein or consented to by Landlord which consent will not be unreasonably withheld, delayed or conditioned. Is there cable service available at the Premises?? If Tenant, or any other person or entity occupying or having a right to occupy or use the Premises or any portion thereof directly or indirectly through or under Tenant, should install any such aerial, antenna or other device on the roof of the Premises, Landlord is hereby authorized by Tenant to remove such device following reasonable written notice to Tenant without notice at any time, at Tenant's expense. Tenant shall not load

Watch insurance provisions that make a tenant responsible for increases in insurance where the cause of the increase is simply operating under the permitted use.

Obtain acknowledgment that intended use shall not result in

Consider the intended use and watch for inconsistent or impractical restrictions

or unload goods being transported to or from the Premises except at such times, in such areas and through such entrances as may be reasonably designated for such purpose by Landlord. We need to understand these restrictions prior to execution. Tenant shall prohibit all trucks and trailers that have entered upon the Project on account of Tenant's conduct of its business and affairs from remaining overnight in or upon any portion of the Project.

9. **COMPLIANCE WITH LAW, OTHER REQUIREMENTS.**

Notwithstanding any other provision of this Lease, Tenant shall not use the Premises, or permit any act or thing of any nature to be done in or about the Premises, or with respect to Tenant's signs or signage or any pylon, pole or monument signs used by Tenant in the Project, which will in any way conflict with or violate any law, statute, ordinance or governmental or quasi-governmental rule or regulation now in force or which hereafter may be enacted or promulgated, or conflict with or violate any order, covenant, restriction or other requirement, whether or not substantial, and whether or not foreseeable, applicable to the Project and/or Premises from time to time. Tenant shall, at its sole cost and expense, promptly comply and cause the Premises to comply with all laws, statutes, ordinances and governmental and quasi-governmental rules, regulations or requirements, and each such order, covenant, restriction and other requirement, now in force or which may hereinafter be in force, including, without limitation, with the requirements of any board of fire underwriters or other similar bodies now or hereafter constituted relating to or affecting the condition, use or occupancy of the Premises, excluding structural changes not related to or affected by the improvements or acts of Tenant or any person or entity directly or indirectly in possession of, or having any rights in or to, the Premises or any portion thereof by or through Tenant. The judgment of any court of competent jurisdiction or the admission of Tenant in any action against Tenant, whether Landlord be a party thereto or not, that Tenant has violated, or the Premises or any portion thereof is in violation of, any law, statute, ordinance or governmental rule, regulation or requirement that Tenant has covenanted herein to cause not to be violated, shall be conclusive of that fact as between Landlord and Tenant. Landlord may not base any declaration of default on the provisions of this Section unless such violation impacts the title to or Landlord's interest in the Premises. Tenant shall, at its expense, obtain all permits and licenses that may be required for its use of the Premises and its conduct of its business and affairs therein.

Landlord's interest here should not extend beyond violations that affect its property interests – for instance assessment of a fine for an employment violation should not give rise to an incurable default.

10. **ALTERATIONS AND ADDITIONS.**

10.1 Tenant's Alterations and Additions. Following completion of the Tenant Work described in Exhibit B hereto, Tenant shall not make or allow to be made any alterations, additions or improvements to or of the Premises or any part thereof without first obtaining the written consent of Landlord, which will not be unreasonably withheld, delayed or conditioned and any alterations, additions or improvements to or of said Premises, including, but not limited to, wall coverings, paneling and built-in cabinet work, but excepting movable furniture and other personal property, shall, at Landlord's option exercised at any time during the Term of this Lease, at once become a part of the realty and belong to Landlord and shall be surrendered with the Premises. In the event Landlord consents to the making of any alterations, additions or improvements to the Premises by Tenant, the same shall be made by Tenant at Tenant's sole cost and expense. In making any such alterations, additions, or

Balance Landlord's interest in having work on its systems performed by its contractor with Tenant's interest in having the work done at a reasonable cost.

To avoid subsequent disputes about what is landlord/tenant property, we seek agreement by use of an exhibit as described in 10.3.

improvements, Tenant shall comply with each of the provisions of Exhibit B regarding Tenant's Work and shall use only contractors and subcontractors approved by both Landlord ~~and Tenant~~ in writing, which approval will not be unreasonably withheld, delayed or conditioned. ~~As a condition of any consent to proposed alterations, additions or improvements, Landlord may require a performance or completion bond or other similar security in an amount equal to one hundred fifty percent (150%) of the cost (as estimated by Landlord) of the proposed alterations.~~ In addition, if any of such alterations, additions or improvements in any way involve or require penetration of the roof of the Premises or affect the Project's HVAC, elevator, electrical or other structural systems, such work shall be performed by Landlord's contractor, at Tenant's expense provided such contractor provides such services at a competitive rate.

We refuse to provide bonds based on our strong net worth

Carve out an annual amount for refurbishment that will not require landlord consent.

10.2 Landlord's Alterations and Additions. Notwithstanding anything else contained herein, Landlord may, from time to time, in its discretion, change the improvements in the Project by the construction, removal, relocation or alteration of any such improvements including, without limitation, additions, enlargements, reductions, alterations, changes in the number, dimension and/or location of stores, office space, parking facilities, any of the Common Areas, and driving lanes, entrances to and exits from the Project, either at one time or in phases, provided Landlord will not exercise the rights reserved herein in such a manner as to impair access to, visibility of, view from, or utilities servicing the Premises, that access to the Premises is not materially precluded thereby. Landlord agrees that no such change shall reduce the aggregate capacity of the parking areas and other parking facilities of the Project below that then legally required by any governmental authority, or violate Insert paragraph reference where parking commitments are made and Paragraph 3.1.2 of Exhibit B.

Balance Landlord's interest in retaining flexibility in the Project with Tenant's interest in protecting against changes that alter the critical attributes of the space.

10.3 Surrender of Premises. Upon the expiration or sooner termination of the Term hereof, Tenant shall, ~~upon written demand by Landlord,~~ at Tenant's sole cost and expense, forthwith and with all due diligence, remove any and all alterations, additions, or improvements to the Premises made by Tenant which remain Tenant's property as described below ~~are designated by Landlord to be removed, so that the Premises shall be surrendered upon expiration of the Lease in the condition in which they were delivered to Tenant, together with such alterations, additions and improvements to the Premises as Landlord shall not have designated be removed upon termination of this Lease.~~ Tenant shall, forthwith and with all due diligence, at its sole cost and expense, repair any damage to the Premises and other portions of the Project caused by such removal ~~or, if Landlord so requests, pay to Landlord Landlord's reasonable estimate of the cost thereof.~~ In addition, upon expiration or sooner termination of the Term hereof, Tenant shall remove its exterior sign and repair the parapet upon which such sign was erected, ~~and pay to Landlord its reasonable estimate of the revenue that will be lost from the Premises, and other consequential damages (if any) that Landlord may suffer as a result of such removal (or Tenant's failure to comply with the obligations undertaken by it as set forth in this Paragraph 10.3).~~ The property described in Exhibit ?? is the type of property which is deemed trade fixtures and personal property which remain Tenant's.

11. **REPAIRS AND MAINTENANCE.**

11.1 Tenant's Repairs and Maintenance.

(a) In General. ~~Subject to the provisions of Exhibit B, Tenant shall be deemed to have accepted the Premises as being in good, sanitary order, condition and repair upon Landlord's delivery, except for uncompleted items listed on a written "punch list" delivered to Landlord within 5 days after Landlord's delivery of the Premises to Tenant.~~ Tenant shall, at Tenant's sole cost and expense, keep the Premises and every part thereof, including Tenant's ~~all~~ signs in and about the Premises, in good and sanitary order, condition and repair (except as hereinafter provided with respect to Landlord's obligations) including, without limitation, the maintenance, replacement and repair of any and all storefront, doors, door assemblies, window casements, glazing, plumbing, pipes, electrical wiring and conduits, and heating, air conditioning and ventilating system (the "HVAC system") exclusively servicing the Premises. Tenant shall obtain and keep in effect during the term of this Lease a service contract for repair and maintenance of the HVAC system, said maintenance contract to conform to the requirements under the warranty, if any, on said HVAC system and otherwise to be in form and substance reasonably satisfactory to Landlord ~~in its discretion~~. Landlord agrees to make available to Tenant any warranties in effect with respect to the HVAC system, but only to the extent permitted under the terms of such warranties. A duplicate copy of such contract and any amendments or renewals thereof shall be delivered by Tenant to Landlord within five (5) days after Tenant first obtains such contract, renewal or amendments. Tenant shall contract for termite and pest extermination services for the Premises with a licensed pest control service provider, which contract shall provide that such services are to be rendered no less frequently than semi-annually. A duplicate copy of such contract and any amendments or renewals thereof shall be delivered by Tenant to Landlord within five (5) days after Tenant obtains such contract, renewal or amendment. Such contract shall provide that the first such service shall be rendered within thirty (30) days after the Commencement Date. Tenant shall cause all damage to adjacent premises caused by Tenant's or others' use of the Premises to be repaired promptly in a good, workmanlike manner by licensed contractors approved by Landlord, and otherwise in a manner reasonably acceptable to Landlord, at Tenant's sole cost and expense. ~~In addition to the foregoing, if so required by Landlord in Landlord's sole and absolute discretion, Tenant shall, at Tenant's sole cost and expense, renovate the leasehold improvements in the Premises promptly in a good, workmanlike manner by licensed contractors approved by Landlord to a condition consistent with the standards of the other premises located within the Project at least once during each five (5) year period during the Term of this Lease.~~ If Tenant refuses or neglects to carry out any maintenance, repairs and replacements properly as required pursuant to this Paragraph 11.1 to the reasonable satisfaction of Landlord, Landlord may, but shall not be obligated to, upon thirty (30) days prior written notice (or such longer period as may be required to complete such work provided Tenant has within such thirty (30) days commenced such work and diligently pursues it to completion), or such shorter notice as may be appropriate in an emergency, perform such maintenance, repairs and replacements without being liable for any loss or damage that may result to Tenant's merchandise, fixtures or other property or to Tenant's business by reason thereof and which cannot be avoided by Landlord acting in a commercially reasonable manner, and upon completion thereof, Tenant shall pay to Landlord, upon demand, both Landlord's reasonable costs relating to any such maintenance, repairs and replacements plus a sum equal to fifteen percent (15%) thereof representing Landlord's overhead. Tenant agrees that the making of any maintenance, repairs and replacements by Landlord pursuant to this Paragraph 11.1, is not a re-entry or a breach of any covenant of quiet enjoyment contained in this Lease or implied by law. Tenant shall give Landlord sufficient advance notice prior to the making of all non-emergency repairs and improvements to the Premises or any portion thereof so as to give Landlord an adequate and reasonable opportunity to post such notices of non-responsibility and to perform other acts in a manner which

Acceptance provisions may need to be more specific when substantial landlord work will be performed between execution and delivery.

Clarify that tenant is not responsible for common utility lines or lines that can be accessed only through other tenants' premises.

Request favored nations language. If only tenant performing, pest problem likely not resolved.

will protect Landlord from the imposition of mechanics' and materialmen's liens with respect thereto.

(b) Hazardous Materials. Landlord represents and warrants that the Premises will upon delivery to Tenant be free from Hazardous Materials as defined below. Tenant shall not introduce Hazardous Materials as defined below into the Premises, waste water or trash at all times shall cause the Premises and the waste water and trash generated from the Premises to be free of "Hazardous Materials" (as defined below). Tenant shall, at its sole cost and expense, file requests for and obtain all permits, licenses, reports, applications and approvals necessary or appropriate for the conduct of its business. Tenant shall not use, generate, manufacture, store, release, threaten to release or dispose of Hazardous Materials in, on or about the Premises or in the waste water or refuse from the Premises. Tenant shall give Landlord prompt written notice of any claim by any person, entity or governmental or quasi-governmental agency, instrumentality or authority that a release or disposal of Hazardous Materials has occurred from the Premises, or that Hazardous Materials are present at the Premises or otherwise affect the Premises. Tenant, through its professional engineers and consultants, and at its cost, shall promptly and thoroughly investigate all Hazardous Materials suspected to contaminate or otherwise to be on the Premises as a result of Tenant's actions. Tenant shall forthwith at its expense remove, repair, clean-up, detoxify or otherwise remediate in strict accordance with law any and all Hazardous Materials in, on, or under the Premises or in the waste water or refuse generated by Tenant from the Premises, and shall indemnify, defend and hold harmless Landlord and each of its officers, directors, agents, employees, constituent partners, consultants and other representatives with respect thereto, whether or not such actions are required by law. For purposes of this paragraph, "Hazardous Materials" shall be deemed to include, without limitation, substances defined as "hazardous substances", "hazardous waste", "hazardous materials", "toxic substances", "toxic waste", "toxic materials", "contaminants", "pollutants", or any variant or similar designations, or any other substance which is now or hereafter regulated or controlled as a dangerous, hazardous or toxic waste, substance or material or as an environmental pollutant, under any federal, state or local law, ordinance, order, decree, rule or regulation now or hereafter in effect and applicable to Tenant or the Premises, including, without limitation (i) the Porter-Cologne Water Quality Control Act (California Water Code Section 13000 et seq.), (ii) the California Hazardous Waste Control Law (Division 20, Chapter 6.5 of the California Health and Safety Code), (iii) The Carpenter-Presley-Tanner Hazardous Substance Account Act (California Health and Safety Code Section 25300 et seq.), (iv) Division 20, Chapter 6.95 (Hazardous Materials Release Response Plans and Inventory) of the California Health and Safety Code, (v) the Safe Drinking Water and Toxic Enforcement Act of 1986 (California Health and Safety Code Section 25249.5 et seq.), (vi) the Resource Conservation and Recovery Act (42 U.S.C. Section 6901 et seq.), (vii) the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. Section 9601 et seq.), and (viii) the Hazardous Materials Transportation Act (49 U.S.C. Section 1801 et seq.). Hazardous Materials shall not include any cleaning and other substances commonly used in the operation of a restaurant so long as they are used and disposed of in accordance with applicable laws. Landlord and its agents, consultants and other representatives shall have the right and shall be permitted, but shall not be required, upon reasonable advance written notice, at all reasonable times and from time to time, to enter upon and inspect the Premises and each portion thereof to ensure compliance with the foregoing covenants and any and all other covenants, agreements and conditions set forth in this Lease. Tenant further acknowledges and agrees that the creation of any Hazardous Materials or the failure to promptly remove or take appropriate corrective action in strict compliance with law respecting the presence of any Hazardous Materials for which Tenant is responsible, on, in, or at the Premises shall constitute waste of the Premises by Tenant. To the full extent permitted by

Landlord indemnify against existing or third party actions.

law, all obligations of Landlord Tenant hereunder respecting Hazardous Materials shall survive the Term and termination of this Lease for any reason. *Our Director of Construction is reviewing this Section and may have additional comments.*

11.2 Landlord's Repair and Maintenance. Subject to the provisions of Section 7 and Paragraph 11.1, Landlord shall repair and maintain, at its sole cost and expense, the structural portions of the Project, including foundations, subfloor, structural roof deck, bearing walls and structural columns and beams of the buildings in the Project, ~~except to the extent that such maintenance and repairs are caused by or result, directly or indirectly, from the act, neglect, fault, omission or breach of any duty by or through one or more of Tenant, its agents, servants, employees, licensees, subtenants, invitees, or contractors, or any damage caused by breaking and entering, in which case, at Landlord's election, Tenant shall either repair such damage at Tenant's sole cost and expense or pay to Landlord the entire cost of such maintenance and repairs within ten (10) days after demand. In addition, Landlord shall repair and Tenant shall reimburse Landlord for all costs and expenses attributable to any repairs, maintenance and replacements to the roof caused, directly or indirectly, by the willful act or negligence or other act or omission in violation of this Lease of (or by or through) one or more of Tenant, its agents, servants, employees, licensees, subtenants, invitees or contractors, including damage to the roof caused by the operation, maintenance and/or repair of Tenant's HVAC system or other equipment servicing the Premises.~~ *These provisions essentially void the Tenant's rights under the mutual waiver of subrogation.* Landlord shall not be liable for any failure to make such repairs or to perform any maintenance unless such failure shall persist for an unreasonable time after written notice of the need of such repairs or maintenance is given to Landlord by Tenant or after Landlord is otherwise aware of the need for such repair. Except as provided in Section 23, there shall be no abatement of rent and no liability of Landlord by reason of any injury to or interference with Tenant's business arising from the making of any repairs, alterations or improvements in or to any portion of the Premises or the building in which the Premises are located, or in or to fixtures, appurtenances and equipment therein unless such work interferes with Tenant's operations in the Premises for more than twenty-four hours at which time all monetary obligations shall abate during the duration of the interference. ~~To the maximum extent permitted by law, Tenant waives the right to make repairs at Landlord's expense under any law, statute or ordinance now or hereafter in effect.~~

Attempt to obtain self-help rights, especially where landlord history is such that it amounts to habitual avoidance.

12. LIENS. Tenant shall keep the Premises and the property in which the Premises are situated free from any liens arising out of any work performed, materials furnished or obligations incurred by, on behalf of, or through, Tenant. ~~Landlord may require, at Landlord's sole option, that Tenant provide to Landlord, at Tenant's sole cost and expense, a lien and completion bond in an amount equal to one hundred fifty percent (150%) of the estimated cost of any improvements, additions or alterations in the Premises which Tenant desires to make, to protect Landlord against any liability for mechanics' and materialmen's liens and to insure completion of such work.~~ Tenant shall give Landlord sufficient advance notice prior to the making of all repairs and improvements to the Premises or any portion thereof so as to give Landlord an adequate and reasonable opportunity to post such notices of non-responsibility and to perform other acts in a manner which will protect Landlord from the imposition of mechanics' and materialmen's liens.

Watch for provisions that permit the landlord to satisfy liens on no or short notice. Tenant needs to preserve the right to bond over and avoid payment of a disputed claim.

13. **ASSIGNMENT AND SUBLETTING.**

See notes from
ICSC Region
Symposium 2003
Panel Discussion

13.1 **Landlord's Consent.** Tenant may not, directly or indirectly, by operation of law or otherwise, transfer or assign this Lease, or any interest therein, and may not sublet the Premises, any portion thereof, or any right or privilege appurtenant thereto, or suffer or permit any other person (the agents, employees and servants of Tenant, while conducting Tenant's business, excepted) to occupy or use the Premises, or any portion thereof, or to conduct business thereon or therefrom, or mortgage, pledge or hypothecate its interest in all or any portion of the Premises or this Lease, without the prior written consent of Landlord which may not be unreasonably withheld, delayed or conditioned~~(which may be withheld in its sole discretion, except as hereinafter set forth)~~, and a consent to one assignment, subletting, occupation, or use by, or mortgage, hypothecation or pledge to, any other person shall not be deemed to be a consent to any other proposed assignment, subletting, occupation, use, hypothecation or pledge. Any such transfer, assignment, subletting, occupancy, new use, mortgage, hypothecation or pledge of the Premises without such consent or otherwise in accordance with this Paragraph 13, shall be null and void, and shall, at the option of Landlord, constitute a default upon notice to and failure by Tenant to remedy such condition within the time frames set forth in Section 20 below~~result in the termination of this Lease~~. In addition to the unique credit and business considerations attendant to Landlord's decision to lease the Premises to Tenant, Landlord has entered into this Lease with Tenant in order to benefit ~~of~~ the Project through one or more of the unique attraction of Tenant's trade name, the unique product line associated with Tenant's business, and the economic benefits attendant to the Percentage Rent to be paid by Tenant as provided herein, essential, among other things, for Landlord's merchandising mix, the continued success of the Project, and fulfillment of the economic expectations of Landlord.

Reasonableness language, even when the agreement is otherwise silent on the standard, can be very important. Consider California case law and statutory changes on this point.

Avoid incurable defaults.

13.2 **General Conditions.** Notwithstanding the foregoing, the following conditions shall apply to any proposed assignment, sublease, transfer or change in user hereunder:

Balance landlord's interest in selecting its tenants against tenant's interest in having flexibility to seek financing and undergo corporate restructuring. Ultimately, Tenant should preserve the right to assign to affiliates and merge with other entities so long as the majority shareholder remains unchanged. Changes in majority shareholders should be subject to reasonable consent if any consent is permitted.

Landlord has substantially greater interest in outright assignments that result in a new tenant. Here it will be interested in the creditworthiness, operational skills, reputation and intended use of the assignee.

(a) Each and every covenant, condition, and obligation imposed upon Tenant by this Lease and each and every right, remedy, or benefit afforded Landlord by this Lease shall not be impaired or diminished as a result of such assignment or sublease, and shall fully apply to each and every assignee, sublessee or other user of the Premises, Tenant and Guarantor shall remain as Guarantors to the Lease, and no Tenant or assignee, sublessee or other user of the Premises shall be released from the obligation under this Lease, whether or not Landlord shall have consented to any such assignment, sublease or other use;

(b) Tenant shall turn over and assign to Landlord any and all consideration directly or indirectly paid or payable for the assignment by Tenant to the assignee of Tenant's leasehold interest or any and all sub-rentals and other amounts payable by subtenants, transferees, or other new occupants or users of all or any portion of the Premises, which are in excess of the Minimum Rent provided herein (or pro rata portion thereof computed on a square footage basis);

~~(e) — If Tenant or the guarantor of Tenant's obligations is a corporation the stock of which is not actively publicly traded on a national securities exchange, or is a limited liability company, unincorporated association or partnership (general or limited) or other entity, the transfer, assignment or hypothecation of any stock or direct or indirect interest in such corporation, limited liability company, association, partnership or other entity or its assets in the aggregate in excess of twenty five percent (25%) shall be deemed an assignment within the meaning of this Paragraph;~~

(d) Tenant shall reimburse Landlord as Additional Rent for Landlord's reasonable costs and attorneys' fees incurred in conjunction with the processing and documentation of any such requested assignment, subletting, transfer, change of ownership or use or hypothecation of this Lease or Tenant's interest in and to the Premises;

~~(e) — Landlord may condition the approval of any assignment, subletting or other transfer as specified herein upon one or more of an increase in the Minimum Rent payable by Tenant or Tenant's successor in interest, an increase in the Security Deposit required to be deposited by Tenant or Tenant's successor in interest, or on the delivery of a lease guaranty from a guarantor, and in form and substance, satisfactory to Landlord in its reasonable discretion; and~~

(f) No subletting, assignment or other transfer, even with the consent of Landlord, shall relieve Tenant of its obligation to pay all amounts required to be paid, and to perform all other obligations to be performed, by Tenant as set forth in this Lease. The acceptance of rent by Landlord from any person shall not be deemed to be a waiver by Landlord of any provision of this Lease or to be a consent to any assignment, subletting or other transfer.

~~(g) — Notwithstanding anything to the contrary set forth above, if at any time or from time to time during the term of this Lease, Tenant desires to assign, sublet or otherwise transfer its interest in all or part of the Premises or its rights under this Lease in a transaction where Landlord's consent is required under the foregoing terms of this Section 13, then the following provisions shall be applicable:~~

~~(i) — Tenant shall notify Landlord in a writing (hereinafter referred to as a "*First Transfer Notice*") setting forth Tenant's desire to enter into such a transaction. Landlord shall have the right, exercisable during the period commencing on the date Landlord receives the First Transfer Notice and ending on the date Tenant gives Landlord the Second Transfer Notice described in clause (ii) of this Paragraph 13.2(g), to terminate this Lease and relieve Tenant of each and every one of its obligations under this Lease thereafter accruing. Such termination shall be effective upon Landlord giving notice thereof to Tenant during such period of time.~~

~~(ii) — In the event that Tenant has given Landlord a First Transfer Notice and Landlord has failed to terminate the Lease pursuant to clause (i) of this Paragraph 13.2(g), at such time as Tenant has obtained a proposal, an acceptance of a proposal, or other statement of intent, commitment or other similar indication of interest for or in an assignment of this Lease, a sublease or change in user of all or a portion of the Premises (or other transfer, however structured) in a transaction for which Landlord's consent would be required under the~~

~~provisions of this Section 13, Tenant shall notify Landlord in a writing (hereinafter referred to as a "Second Transfer Notice") setting forth each of the material terms of the contemplated transaction (including the name of the contemplated transferee, assignee, sublessee or new user). Landlord shall have the right, exercisable during the thirty (30) day period after Landlord has received the Second Transfer Notice, to terminate this Lease and relieve Tenant each and every one of its obligations hereunder thereafter accruing. Such termination shall be effective upon Landlord giving notice thereof to Tenant during such period of time.~~

~~(iii) — If Landlord fails to exercise its right to terminate this Lease under clause (i) of this Paragraph 13.2(g) and Tenant fails to give Landlord a Second Transfer Notice within sixty (60) days after giving the First Transfer Notice, or if Landlord fails to exercise its right terminate this Lease under clause (ii) of this Paragraph 13.2(g) and Tenant fails to complete negotiations for a transaction on the terms and conditions described in the Second Transfer Notice to the third party transferee, assignee, sublessee or new user identified in the Second Transfer Notice within sixty (60) days after giving such Second Transfer Notice, prior to any transfer, assignment, sublease or other transaction by Tenant for which Landlord's consent would be required pursuant to this Section 13, Tenant shall again comply with all the conditions of this Paragraph 13.2(g), as if the First Transfer Notice and Second Transfer Notice had not been given by Tenant and received by Landlord.~~

~~(iv) — If Landlord fails to exercise its right to terminate this Lease under clause (i) or (ii) of this Paragraph 13.2(g) and Tenant completes negotiations for a transaction on the terms and conditions set forth in Tenant's notices with a third party within the sixty (60) day period referred to in Paragraph 13.2(g)(iii), Tenant shall deliver an executed copy of such assignment, sublease or other transfer documents to Landlord to obtain its consent as required in Paragraph 13.1 above.~~

~~(v) — If Landlord exercises its right to terminate this Lease under clause (i) or (ii) of this Paragraph 13.2(g), Landlord shall be free to lease the Premises or any portion thereof (or of other premises within the Project) to any third party, including, without limitation, any third party identified by Tenant in its First Transfer Notice or Second Transfer Notice, and Tenant shall not be entitled to any compensation, or to any portion of the rent or other consideration received by Landlord from such third party or otherwise, as a result thereof. Furthermore, Landlord's exercise of its termination right shall not be construed to impose any liability on Landlord with respect to any real estate brokerage, finders', or other fee, commission or other compensation that Tenant may incur in connection with its proposed transaction.~~

(h) Each sublease, assignment, change in user or other transfer permitted hereunder shall be subject to and made upon the following terms:

(i) Any such sublease, assignment or other transfer shall be subject to the terms of this Lease and the term thereof may not extend beyond the expiration of the term of this Lease;

(ii) The use to be made of the Premises shall be a legal use permitted by this Lease and shall maintain the character of the Project;

(iii) Such assignment, sublease or other transfer shall not violate any terms imposed on Tenant under this Lease, or negative covenant as to use contained in any deed of trust, reciprocal easement agreement, document containing covenants and restrictions, or other document or instrument affecting the Project, and shall not violate any terms imposed on Tenant under this Lease, or exclusive or other rights granted by Landlord to any other tenants in the Project; and

(iv) No sublessee, assignee, new user or other transferee shall have a right to further sublet, assign or transfer any interest herein, or change the use of the Premises or any portion thereof, except in accordance with the provisions of this Section 13.

(i) Tenant shall have the right without the consent of Landlord, but upon prior written notice to Landlord, to assign this Lease to a company incorporated or to be incorporated by Tenant provided that Tenant owns or beneficially controls all the issued and outstanding shares in the capital stock of the corporation. Such assignment shall not, however, relieve Tenant or any guarantor of Tenant's obligations hereunder from its obligations for the payment of rent and for the full and faithful observance of each of the covenants, terms and conditions contained herein.

(j) No permitted assignment, sublease or other transfer or change in use shall be valid and no assignee, sublessee, transferee or new user shall take possession of the Premises or any portion thereof or have any interest under this Lease ~~until unless, within ten (10) days after the execution of the documents governing such transaction,~~ Tenant shall deliver to Landlord a duly executed duplicate original of such documents, each of which documents shall be in form reasonably satisfactory to Landlord and shall provide that (i) the assignee, sublessee, new user or other transferee approved by Landlord assumes Tenant's obligations for the payment of rent and for the full and faithful observance and performance of each of the covenants, terms and conditions contained herein, and (ii) that said assignee, sublessee, new user or transferee will, at Landlord's election, attorn directly to Landlord in the event Tenant's Lease is terminated for any reason. A duplicate original of each of such documents shall be accompanied by a certified resolution of the board of directors of Tenant and of such assignee, subtenant, new user or transferee, in each case if it is a corporation, which resolution authorizes the signatories to such documents to execute same in the name and on behalf of the corporation purportedly executing same.

- 13.3 Leasehold Mortgage. ~~Landlord may grant or withhold its consent in its sole and absolute discretion to any proposed mortgage, pledge or hypothecation by Tenant of its rights and interests in the Premises or any portion thereof or in this Lease. Notwithstanding the forgoing, Landlord hereby consents to Tenant granting U.S. Bank and any successor lender a leasehold interest in this Lease, a security interest in Tenant's property located in the Premises and to Guarantor pledging its stock in Tenant. Landlord further agrees to execute an agreement with Bank and any successor lender in substantially the form attached hereto as Exhibit ??.~~

We may be somewhat unique in our requirement of a right to mortgage our leasehold interest. We negotiate a three way agreement between the landlord, the bank and us addressing landlord/lender interests in the event of a foreclosure by the lender or a termination by the landlord.

14. INDEMNITY AND INSURANCE.

14.1 Indemnity. Tenant shall indemnify, defend with counsel reasonably satisfactory to Landlord in all respects, and save harmless Landlord, its shareholders, partners, agents, representatives, stockholders, officers, directors and employees, and all persons in privity of estate with Landlord or any of such persons, from and against any and all claims, costs, losses, damages and expenses (including, but not limited to, claims made as a result of death, personal injuries, or loss of or damage to property) occurring in or arising in whole or in part, directly or indirectly, out of or in connection with the use and occupancy of the Premises, any breach of this Lease, Tenant's Work or alterations performed by or on behalf of Tenant in or to the Premises, the business conducted in the Premises, or (without limiting the foregoing) as a result in whole or in part of any acts, omissions or negligence of Tenant, or any subtenant, assignee, licensee, or concessionaire occupying or using, or having a right to occupy or use, all or any portion of the Premises, or their respective contractors, subcontractors, vendors, licensees, agents, servants, employees or other persons and entities in or about the Premises, and from and against all costs, expenses and liability occurring in or in connection with any such claim or proceeding brought thereon, including attorneys' fees, unless ~~attributable due solely to the gross negligence, or willful misconduct of~~ or breach of its obligations under this Lease by Landlord (and not required by this Lease to be insured against by Tenant). If Landlord or any other party so indemnified shall be made a party to any litigation, arbitration or other proceeding commenced by or against Tenant, then Tenant shall protect and hold all of such parties harmless, with counsel reasonably satisfactory to Landlord in all respects, and shall pay all costs, expenses and attorneys' fees incurred or paid by all of them in connection with such litigation. ~~Landlord shall indemnify, defend with counsel reasonably satisfactory to Tenant in all respects, and save harmless Tenant, its shareholders, partners, agents, representatives, stockholders, officers, directors and employees, and all persons in privity of estate with Tenant or any of such persons, from and against any and all claims, costs, losses, damages and expenses (including, but not limited to, claims made as a result of death, personal injuries, or loss of or damage to property) occurring in or arising in whole or in part, directly or indirectly, out of or in connection with the operation of the Project, any breach of this Lease, Landlord's Work or alterations performed by or on behalf of Landlord in or to the Project, or (without limiting the foregoing) as a result in whole or in part of any acts, omissions or negligence of Landlord, or any of its agents, servants, employees, and from and against all costs, expenses and liability occurring in or in connection with any such claim or proceeding brought thereon, including attorneys' fees, unless attributable to the negligence, willful misconduct of or breach of its obligations under this Lease by Tenant (and not insured or required by this Lease to be insured against by Landlord).~~ If Tenant or any other party so indemnified shall be made a party to

any litigation, arbitration or other proceeding commenced by or against Landlord, then Landlord shall protect and hold all of such parties harmless, with counsel reasonably satisfactory to Tenant in all respects, and shall pay all costs, expenses and attorneys' fees incurred or paid by all of them in connection with such litigation.

14.2 Tenant's Insurance. From and after the date the Premises are made available to Tenant for Tenant's Work as provided in Paragraph 4.2, Tenant shall be required to procure, carry and maintain in full force and effect the following insurance:

(a) Liability Insurance. Tenant shall obtain and maintain in full force and effect during the term of this Lease, at its expense, one or more policies of Broad Form Comprehensive General Liability Insurance with limits of coverage of not less than Three Million Dollars (\$3,000,000.00) each occurrence at each location, which coverage shall include commercial liability coverage, ~~employer's liability coverage~~ and, if Tenant serves or sells alcoholic beverages in or from the Premises, liquor liability coverage. In addition, Tenant shall maintain or cause to be maintained Worker's Compensation insurance with respect to all work done in and about the Premises as required by law. Tenant shall also maintain non-owned and hired automobile liability insurance with the same limits of coverage as the liability insurance Tenant is required to maintain pursuant to this Paragraph.

Not
landlord's
concern.

(b) First Party Insurance. Tenant shall obtain and maintain in full force and effect during the term of this Lease, at its expense, one or more policies of Broad Form Commercial Property Insurance, including coverage for fire, vandalism, malicious mischief and sprinkler (and earthquake sprinkler) leakage insurance (if there are any sprinklers in the Premises), on all movable trade fixtures, furniture and furnishings installed by Tenant in and about the Premises and all plate glass in the Premises. Such insurance shall be payable to Tenant and shall be in the amount equal to at least ~~eighty one hundred~~ percent (80+00%) of the replacement cost thereof. ~~Such policy or policies shall include business income insurance for direct or indirect loss of earnings attributable to all perils insured against under such Broad Form Commercial Property Insurance.~~ In addition, Tenant shall obtain and maintain, at its expense, in full force and effect during the term of this Lease, Broad Form Boiler, Machinery and Miscellaneous Apparatus Insurance on a blanket repair and replacement basis with limits for each accident in an amount not less than eighty percent (80%) of the replacement cost of all leasehold improvements and of all HVAC systems and related equipment, boilers, pressure vessels, if any, and miscellaneous electrical apparatus owned or operated by Tenant or by others (other than Landlord) on behalf of or through Tenant in the Premises, or relating to or serving the Premises. Tenant also shall procure and maintain at its expense in full force and effect during the term of this Lease (A) plate glass insurance, at full replacement value, (B) with respect to alterations, improvements and the like required or permitted to be made by or on behalf of Tenant hereunder, contingent liability and builders' all-risk insurance, ~~in an amount satisfactory to Landlord, and (C) loss of income and business interruption insurance in such amounts as will reimburse Tenant for a period of not less than one year for direct or indirect loss of earnings and extra expense attributable to all perils commonly insured against by prudent tenants or attributable to prevention of access to the Premises or the Project, or any portion thereof, as a result of such perils.~~

Who bears
risk of loss –
rent
abatement
(landlord
bears) or
tenant
required to
pay rent
during
closure and
look to its
business
interruption
insurance

(c) ~~Other Insurance.~~ Tenant shall also obtain and maintain throughout the term of this Lease, at its expense, any and every other

Too
broad.

~~form of insurance and such higher limits of coverage Landlord, acting reasonably, requires from time to time in form, in amounts and for perils against which a prudent tenant would insure.~~

(d) Policies. Each policy required to be carried by Tenant hereunder and each renewal thereof shall be issued by an insurance carrier which is an "approved carrier" in the State of California having not less than a rating of A and a financial rating of not less than Class XI, as rated in the most recently published Best's Insurance Guide, and shall contain (A) a provision that it cannot be cancelled or amended insofar as it relates to the Premises, without at least thirty (30) days prior notice to Landlord and Landlord's mortgagee(s), if any, and (B) a provision that such policy and the coverage evidenced thereby shall be primary and non-contributing with respect to any policies carried by Landlord, and that any and all coverage carried by Landlord is excess insurance. In addition, each such policy shall name Tenant, Landlord, Landlord's mortgagee(s), if any and Landlord provides the name and address of such mortgagee to the carrier, and Landlord's management agent, if any and Landlord provides the name address of such mortgagee to the carrier, as insureds, as their interests may appear. ~~Certificates~~ A duplicate original of all policies procured by Tenant in compliance with its obligation under this Section 14 (appropriately authenticated by the insurer) shall be delivered to Landlord ~~at least thirty (30) days~~ prior to the commencement of Tenant's Work or otherwise upon demand by Landlord, and thereafter, at least thirty (30) days prior to the expiration of any such policy; ~~provided, however, that if a duplicate original is not available thirty (30) days prior to commencement of Tenant's Work, Tenant shall furnish Landlord with a duplicate original of the insurance binder for such insurance together with an Additional Insured Endorsement, and provide Landlord with a duplicate original of the policy when such duplicate original first becomes available to Tenant (which shall, in all events, be not less than five (5) days prior to the commencement of Tenant's Work).~~ In the event of Tenant's failure, in whole or in part, at any time during the Term hereof, to obtain insurance required to be carried by Tenant under the provisions hereof or to provide such evidence hereof in timely fashion, Landlord shall have the right (but shall not be obligated) upon ten (10) days written notice of its intent to do so, to procure such insurance and Tenant shall pay to Landlord the reasonable costs and expenses thereof together with an additional amount equal to ten percent (10%) thereof as an administrative fee. Subject to Landlord's prior approval, Tenant may provide all or any of the property insurance required pursuant to this Section 14 by blanket policies covering all or a substantial number of Tenant's locations, provided that Landlord's coverage shall not be impaired or diminished thereby, subject to the receipt by Landlord of certified copies of the coverage sections for the Premises ~~and Landlord's approval thereof, not to be unreasonably withheld or delayed.~~

(e) Insurance Coverage Not Limit of Liability. In no event shall the limits of coverage of any insurance policy maintained by Tenant, whether pursuant to the requirements of this Lease or otherwise, be deemed to limit Tenant's liability (under this Lease or otherwise) to or for the perils insured or required to be insured against by Tenant.

14.3 Landlord's Insurance. Subject to and in consideration of Tenant's compliance with its obligations under Paragraph 14.2 hereof, ~~to the extent the same is available from Landlord's insurance carrier, and unless Landlord elects to self insure,~~ Landlord shall keep the Premises and the building of which they are a part and the Project insured against loss or damage by fire

and such other perils as commonly covered in a Broad Form Commercial Property Insurance Policy ~~as Landlord deems appropriate (which may include~~ earthquake and/or flood), with extended coverage endorsements, in amounts (less applicable deductibles) equal to at least the replacement cost thereof above foundations. Such insurance shall cover improvements in the Premises owned by Landlord to the extent that the same are customarily insurable as part of the realty, but shall not include the cost of restoration of Tenant's movable trade fixtures, furniture, furnishings or decorative effects. In addition, such insurance shall be subject to and included in the insurance referred to in Paragraph 7.2(a)(i)(dd). Such insurance may be obtained through blanket or umbrella policies in the sole discretion of Landlord. *Insert a mirror provision requiring Landlord to carry liability insurance including contractual indemnifications.*

Consider how this section interacts with waiver of subrogation.

14.4 Increase in Insurance Premiums. Other than items typically used in the operation of a restaurant, Tenant shall not keep, use, sell or offer for sale in or upon the Premises any article which may be prohibited by (or which may result in an increase in the premium for) any fire insurance policy in force from time to time covering the Premises or the Project. ~~If Tenant's violation of the preceding sentence (a) the occupancy of the Premises; (b) the conduct of business in the Premises; (c) the sale of any merchandise from or on the Premises (whether or not Landlord has consented to the sale of such merchandise) or in any other portion of the Project where permitted by Landlord; or (d) any acts or omissions of Tenant or persons or entities claiming by, through or under it in the Project or any part thereof,~~ causes or results in any increase in premiums for the insurance carried from time to time by Landlord with respect to the Project, Tenant shall pay any such increase in premiums as Additional Rent promptly after invoices for such additional premiums are rendered by Landlord, ~~together with an additional amount equal to ten percent (10%) thereof to compensate Landlord for its administrative burden occasioned thereby.~~ In determining whether increased premiums are caused by or result from the use or occupancy of the Premises, or the sale of any article therein or therefrom, a schedule issued by the organization computing the insurance rate on the Project showing the various components of such rate (as such rates may change from time to time with respect to any of such components) shall be conclusive evidence of the several items and charges which make up such rate. Tenant shall comply promptly with all reasonable requirements of the Insurer's Advisory Organization and of any insurance policy now or hereafter in effect, pertaining to or affecting the Premises or the Project.

14.5 Risk. Tenant agrees to use and occupy the Premises and to use all other portions of the Project which it is permitted to use by the terms of this Lease at its own risk, and hereby (for itself and all persons claiming under, by or through Tenant) releases Landlord, its agents, servants, officers, directors, constituent partners, contractors and employees, from any and all costs, losses, damages, liabilities, claims and demands of every kind, nature and description resulting from any accident, damage, injury, breaking and entering or other crime, or other event, whether or not foreseeable, occurring therein, ~~unless arising from due solely to Landlord's or its agents', employees' or contractors' gross negligence, or willful misconduct or breach of this Lease. Landlord shall have no responsibility or liability for any loss of, or damage or injury to, fixtures, improvements, Tenant's Work, merchandise or other personal property of Tenant from any source whatsoever.~~

14.6 Waiver of Subrogation. Landlord and Tenant each hereby waives any rights it may have against the other Landlord, its

employees or agents to recover for loss or damage to property arising from a casualty insured against or required to be insured against hereunder. In addition, all insurance policies carried by each party Tenant pursuant to this Section 14, including but not limited to contents, fire and casualty insurance, shall expressly waive any right on the part of the such Tenant's insurer against the other Landlord, its employees or agents for damage to or destruction of the Premises or any other property resulting from the acts, omissions or negligence of the other party Landlord, its employees or agents.

A mutual waiver of subrogation is critical. Watch for indemnification provisions that undo the waiver of subrogation.

15. UTILITIES.

15.1 Separate Metering. Tenant shall apply to the applicable utility company or municipality for all gas, water, telephone and all other utility services required by Tenant for use in the Premises, and shall be responsible for the connection and installation thereof (subject to Exhibit B). Tenant promptly shall pay for all water, gas, heat, light, electricity, sewer charges, rubbish removal, telephone service and all other services and utilities which may from time to time be supplied to the Premises, together with any and all taxes thereon. If any such services are not separately metered or charged to Tenant, Tenant shall pay a reasonable proportion, to be reasonably determined by Landlord, of all charges jointly metered with other premises. ~~Tenant Landlord~~ shall pay the cost of a separate meter or submeter for water if so required by Landlord in its sole discretion. If any such utility charges and expenses are not paid when due, Landlord may, but shall not be required to, upon at least ten days advance written notice of its intent to do so, pay the same, and any amount so paid by Landlord, together with an administrative fee equal to ten percent (10%) thereof, shall thereupon become due to Landlord from Tenant as Additional Rent. Any and all utility connection fees and permits or assessments required by Tenant for its use or occupancy of, in, on or from the Premises shall be paid by Landlord Tenant at its sole cost and expense. Landlord shall not be liable in damages or otherwise to any person or entity for any failure or interruption of any utility service being furnished to the Premises unless Landlord or its agents, employees or contractors caused such failure or interruption, and no such failure or interruption shall entitle Tenant to terminate this Lease or to receive any abatement of the rent and/or other amounts that it is required to pay pursuant hereto unless such failure or interruption continues for more than twenty-four hours in which case all monetary obligations under this Lease shall abate for the duration of the failure or interruption. ~~In no event shall Tenant use any apparatus or device in the Premises requiring excess lighting, or requiring current in excess of 110 volts, or which in any way increase the amount of electricity or water furnished or supplied, or required to be furnished or supplied, for use in the Premises.~~

15.2 Alternative Provider of Electricity.

(a) Landlord Consent Required. If Tenant desires to utilize services of an electricity service provider ("AEP") other than the public utility that is servicing the Project as of the date of Tenant's execution of this Lease, no such AEP shall be permitted to provide service to Tenant or to install its lines or other equipment within the Project without obtaining the prior written consent of Landlord, which shall not be unreasonably withheld, delayed or conditioned.

(b) Conditions to Consent. Unless all of the following conditions are satisfied to Landlord's satisfaction in a written agreement between the AEP and Tenant or by any other means acceptable to Landlord, it shall be reasonable for Landlord to refuse its consent:

(i) No Expense to Landlord. Landlord shall incur no expense whatsoever with respect to any aspect of AEP's provision of its services, including without limitation, the cost of installation, service, and materials;

(ii) AEP Supplies Insurance and Financial Verification. Prior to commencement of any work in or about the Premises and/or the Project by AEP, AEP shall supply Landlord with verification that, in Landlord's sole judgment, AEP is (A) properly insured, and (B) financially capable of covering any uninsured damage;

(iii) AEP Will Follow Building Rules. Prior to the commencement of any work in or about the Project by AEP, AEP shall agree in writing to abide by such rules and regulations, job site rules, and such other requirements as reasonably determined by Landlord to be necessary to protect the interest of the Project;

(iv) Sufficient Space for Equipment and Materials. Landlord reasonably determines that there is sufficient space in the Project for the placement of all of AEP's equipment and materials, including without limitation, in the electricity risers;

(v) AEP in Good Standing. AEP is, in Landlord's sole judgment, licensed and reputable, as shown in documents acceptable to Landlord;

(vi) Compensation for Space. AEP agrees, in a license agreement signed by Landlord and AEP, to compensate Landlord the amount determined by Landlord for (A) space used in the Project for the storage and maintenance of AEP's equipment ("AEP's Space"); and (B) all costs that may be incurred by Landlord in arranging for access by AEP's personnel, security for AEP's equipment, and any other such costs as Landlord may incur;

(vii) AEP Subject to Landlord's Supervision. AEP agrees that Landlord shall have the right to supervise AEP's performance of any work on or about the Project, including, without limitation, any installations or repairs;

(viii) AEP Must Give Landlord Access. AEP agrees that Landlord shall have the right to enter AEP's Space at any time in the event of an emergency and at all reasonable times and upon reasonable notice for the purpose of (A) inspecting same; (B) making repairs to AEP's Space and performing work therein as may be necessary, in Landlord's judgment; or (C) exhibiting AEP's Space for purposes of sale, lease, ground lease, or financing.

(c) Consent Not a Landlord Warranty. Landlord's consent under this Section shall not be deemed any kind of warranty or representation by landlord, including without limitation, as to the suitability or competence of AEP.

(d) Tenant Pays Expenses. Tenant acknowledges and agrees that all electricity services desired by Tenant shall be ordered and utilized at the sole expense of Tenant.

(e) Tenant Responsible for Service Interruptions. Tenant agrees that to the extent service by AEP is interrupted, curtailed, or discontinued for whatever reason, Landlord shall have no obligation or liability with respect thereto.

(f) Tenant Indemnifies Landlord. Tenant shall indemnify and hold harmless Landlord for all losses, claims, demands, expenses (including attorneys' fees and court costs), and judgments against Landlord caused by or arising out of, either directly or indirectly, any acts or omissions by AEP.

(g) Landlord's Refusal to Consent. Notwithstanding any provision herein to the contrary, the refusal of Landlord to consent to any prospective AEP shall not be deemed a default or breach by Landlord of its obligations under this Lease unless and until Landlord is adjudicated in a final and unappealable court decision to have acted recklessly or maliciously with respect to its refusal.

(h) Right to Make Tenant Change AEP. Notwithstanding Tenant's rights hereunder, Landlord shall have the right at any time and from time to time during the Lease Term to require Tenant to contract for electricity service with a different AEP or AEPs ("Landlord's AEP").

16. **PERSONAL PROPERTY TAXES.** Tenant shall pay, or cause to be paid, before the same are due, any and all taxes, fees and levies charged or assessed or which become payable during the term hereof upon any portion or all of Tenant's leasehold estate, ~~leasehold improvements~~, equipment, furniture, fixtures, and any other personal property located in the Premises. In the event any or all of Tenant's ~~leasehold improvements~~, equipment, furniture, fixtures and other personal property shall be assessed and taxed with the real property, Tenant shall pay to Landlord the share of such taxes reasonably allocated by Landlord to Tenant and its property within ~~thirty-ten (30+0)~~ days after delivery to Tenant by Landlord of a statement in writing setting forth the amount of such taxes so allocable and the basis of such allocation.

17. **RULES AND REGULATIONS.** Tenant shall fully and faithfully observe and comply with each of the rules and regulations as set forth in Exhibit H (as amended, modified or restated in reasonable and nondiscriminatory form, from time to time, the "Rules and Regulations") and any reasonable and nondiscriminatory amendments or modifications thereto that Landlord may from time to time promulgate relating to the Project or any portion thereof. The rules and regulations shall be binding upon Tenant upon delivery of a copy of them to Tenant. Landlord shall not be responsible to Tenant for the nonperformance of any of said rules and regulations by any other tenants or occupants of the Project.

Should be uniformly enforced!

18. **HOLDING OVER.** If Tenant remains in possession of the Premises or any part thereof after the expiration of the Term, such occupancy shall be a tenancy from month to month at a rental in an amount equal to the amount of the last monthly Minimum Rent payable by Tenant hereunder plus, after thirty (30) days advance written notice of such increase, an increase equal to ~~twenty-five one hundred~~ percent (~~25+00~~%) of the amount of the last monthly Minimum Rent payable by Tenant hereunder, plus Percentage Rent and all other charges payable hereunder, and upon

Avoid situations where seemingly agreeable holdovers (e.g. while negotiating extension) results in unanticipated rent increase. GFN voids increased rent.

all the terms hereof applicable to a month to month tenancy. Nothing contained in this Section 18 shall be construed as consent to such holding over by Tenant. If Tenant fails to surrender the Premises upon the termination of this Lease, Tenant shall be liable for, and shall indemnify, defend and hold harmless Landlord from, all damages, claims, costs, losses and liabilities directly or indirectly resulting from such failure, including, without limiting the generality of the foregoing, any and all claims made by a succeeding tenant arising out of such failure to surrender the Premises.

19. **ENTRY BY LANDLORD.** Landlord reserves, and it and its agents and employees shall, upon reasonable prior written notice, at any and all reasonable times have, the right to enter the Premises to inspect the same, to submit or display said Premises to actual or prospective purchasers, encumbrancers and tenants, to comply or attempt to comply with requirements of law or insurance carriers or regulators imposed on it, to post notices of non-responsibility, to repair the Premises and any portion of the building of which the Premises are a part that Landlord may deem necessary or desirable, without abatement of rent or any amounts due to Landlord pursuant hereto, and may for that purpose erect scaffolding and other necessary structures where reasonably required by the character of the work to be performed. The entrance to the Premises shall not be unreasonably blocked thereby, and further the business of Tenant shall not be interfered with unreasonably. Notwithstanding the foregoing, if Landlord's exercise of the rights reserved hereunder interferes with Tenant's operations in the Premises for more than twenty-four (24) hours, all monetary obligations under this Lease shall abate for the duration of the Lease. If Landlord and Tenant have not executed a new lease or an extension of this Lease prior to the date which is six (6) months prior to the termination of the term hereof, as previously extended, Landlord shall be permitted to post, and to enter the Premises for the posting of, "For Lease" or similar signs on or in the Premises provided such signs shall be of a size, location and appearance as to not interfere with Tenant's signage, visibility, view and operations. Once said signs are posted by Landlord, Tenant shall not remove or alter same, and shall not in any way hinder their visibility. Tenant hereby waives any claim for damages or for any injury or inconvenience to or interference with Tenant's business, any loss of occupancy or quiet enjoyment of the Premises, and any other loss occasioned by such posting in conformance with this sentence ~~thereby~~. For each of the aforesaid purposes, Landlord shall, until the date Tenant has completed Tenant's Work, have and retain a key with which to unlock all of the doors in, upon and about the Premises, excluding Tenant's vaults, safes and files. Upon completion of Tenant's Work, Tenant shall change all locks on all doors and windows in the Premises at Tenant's cost and expense. Landlord shall have the right at all times to use any and all means which Landlord may deem appropriate to open said doors in an actual or perceived emergency, in order to obtain entry to the Premises, without liability to Tenant except for any failure to exercise due care for Tenant's property, and any entry to the Premises obtained by Landlord by and of said means, or otherwise, shall not under any circumstances be construed or deemed to be a forcible or unlawful entry into, or a detainer of, the Premises, or an eviction of Tenant from the Premises or any portion thereof.

Landlord will want the right to enter in event of an emergency

20. **TENANT'S DEFAULT.** The occurrence of any one or more of the following events shall constitute a default and breach of this Lease by Tenant:

20.1 **Vacating or Abandonment.** The vacating or abandonment of the Premises by Tenant.

20.2 **Monetary Default.** The failure by Tenant to make any payment of rent (including, without limitation, Minimum Rent, Percentage Rent and Additional Rent) or any other payment required to be made by Tenant hereunder, within five business ~~three~~ days after written notice from Landlord (which notice

Assure adequate time to function within regular business practice for purpose of curing default. Carve out 1 to 2 annual exceptions to cover the odd occurrence.

shall be in lieu of and not in addition to any required payment or quit notice). For the purposes of this Lease, all amounts payable by Tenant under this Lease shall be considered rent.

20.3 Non-Monetary Default. The failure by Tenant to observe or perform any of the covenants, conditions or provisions of this Lease to be observed or performed by Tenant, other than those described in the other provisions of this Section 20 where such failure shall continue for a period of ~~thirty-ten (30+0)~~ days after written notice thereof by Landlord to Tenant; provided, however, that if the nature of Tenant's default ~~(other than a default under Paragraph 1.8, 3.1, 3.2 or 8, as to any of which default there shall be no cure period)~~ is such that it is susceptible to cure within thirty (30) days but more than ~~thirty (30) ten (10)~~ days are reasonably required for its cure, then Tenant shall not be deemed to be in default if Tenant commences such cure within said ~~thirty ten (30+0)~~ day period, and thereafter diligently and continuously prosecutes such cure to completion, and in fact completes such cure within thirty (30) days after such notice is given to it by Landlord.

~~20.4 Habitual Default. The failure by Tenant to make any payment of rent or any other payment required to be made by Tenant hereunder, or to satisfy any other obligation imposed on it under this Lease, as and when due, and whether or not subsequently cured, on more than three (3) occasions during any consecutive period of twelve (12) months during the Term of the Lease. Tenant acknowledges that the purpose of this provision is to prevent repetitive defaults by Tenant hereunder, because such repetitive defaults likely will impose a hardship upon Landlord.~~

Some form of this is probably reasonable; negotiate the term and number of defaults; attempt to limit to similar types of defaults.

20.5 Bankruptcy. The making by Tenant or any guarantor of Tenant's obligations hereunder of any general assignment or general arrangement for the benefit of creditors; or the filing by or against Tenant or such guarantor of a petition to have Tenant or such guarantor, respectively, adjudged a bankrupt, or a petition for reorganization or arrangement under any law relating to bankruptcy (but only if, in the case of a petition filed against Tenant or such guarantor, the same is not dismissed within sixty (60) days thereafter); or the appointment of a trustee or a receiver to take possession of substantially all of Tenant's or such guarantor's assets located at the Premises or of Tenant's interest in this Lease, but only if possession is not restored to Tenant or such guarantor within thirty (30) days thereafter; or the attachment, execution or other judicial seizure of substantially all of Tenant's or such guarantor's assets located at the Premises (or, in the case of a guarantor, anywhere) or of Tenant's interest in this Lease, but only if such attachment, execution, seizure is not discharged within thirty (30) days; or the acknowledgement by Tenant or such a guarantor in writing of its inability to pay its obligations generally as they come due.

~~20.6 Insolvency. The insolvency of Tenant or any guarantor of Tenant's obligations hereunder or a reduction by more than twenty-five percent (25%) in Tenant's or such guarantor's net worth from its net worth as of the date of this Lease.~~

~~20.7 False Statements or Representations. The discovery by Landlord that any financial or other statement given to Landlord, or any representation or warranty made to Landlord, by Tenant, any assignee of Tenant, any subtenant of Tenant, any successor-in-interest of Tenant or any guarantor of any of Tenant's obligations hereunder, or any of them, was false or misleading in any respect when made.~~

Some form of this is probably appropriate. Negotiate regarding materiality, intentional and avoiding incurable default, particularly if arises from acts of third party.

21. REMEDIES IN DEFAULT.

21.1 Landlord's Remedies. In the event of any default or breach by Tenant, Landlord may at any time thereafter, in its sole discretion, with or without notice or demand and without limiting Landlord in the exercise of a right or remedy which Landlord may have by reason of such default or breach:

(a) Terminate Tenant's right to possession of the Premises by any lawful means, in which case this Lease shall terminate and Tenant immediately shall surrender possession of the Premises to Landlord. In such event Landlord shall be entitled to recover from Tenant all damages incurred by Landlord by reason of Tenant's default including, but not limited to, (i) the cost of recovering possession of the Premises; (ii) the worth at the time of the award of any unpaid rent which had been earned at the time of termination, but which had not been paid; (iii) the worth at the time of the award of each obligation of Tenant which has accrued prior to the date of such termination, but which has not been satisfied; (iv) the worth at the time of the award of the amount by which the unpaid rent which would have been earned after the termination until the time of the award exceeds the amount of such rental loss that Tenant proves could reasonably have been avoided; (v) expenses of placing the Premises in good order, condition and repair; (vi) expenses of reletting, including necessary renovation and alteration of the Premises; (vii) reasonable attorneys' fees; (viii) the worth at the time of award as determined by the court having jurisdiction thereof of the amount by which the unpaid Minimum Rent, Percentage Rent, Additional Rent, Adjustments and other amounts required to be paid by Tenant pursuant to this Lease for the balance of the term after the time of such award exceeds the amount of such loss for the same period that Tenant proves reasonably could be avoided; (ix) that portion of any leasing commission paid by Landlord and applicable to the unexpired term of this Lease; and (x) all other incidental and consequential damages, including, without limitation, damages for diminution in the value of the Project arising out of breach by Tenant of its operating covenant set forth in Paragraphs 29.1 and 29.2, below. As used in Paragraphs 21(a)(ii),(iii) and (iv), the "worth at the time of award" is computed by allowing interest at a rate equal to the lesser of (A) the default rate of one and one-half percent (1½%) per month (the "Default Rate") or (B) the maximum rate permitted by law. As used in Paragraph 21.1(a)(viii), the "worth at the time of award" is computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus one percent (1%);

(b) Maintain Tenant's right to possession, in which case this Lease shall continue in full force and effect whether or not Tenant shall have abandoned the Premises. In such event Landlord shall be entitled to enforce all of Landlord's rights and remedies under this Lease, including the right to recover the rent and any other charges and Adjustments as may become due hereunder;

(c) Seek specific performance by Tenant, in the case of breach by Tenant of one or more of its covenants herein, including, among others, its covenant of continuous operation set forth in Paragraphs 29.1 and 29.2, below;

(d) Exercise the remedy described in California Civil Code section 1951.4 (lessor may continue lease in effect after lessee's breach and abandonment and recover rent as it becomes due, if lessee has the right to sublet or assign, subject only to reasonable limitations);

(e) Exercise the remedy described in California Civil Code section 1954; and/or

(f) Pursue every and any other remedy or right now or hereafter available to Landlord under the laws or judicial decisions of the State in which the Premises are located.

21.2 Cumulative Remedies. It is further agreed that Landlord's rights and remedies under this Lease, at law and in equity are distinct, separate and cumulative remedies, which may be exercised consecutively in any order, concurrently, or in any other manner and order selected by Landlord, and that no one of them, whether or not exercised by Landlord, shall be deemed to be in exclusion of any of the others.

21.3 Acceptance of Rent. No receipt of moneys by Landlord from Tenant after termination of this Lease, or after the giving of any notice of termination of this Lease, shall reinstate, continue or extend the Term of this Lease or affect any notice theretofore given to Tenant, or operate as a waiver of the right of Landlord to enforce the payment of rent and any other sum or sums of money and other charges herein reserved and agreed to be paid by Tenant then due or thereafter falling due, or operate as a waiver of the right of Landlord to recover possession of the Premises by proper remedy, except as herein otherwise expressly provided, it being agreed that after the service of notice to terminate this Lease or the commencement of suit or summary proceedings, or after final order or judgment for the possession of the Premises, Landlord may demand, receive and collect any moneys due or thereafter falling due without in any manner affecting such notice, proceeding, order, suit or judgment, except as herein otherwise specifically provided, all such moneys collected being deemed payments on account of the use and occupation of the Premises, or at the election of Landlord, on account of Tenant's liability hereunder.

21.4 Landlord's Right to Cure. In the event of any breach of this Lease by Tenant, Landlord may (but shall not be obligated to) at any time, after ~~ten-five (105)~~ (105) days' written notice or such shorter period as may be provided in any other provision of this Lease, cure such breach for the account and at the expense of Tenant. If Landlord at any time so elects or is compelled by any other person to cure such breach or is compelled to incur any other expense arising out of a breach by Tenant (including without limitation, reasonable attorneys' fees and disbursements in instituting, prosecuting or defending any suits, actions or proceedings to enforce Landlord's rights under this or any other Paragraph of this Lease or otherwise) the sum or sums so paid by Landlord, with all interest, costs and damages, shall be paid by Tenant to Landlord within five (5) days following written demand. Such expenses may be recovered in the same action or proceeding forming the basis of default.

~~21.5 No Counterclaims. Tenant hereby waives its right to plead any counterclaim unrelated to this Lease or Tenant's occupancy of the Premises, or offset, in any action or proceeding brought by Landlord against Tenant for non-payment of Rent or default hereunder. This shall not, however, be construed as a waiver of Tenant's right to assert any claim in a separate action brought by Tenant.~~

21.6 Additional Rent. Landlord shall have the same rights and remedies upon Tenant's failure to pay Additional Rent as are available to Landlord upon Tenant's failure to pay Minimum Rent.

21.7 Landlord's Relief from Obligations. Landlord shall be under no obligation to observe or perform any covenant of this Lease on its part to be observed or performed which accrues after the date of any default by Tenant hereunder.

~~21.8 Waiver of Redemption Rights. Tenant hereby waives, to the maximum extent permitted by law, any right of redemption or relief from~~

~~forfeiture under the law of the governing jurisdiction, or under any other present or future law, in the event Tenant is evicted or Landlord takes possession of the Premises by reason of a default by Tenant hereunder, including without limitation Section 1179 of the California Code of Civil Procedure.~~

~~21.9~~ 21.9 ~~—~~ Calculation of Rent Due After Re-Entry. For purposes of this Section 21, the rent due for any calendar month after re-entry by Landlord shall be deemed to be the average monthly rent, including all Minimum Rent, Percentage Rent, Additional Rent, Adjustments, and other charges, which shall have been payable pursuant to this Lease for the twelve (12) month period immediately prior to such re-entry, or for such shorter period of time as this Lease shall have been in effect.

21.10 Mitigation of Damages. In the event of a default by Tenant, Landlord shall act in a commercially reasonable manner to mitigate its damages.

22. **DEFAULT BY LANDLORD; LIMITATIONS ON REMEDIES.** Landlord shall not be in default unless Landlord fails to perform obligations required of Landlord within a reasonable time, ~~but in no event shall Landlord be deemed in default if such failure is cured within thirty (30) days after written notice by Tenant to Landlord, and to the holder of each mortgage or deed of trust covering the Premises whose name and address shall have theretofore been furnished to Tenant in writing,~~ specifying the obligation(s) that Landlord has failed to perform and that such failure, if it continues, shall constitute a default hereunder; provided, however, that if the nature of Landlord's obligation is such that more than thirty (30) days are required for the discharge thereof then Landlord shall not be in default if Landlord commences performance within such thirty (30) day period and thereafter diligently prosecutes the same to completion. ~~In no event shall Tenant have the right to terminate this Lease as a result of Landlord's default and Tenant's remedies shall be limited to money damages and/or an injunction.~~ Recourse to Landlord for the recovery of damages by Tenant (or persons claiming by, through or under Tenant) shall be limited to Landlord's interest in the Project at the time that Landlord's liability is established, including rents therefrom, subject to the rights of holders of all mortgages, deeds of trust and other liens thereon. ~~Tenant acknowledges that Landlord may not now or in the future own the entire property consisting of the Project, and Tenant agrees to waive and hereby waives any and every violation or breach of this Lease occurring by virtue of any act or omission to act with respect to property not owned by Landlord. In the event of any such violation or breach, Tenant covenants that it shall not attempt to reduce or abate its rent, or pursue any other potential remedy against Landlord. No action may be brought by Tenant more than six (6) months after the occurrence of the event (including, without limitation, the making of a representation by Landlord or the failure of Landlord to act in accordance with the obligations imposed on it) which is the basis for Tenant's claim.~~

Be sure to obtain remedies for landlord default and to avoid language that states "sole remedy". Maintain all other remedies available under the law.

This is a unique provision. Landlord must have sufficient control to stand behind the commitments made in the lease.

23. **RECONSTRUCTION.**

23.1 Destruction of the Premises

Some leases will limit landlord's responsibility to commence based upon receipt of insurance proceeds. You will want to delete or negotiate a reasonable time period after which landlord must commence regardless of receipt of proceeds.

(a) If the Premises are at any time destroyed or damaged (including, without limitation, smoke and water damage) as a result of fire, the elements, accident or other casualty required to be insured against by Landlord pursuant to Paragraph 14.3 hereof or otherwise insured against by Landlord ~~and not caused by Tenant~~, and if as a result of such occurrence:

Waiver of subrogation and interplay of insurance issue.

(i) The Premises are rendered untenantable only in part, this Lease shall continue in full force and effect and

Landlord shall, subject to Paragraph 23.3 hereof, commence diligently to reconstruct, rebuild or repair the Premises to the extent only of Landlord's Work set out in Exhibit B, and exclusive of Tenant's Work as therein set out (we need to discuss who insures those components covered by the TI Allowance), and only a portion of the Minimum Rent, Adjustments and other amounts that Tenant otherwise would be obligated to pay (but not Tenant's obligation to pay Percentage Rent, ~~Adjustments or other amounts pursuant hereto~~), equal to the ratio from time to time of the area of the portion of the Premises so rendered and remaining untenable to the area of the entire Premises until the Premises have been restored and rendered tenable by Landlord to the extent of Landlord's Work as set out in Exhibit B, plus the period described in 23.1(b) below, shall be abated. Provided however, if the portion of Premises left tenable is not sufficient in size or nature for Tenant to economically operate its business, then the entire Premises shall be considered untenable and subsection (ii) below shall apply.

(ii) The Premises are rendered wholly untenable, Landlord shall, subject to Paragraph 23.3 hereof, commence diligently to reconstruct, rebuild or repair the Premises to the extent of Landlord's Work as set out in Exhibit B (we need to discuss who insures those components covered by the TI Allowance), and ~~only~~ Minimum Rent, Adjustments and other amounts that Tenant would otherwise be obligated to pay (but not Tenant's obligation to pay Percentage Rent, ~~Adjustments or other amounts pursuant hereto~~) shall abate entirely from the date of the destruction or damage until the Premises have been restored and rendered tenable by Landlord to the extent of Landlord's Work as set out in Exhibit B, plus the period described in 23.1(b) below.

(b) Upon Tenant being notified in writing by Landlord, its architect or other representative that reconstruction of Landlord's Work as set out in Exhibit B has been completed to the extent necessary for Tenant to commence Tenant's Work, Tenant shall promptly commence and thereafter diligently and continuously reconstruct Tenant's Work, and if the Premises have been closed for business, Tenant shall reopen forthwith (but in no event later than on the date that is a number of days after such notice is given to Tenant equal to the number of days set forth in Paragraph 1.9 and Section 4 with respect to the initial determination of the Commencement Date), fully stocked, fixturized and staffed.

- 23.2 Uninsured Casualty and Damage at the End of the Term. ~~In the event the Premises are damaged as a result of any cause other than the perils covered by Landlord's fire and extended coverage insurance, then Landlord shall forthwith repair the same, provided the extent of the destruction is less than five percent (5%) of the then full replacement cost of the Premises. In the event the destruction of the Premises is to an extent of five percent (5%)~~ (this seems too low; I would like to discuss the amount or other manner of measuring) or more of the full replacement cost and (i) such damage is not covered by the insurance carried or required to be carried by Landlord or Tenant under this Lease, or (ii) the damage occurs during the last twenty-four months of the lease term (allowing for any extensions available to tenant which it may then elect to exercise) then (i) the party incurring the uninsured loss or (ii) either party at the end of the Lease term ~~Landlord~~ shall have the

option; (1) to repair or restore such damage, this Lease continuing in full force and effect, but the Minimum Rent and additional charges to be proportionately reduced as provided in Paragraph 23.1(a), above; or (2) give notice to the other party Tenant at any time within sixty (60) days after such damage, terminating this Lease as of the date specified in such notice, which date shall be not more than thirty (30) days after the giving of such notice. In the event either party Landlord gives such notice, this Lease shall expire and all interest of Tenant in the Premises shall terminate on the date so specified in such notice, and the Minimum Rent and other charges, reduced by a proportionate reduction, based upon the extent, if any, to which such damage interfered with the business carried on by Tenant in the Premises, shall be paid up to the date of said termination.

The larger tenant's investment, the more interest it has in binding the landlord to rebuild. Keep in mind, much of tenant's investment (going concern value) is not recoverable through insurance. Conversely, Landlord does not want to be obligated to rebuild due on one tenant's demand.

23.3 Damage to the Project. If more than twenty-five percent (25%) of the leasable area of the Project is damaged by fire or other cause, notwithstanding whether the Premises may be affected or unaffected by such fire or other casualty and Landlord is terminating leases for at least twenty-five percent (25%) of the space leased to other Tenants, Landlord shall have the right, to be exercised by notice in writing to Tenant within sixty (60) days from and after such occurrence, to elect to cancel and terminate this Lease. Upon the giving of such notice to Tenant, the term of this Lease shall expire by lapse of time upon the sixtieth (60) third (3rd) day after such notice is given, and Tenant shall thereupon vacate the Premises and surrender the same to Landlord.

~~23.4 Damage at the End of the Term. Notwithstanding anything to the contrary contained in this Paragraph, Landlord shall not have any obligation whatsoever to repair, reconstruct or restore the Premises if damage to the Premises or the Project results from any casualty that occurs during the last twenty-four months of the term of this Lease or any extension thereof.~~

Some mutual provision is usually appropriate.

23.5 Damage to Tenant's Property. Landlord shall not be required to repair any injury or damage by fire or other cause to, or to make any repairs or replacements of, any leasehold improvements (same comment as above), fixtures, equipment, inventory or other personal property of Tenant.

23.6 Waiver. The provisions of Sections 1932(2) and 1933(4) of the California Civil Code are hereby waived by Tenant, it being the intention of the parties that the express terms of this Lease shall control under any circumstances in which those provisions might otherwise be applicable. We need to discuss these waivers.

24. EMINENT DOMAIN.

24.1 Taking Resulting in Termination. In the event the entire Premises shall be appropriated or taken under the power of eminent domain by any public or quasi-public authority, agency or instrumentality, this Lease shall terminate and expire as of the date of such taking, and Landlord and Tenant shall each thereupon be released from any further liability accruing under this Lease (except that neither party shall Tenant shall not be released from those liabilities and obligations that, pursuant to the other terms and conditions of this Lease, expressly survive the termination of this Lease). In the event more than twenty-five percent (25%) of the leasable square footage of the Premises or such smaller

portion as may result in the remaining premises to be inadequate for the economical operation of Tenant's business is taken under the power of eminent domain by any public or quasi-public authority, agency or instrumentality, or if by reason of any appropriation or taking of a portion of the Premises, regardless of the amount so taken, the remainder of the Premises is not a contiguous parcel of property, either Landlord or Tenant shall have the right to terminate this Lease as of the date Tenant is required to vacate the portion of the Premises so taken, upon giving notice in writing of such election within ~~sixty (60) thirty (30)~~ days after receipt by Tenant from Landlord of written notice that said Premises have been so appropriated or taken. Landlord shall, after learning of any appropriation or taking, give prompt notice in writing thereof to Tenant.

24.2 Award. If this Lease is terminated as provided in Paragraph 23.1, Landlord shall be entitled to the entire award made and compensation paid in connection with the taking of the Premises or any portion thereof. The rental and other charges for the last month of Tenant's occupancy shall be prorated to the date of such taking. Tenant's right to receive compensation or damages for its fixtures and personal property shall not be affected in any manner hereby. Tenant waives the benefit of Section 1265.150 of the California Code of Civil Procedure. We need to discuss these waivers.

Be careful not to limit your remedy under the applicable law for the governing jurisdiction.

24.3 Partial Taking. If neither Landlord nor Tenant elects so to terminate this Lease, Tenant shall continue to occupy that portion of the Premises which shall not have been appropriated or taken as herein provided or, if less than twenty-five percent (25%) of the Premises shall be appropriated under the power of eminent domain by any public or quasi-public authority, agency or instrumentality, and the remainder thereof is a contiguous parcel of property, then in either such event the following shall occur: (a) at Landlord's cost and expense and as soon as reasonably possible, Landlord will restore the Premises on the land remaining to a complete unit of like quality and character (but not necessarily of like size or layout, so long as the resulting size and design is reasonably acceptable to Tenant for the operation of its business) as existed prior to such appropriation or taking; (b) the minimum annual rental provided for in Paragraph 1.11 shall be reduced on an equitable basis, taking into account the relative values of the portion of the Premises taken as compared to the portion remaining; and (c) Landlord shall be entitled to receive the total award and compensation paid pursuant to such proceedings. Tenant hereby waives any statutory rights of termination which may arise by reason of any partial taking of the Premises under the power of eminent domain.

24.4 Transfer Under Threat of Taking. For the purposes of this Section 24 only, a voluntary sale or conveyance by Landlord under threat or in lieu of condemnation shall be deemed an appropriation or taking under the power of eminent domain.

24.5 Waiver. The provisions of Sections 1265.110, 1265.120, 1265.130 and 1265.140 of the California Code of Civil Procedure are hereby waived by Tenant, it being the intention of the parties that the express terms of this Lease shall control under any circumstances in which those provisions might otherwise be applicable. We need to discuss these waivers.

25. PARKING AND COMMON AREAS. Tenant acknowledges that the Common Areas (including parking areas (if any)) of the Project are extremely limited. Such Common Areas, as they exist from time to time during the term of this Lease, shall be available for the non-exclusive use of Tenant during the full term of this Lease or any extension of the term ~~hereof, provided that the condemnation or other taking by any public authority, or sale in lieu of condemnation, of any or all of such Common Areas and parking areas shall not constitute a violation of this covenant~~. Landlord shall have the right to add

If parking is a critical component, be sure that loss of it in a condemnation triggers termination rights under the lease. Otherwise, you may find yourself obligated to operate without adequate parking.

parking and/or other areas to the Common Areas. Tenant understands and acknowledges that any portion or portions of the Project on which no buildings are erected as of the Commencement Date shall be part of the Common Areas of the Project until such time as buildings are erected thereon. Notwithstanding the foregoing, Landlord shall have the right to close, if necessary or appropriate, in Landlord's determination, all or any portion of the Common Areas to such extent as may in the opinion of Landlord or Landlord's counsel be reasonably necessary to prevent a dedication thereof or the accrual of any rights of any person or the public therein; to close temporarily all or any portion of the Common Areas to discourage non-customer use; to use portions of the Common Areas while engaged in making additional improvements or repairs or alterations to the Project or any portion thereof; to transfer, in whole or in part, any of Landlord's rights or obligations under this Paragraph to any other tenant(s), subtenant(s) or other occupant(s) of the Project, or to such other party(ies) or designee(s) as Landlord may from time to time determine; and to do and perform such other acts (whether similar or dissimilar to the foregoing) in, to and with respect to, the Common Areas as in the use of good business judgment Landlord shall conclusively determine to be appropriate for the Project. In addition, Landlord reserves the right to change or restrain the use of the entrances, exits, parking area(s), Common Areas, traffic lanes, pedestrian sidewalks and passageways, and the boundaries and locations of such, provided however, that anything to the contrary notwithstanding contained in this Section 25, said parking area or areas shall at all times be at least equal to the parking for the Project then legally required by governmental authorities or that available to Tenant under the current plans for the Project. The rights of Tenant in and to the Common Areas shall at all times be subject to the rights of Landlord, Landlord's employees and agents, and the other tenants in the Project, their employees and customers to use the same in common with Tenant, and Tenant shall keep the Common Areas free and clear of any obstructions, garbage and refuse created or permitted by Tenant or resulting from Tenant's activities or those of its licensees, invitees, concessionaires, employees, customers and contractors. ~~If, in the opinion of Landlord, unauthorized persons are using any of the Common Areas by reason of the presence of Tenant in the Project, Tenant, upon demand of Landlord, shall restrain such unauthorized persons by appropriate proceedings.~~ Nothing herein shall affect the right of Landlord at any time to remove any such unauthorized person from the Common Areas or to prohibit the use of said Common Areas by unauthorized persons.

Avoid being obligated to control the actions of third parties over whom you have no control.

25.1 Maintenance of Common Areas. Landlord, directly or by contract, shall keep said parking and common areas in a neat, clean and orderly condition and shall repair any material damage to the facilities thereof, but all expenses in connection with said parking and common areas shall be charged and prorated in the manner as set forth in Paragraph 7.2 hereof.

Common Areas in enclosed center – replacement should be similar replacement, i.e., state of the art v. standard

25.2 Employee Parking. We need to understand (and reflect in the Lease) where employee parking will be available. Unless an employee parking area or areas are designated on Exhibit A to this Lease, no employees of Tenant may park within the parking and common areas of the Project. In the event an employee parking area or areas is or are designated on Exhibit A, Landlord shall have the right to prohibit Tenant's employees from parking in such employee parking area or areas during certain periods during the year. ~~Tenant shall furnish to Landlord a list of all its employees' vehicle license numbers within fifteen (15) days after taking possession of the Premises, and Tenant thereafter shall notify Landlord of any change in such list within five (5) days after each such change occurs. Tenant shall be responsible for compliance by its employees with the parking provisions contained herein. If Tenant or its employees park in other~~

...during employee hours of employment

Avoid being obligated to control the actions of third parties, even employees, especially if failure to do so can result in penalties or default.

~~than designated employee parking areas, Landlord may charge Tenant, as Additional Rent, Fifteen Dollars (\$15.00) per day for each day or partial day each such vehicle is parked in any part of the Common Areas other than the portions so designated.~~ Tenant hereby authorizes Landlord to tow away from the Project any vehicle belonging to Tenant ~~or Tenant's employees~~ parked in violation of these provisions, and/or to attach violation stickers or notices to such vehicle.

25.3 Use of Common Parking Areas. Tenant, for the use and benefit of Tenant, its agents, employees, customers, licensees and sub-tenants, shall have the non-exclusive right in common with Landlord, and other present and future owners, tenants and their agents, customers, licensees and sub-tenants, to use said common and parking areas during the entire term of this Lease, or any extension thereof, only for ingress and egress, and automobile parking. In the event Landlord elects to limit or control the use thereof by customers or invitees of the Project, whether by validation or parking tickets or any other method of assessment, or to charge for parking, Tenant agrees to participate in such program under Landlord's rules and regulations in connection therewith established from time to time; provided such rules and regulations are reasonable and nondiscriminatory and do not result in Tenant expenses not contemplated in this Lease. ~~Tenant shall honor, and shall cause its employees, agents, vendors and customers to honor, all exclusive parking rights granted to any other occupant of the Project with respect to any parking spaces so marked. (we understood none could be granted)~~ Tenant shall not display or sell merchandise, install or permit to remain its person property, distribute handbills, printed material or other advertising, or otherwise solicit business, within the Common Area and parking areas or any portion thereof.

26. SIGNS.

26.1 Window Signs. Tenant may maintain near the interior glass panes and supports of the show windows of the Premises only such signs, advertising placards, names, insignia, trademarks and descriptive material as shall have first received the written approval of Landlord (not to be unreasonably withheld, delayed or conditioned) as to type, size, color, location, copy nature and display qualities, provided that in no event shall such signs cover more than twenty percent (20%) of the glass portion of such windows. In addition, no signs, placards or material shall be affixed to the glass or be placed within two feet of the interior glass panes. Anything to the contrary in this Lease notwithstanding, Tenant shall not affix any sign to the roof of its Premises.

Approval of landlord not necessary if consistent with tenant's other locations. If tenant is a national tenant, landlord should already have a good idea of what store signage will look like.

26.2 Exterior Sign. We will provide either a specific sign package prior to lease execution or a sample package which we would want to attach as an exhibit and provide in the lease that such package has been approved by the landlord. Tenant shall erect one sign on the front of the Premises facing Pacific Coast Highway and one sign on the front of the Premises facing 5th Street near the escalator, not later than the date Tenant opens for business, in accordance with the sign criteria which has been established by Landlord or Landlord's architect for the Project, attached hereto as Exhibit C, and otherwise in accordance with and subject to local ordinances and other laws, rules or regulations. Tenant shall submit to Landlord, prior to installation of the sign, a detailed sign drawing to be approved by Landlord. Notwithstanding the foregoing, nothing contained herein shall constitute a representation by Landlord regarding governmental requirements regarding signs and signage and, in the event of a conflict between the criteria set forth on Exhibit C and such governmental requirements, such governmental requirements shall control Tenant's signs and signage.

26.3 The Project Directory, Monument or Pylon. In the event there is a directory, monument or pylon for the Project and Landlord determines that Tenant shall be listed thereon, Tenant shall pay the cost of installation of its sign thereon. ~~In addition to the cost of its sign, Tenant shall reimburse Landlord for a proportionate share of the cost of installation, repair, maintenance and operation of the Project pylon, monument or directory as reasonably determined by Landlord.~~ Do you anticipate such a sign? If so, construction should be part of your project costs and maintenance should be part of CAM.

27. **AUCTIONS; OTHER PROHIBITED ACTIVITIES.** Tenant shall not advertise, conduct or permit to be conducted any sale by auction in, upon or from the Premises whether said auction be voluntary, involuntary, pursuant to any assignment for the payment of creditors or pursuant to any bankruptcy or other insolvency proceeding. In addition, in no event shall Tenant conduct or advertise any fire, going out of business or bankruptcy sale in, upon or from the Premises.

28. **DISPLAYS; APPEARANCE OF PREMISES.** Tenant may not display or sell merchandise or allow grocery carts or other similar devices owned by or within the control of Tenant to be stored or to remain outside the exterior walls and permanent doorways of the Premises. Tenant further agrees not to install any exterior lighting, amplifiers or similar devices or use in or about the Premises any advertising medium which may be heard or seen outside the Premises, such as flashing lights, searchlights, loudspeakers, phonographs or radio broadcasts. In addition, the Premises shall have a neat and attractive appearance at all times from all points outside of the Premises. ~~In this regard, Tenant promptly shall comply with all directives given by Landlord regarding all items of personal property and leasehold improvements, including displays of merchandise, located in the interior of the Premises within five (5) feet of the perimeter boundary of the Premises, and all directives of Landlord relating to building and display materials and floor coverings located within the Premises. Notwithstanding the foregoing, Tenant may provide music and lighting on its Patio.~~

29. **OPERATION OF PREMISES; BUSINESS.**

This is far too broad—it essentially gives landlord free license to resolve as it chooses, even though landlord may have set up the conflict by granting competing use clauses.

29.1 **Covenant of Continuous Operation; Maintenance of Affiliation.** Tenant covenants that, subject to all of the terms, covenants and conditions of this Lease, it will use, occupy and operate the entire Premises continuously and without interruption during the entire Term for the purposes set forth in Paragraph 1.8 hereof, under Tenant's Store Name set forth in Paragraph 1.5 hereof, and in a competent, dignified, energetic, businesslike and first class manner so as to enhance the Project as a whole and its reputation as a desirable place to shop ~~and so as to achieve the maximum volume of sales revenue such that Landlord will receive the maximum amount of Percentage Rent for the Premises.~~ At least seventy percent (70%) of the leasable area of the Premises shall be a restaurant area. ~~Tenant shall employ its best judgment, efforts and abilities to operate the business conducted by it in the Premises in such manner as to produce the maximum profitable sales volume reasonably obtainable and to enhance the reputation and attractiveness of the Project. If any conflict shall develop between Tenant and any other tenant of the Project regarding the merchandise that Tenant may carry, services Tenant may provide or with respect to any other matter governed by or referred to in this Section 29, Landlord shall be the sole arbiter of such conflict and its decision shall be binding on Tenant. Landlord shall incur no liability to Tenant as a result of any determination made by Landlord hereunder.~~ Tenant shall not sell, exhibit or display any immoral, racist or pornographic materials, goods or services in or on the Premises. Landlord shall, in its reasonable sole discretion, determine whether such materials, goods or services are racist, immoral or pornographic in nature. ~~If Tenant is associated with or is part of a franchise or chain store operation at the time of the execution of this Lease, or if the operation of Tenant within the Premises is part of a chain or multi store operation, then, whether or not Tenant is a single purpose entity formed for the purpose of operating its business in the Premises, Tenant hereby covenants that it shall remain a part of said franchise, or chain or multiple store operation, and the Premises shall be operated as an integral part of such franchise, or chain or multiple store operation, continuously~~

Balance landlord's desire for maximum sales against tenant's need to operate a profitable business in keeping with the business concept.

Deleted because it does not apply to this lease.

~~and without interruption during the Term hereof. Any action including, without limitation, the termination of Tenant's franchise agreement with its franchisor or the sale of its corporate stock that would sever Tenant's business operation from said franchise or chain or multiple store operation shall constitute a breach of this Section 29.~~

29.2 Hours of Operation. Tenant agrees that, commencing on the Commencement Date and thereafter continuously during the entire Term Tenant will (a) be open for business during such hours as it may elect in its sole discretion and fully stocked on all days and during all hours that it is customary for businesses of like character in the city in which the Premises are located to be open for business; provided, however, that (i) Tenant shall in all events be so open from Sunday through Thursday, inclusive, from not later than 11:30 a.m. until not earlier than 10:00 p.m., and on Friday through Saturday from not later than 11:30 a.m. until not earlier than 12:00 midnight (the "Minimum Hours of Operation"), ~~and also during those additional hours, if any, established by Landlord for the operation of the Project~~, unless Tenant is prevented from doing so by strike, fire or other cause beyond Tenant's reasonable control, and except during reasonable periods for repairing, cleaning and decorating the Premises (which may at Tenant's sole option include a closure for up to one month every five years for major remodeling of the Premises), and (ii) Tenant shall have the right to extend the hours of operation beyond the Minimum Hours of Operation. Tenant shall have the right to close on typical national holidays (i.e., New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day, ~~but not Martin Luther King's Birthday or President's Day~~); (b) adequately staff its store with a sufficient number of adequately trained employees and carry sufficient stock of a size, character and quality ~~so as to handle the maximum business~~; (c) maintain displays of merchandise in the display windows in the Premises, and keep the display windows in the Premises clean, free of litter and well lighted; (d) store in the Premises only such merchandise as will be offered for retail sale in the Premises within a reasonable time; (e) utilize only those minor portions of the Premises as are reasonably required therefor for office or other non-retail purposes; and (f) keep all garbage, trash and refuse generated at the Premises or by the activities conducted therein in rodent-proof containers until removed, and cause the same to be removed in an appropriate manner on a daily basis.

In-line tenant will desire department stores and other in-line tenants to be obligated to maintain same minimum hours.

29.3 Violation of Covenants. If Tenant fails to take possession of the Premises and to open for business fully fixtured, stocked and staffed within sixty days of ~~on~~ the Rent Commencement Date or, after so opening the Premises for business, Tenant thereafter closes the Premises or any material portion thereof to the public, ~~or ceases to be fully fixtured, stocked and staffed, or terminates or changes its franchise, chain or multiple store affiliation~~, in violation of this Section 29, then Landlord, in addition to any and all remedies herein provided, shall have the right at its option (a) to collect not only the Minimum Rent, but as Additional Rent (which shall be included in the items offset in the calculation of Percentage Rent under Section 7.1(a)), payable together with installments of Minimum Rent which become due on or after on the Commencement Date, an additional sum equal to one-fifteenth (1/15th) ~~one-thirtieth (1/30th)~~ of the monthly installment of the then current Minimum Rent for each and every day after the 60th day following the Rent Commencement Date that Tenant shall fail to open the Premises and commence to do business or, after having commenced to do business, for each and every day or portion of a day that the Premises or any material portion thereof are closed ~~or cease to be fully fixtured, stocked and staffed, or that Tenant operates its business in the Premises other than as a franchisee or affiliate of a chain or multiple store operation as contemplated hereby~~, in violation of the requirements of this Section 29, and (b) if such failure exists for more than thirty (30) days and partial days in the aggregate, at any time thereafter while such failure is continuing to cancel and terminate this Lease, and

(c) to seek and obtain injunctive relief and specific performance of Tenant's obligations under this Paragraph 29. The remedies provided in this Paragraph 29.3 are in addition to any and all others remedies provided in this Lease, by law or otherwise to Landlord in the event of default of Tenant. The failure of Tenant to open for business within the Premises and thereafter to remain open for business therein, ~~or to operate its business in the Premises as a franchisee or affiliate of a chain or multiple store operation~~, in each case as required pursuant hereto will cause substantial damage to Landlord, the extent of which damage would be impracticable and extremely difficult, if not impossible, to determine with precision. The parties have agreed to the amount of Additional Rent provided for herein as liquidated damages, and not as penalty, so as to fairly compensate Landlord for such damage. The foregoing amount of Additional Rent has been determined based upon numerous considerations, including the facts that Landlord will have expended considerable amounts of money and entered into various commitments with third parties premised upon Tenant opening for business in the Premises on the Rent Commencement Date and continuing thereafter to operate its business and affairs therein in accordance with the provisions of this Section 29, and that Landlord will be damaged in its sales, financing and lease marketing efforts for other space in the Project by the appearance of the Premises or a portion thereof, as the case may be, as being vacant or non-operating in violation of the provisions of this Section 29 after the commencement of the Term hereof. For the purpose of computing Percentage Rent under this Lease, Tenant's Gross Sales for any period during which Tenant does not conduct its business in strict compliance with its obligations under this Section 29 shall be deemed to be the greater of Tenant's Gross Sales for such period or its Gross Sales for the corresponding period of the last preceding year during which Tenant was open for business as required hereby.

Caution

Review these provisions carefully and assure mutually agreeable language when possible

29.4 Tenant's Acknowledgement. Tenant acknowledges that (i) Landlord is executing this Lease in reliance upon the covenants contained in this Section 29, (ii) such covenants are a material element of consideration inducing Landlord to execute this Lease, and (iii) the Additional Rent to be paid by Tenant pursuant to Paragraph 29.3 shall be deemed to be a reasonable estimate of the damages Landlord will suffer *in the event Tenant breaches said covenants, which damages may include, without limitation, loss of percentage rent from Tenant and other tenants in the Project, a diminution in the reputation of the Project as a desirable place to shop, increased administrative expenses by reason of complaints from other tenants in the Project and increased security costs for the Project.*

The truth of this statement may depend on the tenant, i.e. "mom & pop" v. department store.

30. PROMOTIONAL FUND. ~~Landlord may establish a promotional fund (the "Promotional Fund") for the Project. If and when Landlord establishes such Promotional Fund, Tenant agrees to pay dues to such Promotional Fund as provided in this Section 30. Until such time as Landlord has furnished Tenant with Landlord's determination of a change in the monthly Promotional Fund dues, Tenant shall pay on the first day of each calendar month from and after the Commencement Date the Initial Promotional Fund Dues set forth in Paragraph 1.13 of this Lease. Tenant shall continue to make said monthly payments until notified by Landlord in writing of a change in the amount of monthly Promotional Fund dues, whether based upon increased or decreased costs or upon a change in advertising and Promotional Fund activities in which event, commencing with the first (1st) calendar month following the calendar month in which Landlord gives Tenant written notice of the change in monthly Promotional Fund dues, Tenant shall pay the amount set forth in the written notice to Tenant setting forth such change. By April 1 of each year, Landlord shall endeavor to give Tenant a statement showing the total Promotional Fund expenditures for the prior calendar year. Should Landlord elect to have a Grand Opening promotion, in addition to the above, Tenant agrees to pay to Landlord, within thirty (30) days of Landlord's billing, as its pre opening contribution, a sum equal to Tenant's pro rata share, based on Tenant's building area to the total~~

~~building area occupied, of Landlord's budget for funds to be expended for promotion and advertising of the Project. Default in payment of dues shall be treated in a similar manner to default in rent. Intentionally deleted.~~

31. **WAIVERS.** The waiver by Landlord or Tenant of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of rent or other payments or performance hereunder by Landlord or Tenant shall not be deemed to be a waiver of any preceding default ~~by Tenant~~ of any term, covenant or condition of this Lease, other than the failure of Tenant or Landlord to pay the particular rental or other payment, or to perform such obligation, so accepted, regardless of ~~Landlord's~~ knowledge of such preceding default at the time of the acceptance of such rent, or other payment or performance, respectively.

32. **JOINT OBLIGATION.** If there be more than one person or entity comprising Tenant, the obligations imposed on Tenant hereunder shall be the joint and several obligations of all of such persons and entities.

33. **TIME OF ESSENCE.** Time is of the essence of this Lease and of each and all of the provisions hereof.

34. **RECORDATION.** ~~Tenant shall not record this Lease or any memorandum hereof.~~ Landlord or Tenant may record a short form memorandum hereof, and Tenant or Landlord promptly shall execute and deliver ~~to Landlord~~ such a memorandum in the form requested ~~by Landlord~~ and comply with all other reasonable requests made ~~by Landlord~~ in connection therewith.

35. **QUIET POSSESSION.** Upon Tenant paying the rent and all other amounts reserved hereunder and observing and performing all of the covenants, conditions and provisions on Tenant's part to be observed and performed hereunder (subject to notice and cure provisions set forth herein), Tenant shall have quiet possession of the Premises for the entire Term hereof, subject to all the provisions of this Lease.

36. **LATE CHARGES.** Tenant hereby acknowledges that late payment by Tenant to Landlord of rent or other sums due hereunder will cause Landlord to incur costs not contemplated by this Lease, the exact amount of which will be extremely difficult, if not impossible, to ascertain. Such costs include, but are not limited to, processing and accounting charges, and late charges which may be imposed upon Landlord by the terms of any mortgage or trust deed covering the Premises. Accordingly, if any installment of rent or any sum due from Tenant shall not be received by Landlord or Landlord's designee within five (5) days after said amount is past due, then, in addition to all other remedies provided herein, Tenant shall pay to Landlord a late charge equal to the greater of (i) ten percent (10%) of such overdue amount (but in no event greater than the maximum amount permitted by law), or (ii) a service charge equal to the sum of Fifty Dollars (\$50.00) ~~plus Ten Dollars (\$10.00) per day for each day after the due date for which Tenant's failure to pay continues, plus, in either event, all attorneys' fees incurred by Landlord by reason of Tenant's failure to pay rent and/or other charges when due hereunder.~~ The parties hereby agree that such late charges represent a fair and reasonable estimate of the cost that Landlord will incur by reason of the late payment by Tenant, and that it does not constitute a forfeiture or penalty. Acceptance of such late charges by Landlord shall in no event constitute a waiver of Tenant's default with respect to such overdue amount, nor prevent Landlord from exercising any of the other rights and remedies granted hereunder. Landlord may, at its option, include all late charges accrued during any calendar year in the estimated charges to be paid by Tenant for the ensuing year, and may deduct all late charges from the security deposit, if any, being maintained in accordance with Paragraph 1.15 and Section 6, hereof.

37. **INABILITY TO PERFORM.** This Lease and the obligations of ~~the parties~~ Tenant hereunder shall not be affected or impaired because either party ~~Landlord~~ is unable to fulfill or delayed in fulfilling any of its obligations hereunder on a reasonable basis, if such inability or delay is caused by reason of strike, labor troubles, flood, storm, earthquake, tornado, other acts of God, riot or other civil disobedience or disturbance, shortages of materials or inability to obtain materials on reasonable terms, default by a contractor, subcontractor or supplier, or any other cause beyond the reasonable control of the party required to perform ~~Landlord~~. In such event, the time for ~~Landlord's~~ performance automatically shall be extended for a period of time equal to that during which such inability or delay exists. ~~Notwithstanding any other provision of this Lease, Tenant acknowledges that Landlord may be required from time to time by a governmental or quasi-governmental authority, agency or instrumentality to reduce the energy or water consumption of the Project, to impose a parking or similar regulatory charge, to implement a traffic management program, to modify or restrict the hours of Tenant's business, to limit access to the Project, or to reduce the number of parking spaces available for Tenant's customers and other limiting actions, all of which shall be binding on Tenant if enacted or enforced by Landlord in accordance with the requirement of a governmental or quasi-governmental authority, agency or instrumentality. No such action on the part of Landlord shall be deemed to be a breach by Landlord of its obligations, or of Tenant's rights of quiet enjoyment, under this Lease. This Paragraph shall not in any way limit any right given Landlord under any other section of this Lease.~~

38. **ATTORNEYS' FEES.** In the event any action or proceeding is brought by either party against the other under this Lease, the prevailing party shall be entitled to recover for the actual fees and disbursements of its attorneys in such action or proceeding, including costs of appeal, if any, in such amount as actually is incurred therefor, without regard to any court schedule therefor. ~~In addition, should it be necessary or appropriate in the exercise of reasonable business judgment for Landlord to employ legal counsel to enforce any of the provisions herein contained or to advise it of its rights as against Tenant or in connection with any bankruptcy proceeding relating to Tenant, Tenant shall pay promptly upon demand therefor all attorneys' fees and court costs incurred in connection therewith.~~ The term "attorneys' fees" (or words of similar meaning) shall include the fair market value of ~~Landlord's~~ in-house counsel's services.

39. **SALE BY LANDLORD.** In the event of any sale or other transfer of the Premises by Landlord, Landlord shall be and hereby is entirely released and relieved of all of its covenants, obligations and liabilities contained in or derived from this Lease which arise from and after such sale or transfer, as well as all liabilities arising out of any act, occurrence or omission occurring after the consummation of such sale; and the transferee shall be deemed, without any further agreement between the parties or their successors in interest or between the parties and any such transferee, to have assumed and agreed to carry out any and all of the covenants and obligations of Landlord under this Lease thereafter arising and shall be deemed to be the Landlord thereunder as if it had been the Landlord named as such herein.

40. **SUBORDINATION; ATTORNMENT.**

40.1 Subject to Addendum Paragraph 40.4, this Lease and Tenant's rights hereunder and with respect to the Premises shall be and remain subject and subordinate to all mortgages, ground leases, deeds of trust, liens, encumbrances, restrictions, covenants, conditions, zoning ordinances and all laws, rules, regulations and ordinances now or hereafter affecting or governing the Project or any part thereof, and to any and all advances (if any) to be made thereunder and to the interest thereon, and to all renewals, replacements and extensions thereof. Upon the execution of a subordination and nondisturbance agreement reasonably satisfactory to Tenant and any lender or ground lessor, Tenant will ~~Upon request~~

~~of Landlord, Tenant will in writing in such form as may be requested by Landlord subordinate its rights hereunder to the lien of any mortgage, deed of trust or other encumbrance, now or hereafter in force against the Premises, and to all advances made or hereafter to be made upon the security thereof.~~

40.2 In the event any proceedings are brought for foreclosure, or in the event of the exercise of the power of sale under any mortgage or deed of trust made by Landlord covering the Premises, or eviction of Landlord or its successors or other termination of their rights under any ground lease, Tenant shall attorn to the purchaser upon any such foreclosure or sale or ground lessor under such ground lease, respectively, and recognize such purchaser or ground lessor, as the case may be (herein referred to as the "**Successor Landlord**"), as Landlord under this Lease so long as such Successor Landlord assumes Landlord's obligations arising under this Lease from and after such transfer; provided that Tenant agrees that and Successor Landlord shall not be: (a) liable in any way for any act, omission, neglect or default of any prior Landlord (including, the then defaulting Landlord), except that the Successor Landlord shall be obligated to cure any continuing default, but only to the extent that such default continues after the date that the Successor Landlord succeeds to the interest of Landlord under this Lease, or (b) subject to any claim, defense, counterclaim or offsets which Tenant may have against any prior Landlord (including, the then defaulting Landlord) (but excluding Tenant's right of offset permitted under Section 2.2 of Exhibit B), or (c) bound by any payment of rent or additional rent which Tenant might have paid for more than one month in advance of the due date under this Lease to any prior Landlord (including, the then defaulting Landlord), or (d) bound by any obligation to make any payment to Tenant which was required to be made prior to the time the Successor Landlord succeeded to any prior Landlord's interest (but excluding Tenant's right of offset permitted under Section 2.2 of Exhibit B), or (e) accountable for any monies deposited with any prior Landlord (including security deposits), except to the extent such monies are actually received by the Successor Landlord, ~~or (f) bound by any amendment or modification of the Lease made without the prior written consent of each ground lessor and lender.~~ In addition, Tenant agrees that each lender or holder of any mortgage, deed of trust or other encumbrance, shall have the unilateral right, at such lender's option and without Tenant's consent, to fully or partially subordinate such mortgage, deed of trust or other encumbrance to this Lease, by executing an instrument in form and substance satisfactory to such lender or holder; at the request of such lender or holder, Tenant will execute such instrument acknowledging such subordination, but the failure by Tenant to so execute such instrument shall not affect such subordination.

Review these provisions carefully to assure greater rights are not provided a successor, i.e., right to change terms of the lease.

40.3 ~~In no event shall this Lease, or any of Landlord's rights and remedies hereunder, be subject or subordinate to any lien, leasehold deed of trust, chattel mortgage or other encumbrance against Tenant's interest in the leasehold created by this Lease or encumbering any property of Tenant located in or about the Premises, it being expressly understood and agreed that nothing contained in this Lease shall expressly or impliedly obligate Landlord to subordinate or waive any of Landlord's rights under this Lease or under the laws of the jurisdiction in which the Project is located. Tenant may grant U.S. Bank and any successor lender a security interest in the leasehold estate, and Landlord will execute a letter in the form of Exhibit ?? hereto with U.S. Bank and any successor lender.~~

41. **ESTOPPEL CERTIFICATE; TENANT'S STATEMENT.** Within ten (10) days' after written request by either party Landlord, Tenant the other party shall execute, acknowledge and deliver to Landlord the requesting party or any other party as the requesting party Landlord may direct, a statement in writing and/or certificate (a) certifying that this Lease is unmodified and in full force and effect (or, if modified, stating the nature of such modification and certifying that this Lease as so modified is in full force and effect), and the date to which the rental and other charges are paid in advance, if any, (b)

May want greater time period when rates are favorable. They all arrive at the same time.

acknowledging that there are not, to ~~the responding party's~~ ~~Tenant's~~ knowledge, any uncured defaults on the part of any party hereunder, or specifying such defaults if any are claimed, (c) setting forth the date of commencement of rents and expiration of the Term, and (d) any other matters which ~~the requesting party~~ ~~Landlord~~, such mortgagee, lessee, lessor, purchaser or other party may require. ~~Tenant's~~ ~~Failure to deliver such statement within ten days of a second written request shall constitute a default under this Lease. such time shall be conclusive upon Tenant (i) that this Lease is in full force and effect, without modification except as may be represented by Landlord, (ii) that there are no uncured defaults in Landlord's performance of its obligations under this Lease, and (iii) that not more than one month's monthly Minimum Rent has been paid in advance. In the event Tenant should refuse to execute and deliver said statement and/or certificate, Landlord shall have the right to both (i) execute and deliver such statement and/or certificate in the name and on behalf of Tenant, and (ii) cancel this Lease by giving Tenant an additional ten (10) days notice in writing upon the expiration of which this Lease shall be of no further force and effect.~~

42. **LANDLORD'S FINANCING.** ~~Intentionally deleted. If Landlord's mortgagee or lender requires modification of this Lease, Tenant agrees to execute and deliver to Landlord the agreements required by Landlord's mortgagee or lender to effect such lease modifications, except any modification of the provisions of this Lease relating to the amount of rent, the purposes for which the Premises may be used, the size and location of the Premises, the duration of the term, the Commencement Date, or the improvements to be made by Landlord to the Premises prior to the delivery of possession. In the event Tenant fails or refuses to execute and deliver such modification, such failure or refusal shall be deemed a default and breach of this Lease by Tenant, and Landlord shall have the right to exercise the remedies set forth in Section 21 hereinabove.~~

43. **TRANSFER OF THE PROJECT TO A REIT; SIMILAR SITUATIONS.** If the Project or any portion thereof is transferred or otherwise conveyed to a real estate investment trust, or if the Landlord or one or more of its constituent shareholders, partners or beneficiaries now or hereafter is an entity subject to provisions of Federal or state income tax or other laws regulating the type or source of income that it may derive, or is otherwise restricted as to the actions that it may take or receipts that it may have, without incurring (or increasing) a cost penalty or increase in tax rate or losing a qualification as a type of entity and, as a result thereof, it or its counsel deems it necessary, appropriate, helpful or convenient to modify this Lease, Tenant shall execute and deliver to Landlord the modifications to this Lease recommended by Landlord, such constituent or its counsel to effect such lease modifications, except that Tenant shall not be required to execute and deliver such a modification to the provisions of this Lease if it would materially and adversely affect Tenant's business being conducted in the Premises or the economic benefits and burdens imposed on Tenant pursuant to this Lease. In the event Tenant fails or refuses to execute and deliver such modification, such failure or refusal shall be deemed a default and breach of this Lease by Tenant, and Landlord shall have the right to exercise the remedies set forth in Section 21 hereinabove.

44. **FINANCIAL STATEMENTS.** ~~Intentionally deleted. This Lease is subject to Landlord's approval of Tenant's financial statement and, if applicable, that of each guarantor of Tenant's obligations hereunder. In addition, upon Landlord's written request therefor, but not more often than once per year, Tenant shall furnish Landlord with financial statements (including current income statement) of Tenant (and each guarantor of Tenant's obligations hereunder), prepared in accordance with generally accepted accounting principles consistently applied and certified to be true, complete and correct in all respects by Tenant (or such guarantor, respectively). If Tenant has audited financial statements prepared, such statements shall be submitted to Landlord.~~

45. **SPECIFIC PERFORMANCE.** ~~Intentionally deleted. With respect to any provision of this Lease which provides, in effect, that Landlord shall not unreasonably withhold or unreasonably delay any consent or any approval, Tenant, in no event, shall be entitled to make, nor shall Tenant make, any claim for, and Tenant hereby waives any claim for, money damages; nor shall Tenant claim any money damages by way of setoff, rent abatement, counterclaim or defense, based upon any claim or assertion by Tenant that Landlord has unreasonably withheld or unreasonably delayed any consent or approval; but Tenant's sole remedy shall be an action or proceeding to enforce any such provision, or for specific performance, injunction or declaratory judgment.~~

46. **CUMULATIVE REMEDIES.** No remedy or election hereunder shall be deemed exclusive but shall, whenever possible, be cumulative with all other remedies hereunder, at law, in equity or otherwise.

47. **CONFIGURATION OF THE PROJECT; OTHER TENANTS.** ~~Subject to Section ?? (exclusive).~~ Landlord reserves the absolute right to effect such other tenancies in the Project as Landlord shall determine, in the exercise of its sole business judgment, best promote the interests of the Project. Tenant does not rely on the fact, nor does Landlord represent, that any specific tenant or number or type of tenants shall or shall not during the term of this Lease occupy any space in the Project, nor does Tenant rely on any other tenant operating its business and affairs at the Project at any particular time or times. Moreover, no conduct by any tenant, subtenant, licensee, concessionaire, or other occupant of, customer of, supplier to or user of any portion of the Project shall constitute an eviction, constructive or otherwise, of Tenant from the Premises, ~~and Tenant hereby waives any and all claims that, but for this sentence, it might have against Landlord by reason of such conduct by one or more of such persons and entities.~~

48. **AUTHORITY, GOOD STANDING, EXECUTION, DELIVERY AND TAX COMPLIANCE OF TENANT.** If Tenant is a corporation or other entity, each individual executing this Lease on behalf of said corporation or other entity, respectively, represents and warrants that such entity has been duly formed and is duly and validly existing in good standing as of the date hereof in the jurisdiction of its organization, ~~that such entity has paid all applicable franchise and other taxes due on or prior to the date hereof and imposed on it by each jurisdiction to the tax laws of which it is subject,~~ that the execution and delivery of this Lease has been duly authorized by such entity in accordance with the bylaws and other governing documents of such entity, that such person is duly authorized to execute and deliver this Lease on behalf of said entity, that this Lease has been duly and validly executed and delivered by such entity, and that this Lease is binding upon said entity in accordance with its terms.

49. **LIMITATION OF LANDLORD'S LIABILITY.** Anything in this Lease to the contrary notwithstanding, Tenant agrees that it shall look solely to Landlord's Interest (as hereinafter defined), subject to the prior rights of the holder of any mortgage, deed of trust or other lien or encumbrance thereon, for the collection of any judgment (or other judicial process) requiring the payment of money by Landlord in the event of any default or breach by Landlord with respect to any of the terms, covenants and conditions of this Lease to be observed or performed by Landlord, and no other assets of the Landlord, its officers, directors, agents, representatives, employees, affiliates, shareholders or constituent partners shall be subject to levy, execution or any procedures for the satisfaction of Tenant's remedies, it being the intention and agreement of the parties to this Lease that neither Landlord nor any of its officers, directors, agents, representatives, employees, affiliates, shareholders or constituent partners be personally liable for any deficiency or judgment against Landlord arising out of this Lease, the Premises or Tenant's (or that of the persons and entities acting by or through Tenant) occupancy thereof. In addition, notwithstanding any other provision of this Lease (whether in the body hereof, or in any exhibit or

addendum hereto), Landlord shall have no liability to Tenant, its officers, directors, agents, representatives, employees, affiliates, shareholders or constituent partners whatsoever for any consequential incidental or damages or loss of profits (whether incidental or consequential damages, or not). Landlord's Interest means ~~the smaller of (i) the value of Landlord's interest estate in the land, and buildings and improvements comprising the Project, including rents therefrom, and (ii) what would be the equity value of Landlord's estate in the land and buildings comprising the Project assuming a secured loan equal to eighty percent (80%) of the value of the Project.~~

50. **NOTICES.** All notices, demands, requests, consents and other communications which may or are required or permitted to be given by either party to the other hereunder shall be in writing. All such notices, demands, requests, consents and other communications by the Landlord to Tenant shall be ~~given by personal delivery or~~ sent by United States Mail, postage prepaid, certified with return receipt requested, or by Federal Express or other generally recognized carrier of expedited delivery, for next day delivery, addressed to Tenant at the address set forth in Paragraph 1.18, or to such other place in the United States as Tenant may from time to time designate in a notice properly given to Landlord. All notices, demands requests, consents and other communications by Tenant to Landlord shall be sent by United States Mail, postage prepaid, certified with return receipt requested, or by Federal Express or other generally recognized carrier of expedited delivery, for next day delivery, addressed to Landlord at the address set forth in Paragraph 1.17, and to such other person or place as Landlord may from time to time designate in a notice properly given to Tenant. A notice so delivered shall be deemed given on the first date indicated on the receipt of the carrier that delivery has been made or unsuccessfully attempted to the address of the intended recipient as specified above.

51. **NO REPRESENTATIONS, WARRANTIES OR COVENANTS.** Tenant acknowledges that, except as otherwise expressly set forth herein, neither Landlord nor Landlord's agents or employees have made any representations, warranties or covenants as to the Premises, the suitability of the Premises for the conduct of Tenant's business, the Project or its other tenants or any other matter.

52. **NON-DISCRIMINATION.** ~~—Intentionally deleted. Landlord and Tenant each hereby covenant that there shall be no discrimination or segregation of any person or group of persons on account of race, color, creed, religion, sex, marital status, age, handicap, national origin or ancestry in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the land herein demised, nor shall any grantee or any person claiming under or through such grantee establish or permit such practice or practices of discrimination or segregation with reference to the selection, location, number, use of occupancy of tenants, lessees, subtenants, sublessees or vendees in the land herein demised.~~

53. **SECURITY.** While Landlord does not assume any responsibility to provide any security measures, or any liability for failure to provide same or for any inadequacy thereof, Landlord shall have the authority to institute or continue such security measures, devices, programs, restrictions and combinations thereof as Landlord in its sole discretion deems necessary or appropriate from time to time, taking into account the protection of persons and property of Landlord, Tenant and employees, agents and invitees of each of them and taking into account the business interests of the Project. The costs and expenses of instituting and maintaining such measures, devices, programs, restrictions and combinations thereof, if any, shall be borne by Tenant as a part of the Adjustments, as a separate, additional charge to Tenant based on Tenant's pro rata share (determined in the same manner as Tenants' share of the Adjustments and/or as a direct contribution to the governmental or non-governmental entity supplying any portion of the measures, devices or programs instituted, provided

that the cost of such services to tenants at the Project shall be allocated in a manner ~~reasonably established deemed reasonable~~ by Landlord), taking into account, if Landlord deems applicable, the size, location and any special requirements and conditions of the Premises and Tenant's business and activities. To the degree directed by Landlord, Tenant shall coordinate the Premises' security measures with the measures, devices and restrictions instituted by Landlord, if any. ~~Tenant shall, at Landlord's direction, join such association organized for any of the aforesaid purposes as Landlord may designate, whether or not membership in same is limited to tenants at the Project, shall participate fully therein, shall pay its share of any additional tax or assessment arising out of any special taxing district or special assessment and shall take all such other action as Landlord reasonably may direct to protect the security interests of the Project and that of the other tenants at the Project. It is understood and agreed that the potential severity of security problems and the mutual importance of dealing with same in an expeditious and conclusive manner justify that Landlord, in the mutual interest of the parties hereto, shall have unfettered discretion hereunder. We need to discuss this further as we don't want to pay Landlord for services we already obtain from other sources.~~

54. **BROKERS.** Landlord and Tenant represents and warrants to each other that it has had no dealings with any real estate broker or agent in connection with the negotiation of this Lease excepting only the Broker identified in Paragraph 1.20 hereof, and it knows of no other real estate broker, finder or agent who is entitled to a fee, commission or other compensation in connection with this Lease. Landlord and Tenant shall pay, and indemnify, defend and hold harmless each other Landlord and the Project from and against, any cost, loss, damage, liability or expense (including, without limitation, attorneys' fees) as a result of any claim or demand by any broker, finder or other person or entity that a commission, fee or other compensation is due to it with respect to this Lease or the negotiation of the terms and conditions hereof ~~except, if and only if Landlord is specified as the party that is responsible for the payment of the fees of the Broker identified therein, the fees to be paid to Broker.~~

55. **RELATIONSHIP OF PARTIES.** Nothing in this Lease shall be deemed to create, or construed as creating, the relationship of principal and agent, or a partnership or joint venture, between Landlord and Tenant, or between or among Landlord and any other persons or entities, or to cause Landlord to be responsible in any way for any of the debts or obligations of Tenant or any other person or entity, or to authorize Tenant to act for or in the name of, or bind in any way, Landlord or the Premises, the relationship of Landlord and Tenant being limited to that of a landlord and tenant pursuant to each of the provisions of this Lease. This Lease is made and entered into for the sole benefit of the parties, hereto, and the parties do not intend to create any rights or benefits under this Lease for any person who is not a party to this Lease (subject only to Section 56).

56. **CONSTRUCTION OF THIS LEASE; GOVERNING LAW.** The headings and titles to the Paragraphs of this Lease other than Section 1 are for convenience of reference only, do not limit in any way the terms, conditions and provisions of this Lease, and shall have no effect upon the construction or interpretation of any part hereof. Whenever required by the context of this Lease, the singular shall include the plural and the masculine shall include the feminine, and vice versa. All riders, exhibits and addenda, if any, affixed to this Lease are hereby incorporated into and are an integral part of this Lease, as if fully set forth herein. Each of the persons and entities comprising Tenant and Landlord has fully participated in, and has been represented by independent qualified legal counsel ~~licensed in the State of California~~ in connection with, the negotiation, preparation, execution and delivery of this Lease and in undertaking its obligations set forth herein. Any generally applicable rule of construction to the effect that ambiguities in a document are to be interpreted in the manner less

favorable to the drafting party shall not apply to this Lease. If any provision of this Lease is found or held by a tribunal having requisite jurisdiction to be invalid, void, or illegal, such finding or holding shall in no way affect, impair or invalidate any other provisions hereof and such other provisions shall remain in full force and effect. The submission of this document for examination and negotiation does not constitute an offer to lease, or a reservation of, or option for, the Premises, and this Lease shall become and be effective and binding upon Landlord and Tenant only upon the execution and delivery hereof both by Landlord and by Tenant. All negotiations, considerations, arrangements, representations, warranties and understandings between Landlord and Tenant with respect to any matter covered or mentioned in this Lease are fully and completely incorporated in this Lease, and this Lease represents the entire agreement of the parties with respect to all aspects of Tenant's leasehold interest and estate in the Premises and the terms and conditions thereof. No prior arrangements, agreements, representations, warranties or understandings, if any, pertaining to any such matters and not expressly incorporated in this Lease shall be effective against Landlord or Tenant for any purpose. Subject to the provisions of this Lease as to assignment, the covenants and conditions herein contained shall apply to, inure to the benefit of and bind the heirs, successors, executors, administrators and assigns of the parties hereto. This Lease may be modified or altered only by agreement in writing between Landlord or Landlord's agent, or their successors, and Tenant, and no act or omission of any employee or other agent of Landlord or Tenant or of Landlord's broker not specifically authorized by Landlord or Tenant shall alter, change or modify any of the provisions hereof. No provision of this Lease may be modified, amended or waived except by an agreement in writing signed by the parties hereto or their respective successors in interest. This Lease shall be construed and enforced in accordance with the laws of the State of California.

57. **MERGER.** The voluntary or other surrender of this Lease by Tenant, or a mutual cancellation thereof, shall not work a merger, and shall at the option of Landlord, terminate all or any existing sublease or subtenancies, or may, at the option of Landlord, operate as an assignment to Landlord or any or all of such subleases or subtenancies.

58. **ACCORD AND SATISFACTION.** No payment by Tenant or receipt by Landlord of a lesser amount than the rent herein stipulated shall be deemed to be other than on account of the rent otherwise payable hereunder, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as rent be deemed an accord and satisfaction, and Landlord may accept such check or payment without prejudice to Landlord's right to recover the balance of such rent or pursue any other remedy provided in this Lease.

59. **SURVIVAL OF OBLIGATIONS.** The provisions of this Lease with respect to any obligation of Tenant to pay any sum owing or to perform any act after the expiration or other termination of this Lease shall survive the expiration or other termination of this Lease.

60. **COUNTERCLAIM AND JURY TRIAL.** ~~Intentionally deleted. IN THE EVENT THAT LANDLORD COMMENCES ANY SUMMARY PROCEEDINGS OR ACTION FOR NON PAYMENT OF RENT OR OTHER CHARGES PROVIDED IN THIS LEASE, TENANT SHALL NOT INTERPOSE ANY COUNTERCLAIM OF ANY NATURE OR DESCRIPTION IN ANY SUCH PROCEEDING OR ACTION. TENANT AND LANDLORD BOTH WAIVE A TRIAL BY JURY OF ANY AND ALL ISSUES ARISING IN ANY ACTION OR PROCEEDING BETWEEN THE PARTIES HERETO OR THEIR AFFILIATES, UNDER OR CONNECTED WITH THIS LEASE, ANY OF ITS PROVISIONS, OR ANY TRANSACTIONS OR AGREEMENTS SET FORTH HEREIN OR CONTEMPLATED HEREBY.~~

61. **QUITCLAIM DEED.** At the expiration or earlier termination of this Lease, Tenant shall, upon the request of Landlord, execute, acknowledge, and deliver to Landlord, within five (5) days after such request, any quitclaim deed or other documents to remove the cloud of this Lease from the Premises.

IN WITNESS WHEREOF, the parties have executed this Lease as of the date set forth in Paragraph 1.1, above.

LANDLORD:

**CIM/HUNTINGTON
BEACH, INC.,**
a California corporation

By: _____
Name:
Title:

TENANT:

RUI ONE CORP.,
a Minnesota corporation

By: _____
Name:
Title:

By: _____
Name:
Title:

EXHIBIT A

Floor Plan

EXHIBIT A-1

Legal Description

EXHIBIT B**WORK LETTER**1. Approval Process for Plans.

1.1 Delivery of Shell Plans and Preparation of Preliminary Plans. As soon as available, Landlord shall deliver to Tenant the plans for the portion of the Project showing the Premises' shell (the "**Shell Plans**"). The Shell Plans shall consist of complete architectural, structural and civil plans and at least baseline plans of mechanical, electrical and plumbing systems. When will these be available? They need to be attached to the lease or our execution will need to be subject to review and acceptance of the plans.

1.2 Approval of Preliminary Plans. Within ~~thirty (30)~~ ninety (90) calendar days following Landlord's delivery to Tenant of the Shell Plans, but not earlier than 270 days prior to the Anticipated Delivery Date, Tenant shall submit to Landlord preliminary plans and specifications (the "**Preliminary Plans**") for the tenant improvements to be installed in the Premises (the "**Tenant Improvements**"). The Preliminary Plans shall be prepared by an architect selected and paid by Tenant who is licensed by the State of California. Said architect shall be approved by Landlord in writing, which approval shall not be unreasonably withheld, delayed or conditioned.

1.2.1. Landlord's Response. Within ten (10) business days after Landlord's receipt of the Preliminary Plans, Landlord shall notify Tenant in writing of its approval of the Preliminary Plans or of any reasonable objections thereto. Within ~~twentyseven (207)~~ business calendar days after the receipt by Tenant of a timely objection of Landlord, Tenant shall cause the Preliminary Plans to be modified or advise Landlord the reason the request cannot be accommodated, and shall thereafter deliver the modified plans to Landlord for its approval. Landlord shall have five (5) business days from its receipt thereof to approve such modified Preliminary Plans in the same manner as set forth above. This procedure shall be followed until all reasonable objections have been resolved and the Preliminary Plans have been approved.

1.2.2. Termination If No Approval. In the event that Landlord has not approved the Preliminary Plans within forty (40) calendar days following the delivery by Tenant to Landlord of the first set of Preliminary Plans, then Landlord or Tenant shall have the option to terminate this Lease on five (5) calendar days advance written notice to ~~the other party~~ Tenant. ~~In such event, Tenant shall be liable for all costs and fees incurred by Landlord in connection with its review and approval of the Preliminary Plans, and legal fees and costs, if any, incurred by Landlord in connection with the negotiation and preparation of this Lease. All of such costs and fees shall be paid by Tenant to Landlord within five (5) calendar days following written demand by Landlord. Notwithstanding the foregoing, however, Tenant may make the changes to the Preliminary Plans as requested by Landlord within five (5) calendar days following Landlord's notice to terminate the Lease, thereby nullifying such termination. If either party terminates the Lease in accordance with this Section, Landlord shall reimburse Tenant the costs it incurred in designing the restaurant.~~

1.2.3. Evidence of Approval. Landlord's and Tenant's approval of the Preliminary Plans shall be evidenced by their initialing and dating each page thereof.

1.2.4 Tenant Improvement's Design Concept. Tenant covenants that the design and concept to be set forth in the Preliminary Plans shall comply with Paragraph 1.8 of the Lease. It is understood that Landlord's approval rights under this Paragraph 1.2 and under Paragraph 1.3 do not include the rights to approve Tenant's actual design concept for the Premises (except as to compliance with Paragraph 1.8 of the Lease) , although Tenant agrees to act reasonably in accepting or rejecting Landlord's comments and be sensitive to Landlord's comments thereon. In the event, however, that a change in Tenant's design and concept of the Premises results in a change to the interior-structural elements or exterior of the Premises, Tenant shall submit a Change Order Request (as hereinafter defined), which shall be subject to Landlord's approval rights under Paragraph 1.6.

1.3 Approval of Permit Drawings. Within ninety (90) fifteen (15) calendar days following the initialing of the Preliminary Plans by Landlord and Tenant, Tenant shall prepare and deliver to Landlord engineering working drawings for all mechanical, electrical, plumbing and fire sprinkler systems (the "Permit Drawings") for Landlord's approval.

1.3.1. Landlord's Response. Landlord shall approve or disapprove the Permit Drawings within ten (10) business days after Landlord's receipt thereof. Landlord's disapproval shall be effected by Landlord's delivery to Tenant, within such ten (10) business day period, of a writing setting forth with specificity the reasons for such disapproval. Within twenty (20) seven (7) business-calendar days of the receipt by Tenant of Landlord's objections, Tenant shall cause the Permit Drawings to be modified or advise Landlord of the reason the request cannot be accommodated and shall deliver the modified Permit Drawings to Landlord for its approval. Landlord shall have five (5) business days from its receipt thereof to approve such modified Permit Drawings in the same manner as set forth above. This procedure shall be followed until all objections have been resolved and the Permit Drawings have been approved. Landlord will not unreasonably withhold, delay or condition its consent.

1.3.2. Termination If No Approval. In the event that the Permit Drawings have not been approved by Landlord and Tenant within thirty (30) calendar days following the delivery by Tenant to Landlord of the first set of Permit Drawings, then Landlord or Tenant shall have the option to terminate the Lease, on five (5) calendar days advance written notice to the other party-Tenant. ~~In the event the Lease is cancelled by Landlord, Tenant shall pay to Landlord within five (5) calendar days of Landlord's written demand, all fees and costs incurred by Landlord in connection with its review and approval of the Preliminary Plans and the Permit Drawings, and legal fees and costs, if any, incurred by Landlord in connection with the negotiation and preparation of this Lease. Notwithstanding the foregoing, however, Tenant may make the changes to the Permit Drawings as requested by Landlord within five (5) calendar days following Landlord's notice to terminate the Lease, thereby nullifying such termination. If either party terminates the Lease in accordance with this Section, Landlord shall reimburse Tenant the costs it incurred in designing the restaurant.~~

1.3.3. Evidence of Approval. Tenant's and Landlord's approval of the Permit Drawings shall be evidenced by their initialing and dating each page thereof.

1.4 Limitation on Tenant's Improvements. In no event shall the Tenant Improvements to be made by Tenant to the Premises exceed the limits or capacities of the systems in the building in which the Premises are located, including the limits applicable to plumbing, electrical, HVAC, and load bearing systems. We need a clear understanding of these limitations prior to committing; the plans requested above should reflect this information.

1.5 Plan Check. Upon Landlord's and Tenant's approval of the Permit Drawings, ~~and in any event within ninety (90) days after the date of this Lease,~~ Tenant shall submit a final version thereof to the Department of Building and Safety for the City where the Project is located ("**DBS**") for necessary plan checks and approvals. Any and all plan check corrections shall be made by Tenant.

1.6 Change Orders. In the event Tenant desires to change any item of the Permit Drawings or the Preliminary Plans following approval by Landlord, Tenant, and DBS, and such change modifies the structural components or the appearance of the Premises from the exterior, then Tenant shall submit a change order detailing the desired change (the "**Change Order Request**") to Landlord for Landlord's approval. Landlord shall not unreasonably withhold or condition its consent. Within three (3) business days after receipt of the Change Order Request from Tenant (provided Landlord shall have (5) business days if such changes are substantial), Landlord shall notify Tenant in writing if Landlord approves or disapproves the Change Order Request. The latest Permit Drawings and preliminary Plans (including changes thereto pursuant to an approved Change Order Request) as approved by Landlord are herein referred to as the "**Approved Plans**".

1.7 Permit. Tenant shall use its commercially reasonable best-efforts in obtaining all necessary permits for the construction of the Tenant's Improvements (the "**Building Permit**") and shall notify Landlord in writing of the date of issuance of the Building Permit and provide a copy of the same to Landlord. ~~In the event that Landlord determines that Tenant is not using its best efforts in obtaining the Building Permit, the Rent Commencement Date shall be the date the Rent Commencement Date would have been in Landlord's reasonable judgment had Tenant used such best efforts. In the event that the Building Permit has not been obtained by Tenant within thirty (30) calendar days following the date Landlord approves of the Permit Drawings, then Landlord shall have the option to terminate the Lease, on five (5) calendar days advance written notice to Tenant. In the event the Lease is cancelled by Landlord, Tenant shall pay to Landlord within five (5) calendar days of Landlord's written demand, all fees and costs incurred by Landlord in connection the Building Permit and with Landlord's review and approval of the Preliminary Plans and the Permit Drawings, and legal fees and costs, if any, incurred by Landlord in connection with the negotiation and preparation of this Lease. Notwithstanding the foregoing, however, Tenant may provide Landlord with a copy of the Building Permit within five (5) calendar days following Landlord's notice to terminate the Lease, thereby nullifying such termination.~~

1.8 Approval of Tenant's Contractors and Subcontractors. Prior to hiring ~~any the primary~~ contractors ~~or subcontractors,~~ or entering into agreements with any of them, Tenant shall deliver to Landlord for Landlord's approval a list of the primary contractors ~~and subcontractors~~ Tenant proposes to hire to perform the work in the Premises, ~~and true and accurate copies of all contracts and agreements Tenant proposes to enter into with any such contractors and subcontractors in connection with such work. As a condition to its approval, Landlord may require a performance and/or completion bond from Tenant's contractors, insurance coverage, regular written progress reports and consultations, and the employment of only union or non-union personnel and subcontractors. We need to agree upon any of these requirements prior to lease~~

execution; insurance amounts need to be established, we won't agree to a performance bond requirement. Landlord will not unreasonably withhold, delay or condition its approval of any contractor. In any event, Landlord shall have the right to designate the subcontractors to perform work in the Premises which could reasonably affect the structural systems (or warranties concerning such systems) of the Building, including but not limited to the elevator (if any), roof, HVAC, plumbing, exterior, foundation, and load bearing elements; but it shall require that such subcontractors provide such work at competitive rates for the geographic area.

1.9 Timely Performance. Tenant agrees to cause any plans, specifications, drawings, schedules and documents to be provided by it hereunder to be prepared promptly and in coordination with the activities of Landlord and its agents. Landlord agrees to timely perform its obligations hereunder. Time is of the essence.

1.10 Exculpation. Landlord's space planner and engineer are independent contractors. Landlord may introduce Tenant to Landlord's space planner as an accommodation to Tenant. Even if the Preliminary Plans, Permit Drawings, and any changes thereto are performed by Landlord's space planner and engineers, and notwithstanding any advice or assistance which may be rendered to Tenant and/or Landlord's space planner and/or engineers by Landlord or employees or affiliates of Landlord or affiliates of Landlord's general partners, Landlord shall not be responsible for any omissions or errors contained therein. We need to discuss the role of these individuals and Landlord's approval process.

1.11 Signs. Without limiting the foregoing, all signs installed by Tenant shall comply with the Signage Criteria attached to the Lease as Exhibit C.

2. Payment for Tenant Improvement Work.

2.1 Cost of Plans and Tenant Improvement Work. Subject to the provisions of Paragraph 2.2 below, Tenant shall pay for all costs (the "T.I. Costs") incurred in the construction of the Tenant Improvements in the Premises, and the design and preparation of the Approved Plans, Preliminary Plans and Permit Drawings, including but not limited to (i) Change Order Requests and any other revisions as required for approval by Landlord, Tenant, and/or the DBS to the extent such are incorporated into the tenant's plans; and (ii) all necessary printing and distribution costs required to implement the purposes of this Exhibit B. ~~If the cost of the Tenant Improvements is estimated to cost in excess of the T.I. Allowance specified below, Tenant shall deposit with Landlord the excess prior to commencement of construction, and Landlord shall disburse amounts out of such deposit to pay the T.I. Cost.~~

2.2 Tenant Improvement Allowance. Landlord shall provide Tenant with a tenant improvement allowance (the "T.I. Allowance") in the maximum amount of Nine Hundred Five Thousand One Hundred and xx/00 Dollars (\$905,100.00) (\$105.00 per square foot based on 8,620 square feet this will need to be adjusted with the increased square footage) for the cost of the Tenant Improvements constructed and described in the Approved Plans. Any costs for Tenant Improvements in excess of the T.I. Allowance shall be paid for by Tenant, ~~and the availability of liquid funds for the full amount of such excess shall be demonstrated to Landlord prior to the start of construction.~~ Prior to the commencement of construction, Tenant shall provide Landlord with a copy of the executed construction contract ~~with a stipulated sum or guaranteed maximum cost contract showing the cost of the Tenant Improvements.~~ The T.I. Allowance shall be used and applied toward the cost of the design ~~(only to the extent set forth herein)~~ and construction of the Tenant Improvements (including design, architectural, engineering, mechanical and millwork, and excluding, however, the

cost of any furniture, fixtures, trade fixtures, equipment or special installations of Tenant) and for no other purpose; any excess unused portion of the T.I. Allowance shall be retained by Landlord. Tenant acknowledges that the T.I. Allowance has not been calculated so as to provide Tenant with sufficient funds to pay for all tenant improvements. The T.I. Allowance shall be paid by Landlord to Tenant as follows (~~provided, however, that no payment shall be required if construction is not proceeding diligently and continuously in the normal course from commencement, as reasonably determined by Landlord, or if at the time there is any default under this Lease~~ we can agree to some language that payments may be delayed if Landlord provides timely notice of its concern that construction is not proceeding in such a manner as to achieve the targeted opening date and Tenant does not provide reasonable evidence to the contrary):

- 2.2.1 Payment No. 1 - \$181,020.00 (each of these numbers will likewise need to be revised) (“Payment #1”) shall be paid within forty-five (45) days after the later of (a) Tenant’s delivery to Landlord of originals (or certified copies) of all Building Permits for construction of the Tenant Improvements and (b) commencement of construction of the Tenant Improvements (as reasonably determined by Landlord);
- 2.2.2 Payment No. 2 - \$181,020.00 (“Payment #2”) shall be paid within forty-five (45) days after Payment #1.
- 2.2.3 Payment No. 3 - \$181,020.00 shall be paid within forty-five (45) days after Payment #2.
- 2.2.4 Payment No. 4 - \$362,040.00 shall be paid upon satisfaction of all of the following conditions:
 - 2.2.4.1 Tenant shall have provided Landlord with reproducible vellum “as-built” plans and specifications for all improvement work performed by Tenant in the Premises.
 - 2.2.4.2 Tenant shall have provided Landlord with copies of all permits for construction of Tenant’s Improvements and commencement of construction.
 - 2.2.4.3 Tenant shall have completed the Tenant Improvements in the Premises substantially in accordance with the Approved Plans.
 - 2.2.4.4 Tenant’s architect if any or Tenant’s representative, shall have delivered to Landlord a certificate, in a form reasonably acceptable to Landlord (can we agree on the form now?), certifying that the construction of the Tenant Improvements in the Premises has been substantially completed.
 - 2.2.4.5 ~~Thirty five (35) calendar days shall have passed following recordation of a valid notice of completion without any claims or liens having been filed, made or threatened in any way. This requirement was not reflected in the letter of intent. Landlord is sufficiently protected by the lease restrictions related to liens.~~
 - 2.2.4.6 Landlord shall have received unconditional lien releases with respect to ~~all~~ tenant improvement work performed

in the Premises totaling at least \$905,100. *This is consistent with the Letter of Intent.*

- 2.2.4.7 ~~Tenant shall have submitted to Landlord invoices, affidavits, backup information and other proof, in sufficient detail in Landlord's judgment to show that the cost of the Tenant Improvements performed in accordance with the Approved Plans exceeds the T.I. Allowance. This was not included in the letter of intent.~~
- 2.2.4.8 Thirty (30) days shall have passed since the later to occur of (a) the opening of Tenant for the normal conduct of its business, provided that Tenant shall have continuously and fully operated its business from the Premises in a normal and customary manner after such opening, and (b) Tenant shall have commenced the payment of full monthly installments of Minimum Rent and Adjustments.

Notwithstanding anything to the contrary set forth in the foregoing, in the event that the T.I. Costs for the Tenant Improvements shall be less than the T.I. Allowance, Landlord shall not be obligated to advance to Tenant more than the T.I. Costs.

3. Construction.

3.1 Construction by Landlord. Landlord shall construct the following items ("Landlord's Work") per the Permit Drawings: *As we discussed yesterday, we will want the right to approve Landlord's plans prior to lease execution or make the lease execution contingent upon our subsequent acceptance. We will then want a requirement that Landlord not vary from those plans in any manner that impacts the Premises, how we relate to the Common Areas, the view, access to the premises, utilities serving the premises, adjoining walls, or our cost of construction without our prior consent.*

3.1.1. Standard Items.

(a) CODES PERMITS, INSPECTIONS & APPROVALS:

- (i) Landlord shall obtain all necessary inspections associated with Landlord's Work, including a certificate of occupancy *which permits the operation of the restaurant in the Premises without unusual restrictions or obligations.*
- (ii) Landlord shall assist Tenant in securing approvals of governing agencies having jurisdiction over the Premises for signage and canopies.

(b) UTILITIES TO PREMISES: Landlord shall provide the following utilities:

- (i) Electricity:
- (aa) Landlord shall install complete electrical service, meter(s), main disconnect, *transformer, wire* and conduit to Premises as specified in the approved Permit Drawings as follows:

- (1) One 800 to 1200 amp 120/208 3 phase 4 wire main disconnect for Tenant's sole use. HVAC electrical connection will be an empty conduit stubbed at ceiling level of Premises we aren't sure why this is written this way. (To be connected by Tenant to Tenant's subpanel.) One empty conduit from electrical room to Tenant's Premises (Landlord needs to pull wire).
- (bb) Landlord shall provide separate meters for the following:
 - (1) Common Areas associated with all building tenants.
- (ii) Gas:
 - (aa) Landlord shall provide metered natural gas service with 26,000 MBTUH capacity stubbed to the Premises and shall extend such natural gas service to designated Patio Space stub points.
- (iii) Water and Sewer:
 - (aa) Landlord shall provide a privately metered (confirm that the meter measures our service only) water service including a minimum of 2" cold water line at 50 PSI stubbed to the Premises and 4" cast iron sanitary sewer line, with grease trap and lines for future restroom stubups described in 3.1.1(d) below. Landlord shall pay for the utility connection fees, if any.
- (iv) HVAC:
 - (aa) Landlord shall provide and install an adequate HVAC system serving the Premises exclusively and delivering between 55 to 60 (we anticipate needing approximately 90 tons) tons for the 8,620 (correct square footage) square feet of leasable area. Final size of unit(s) shall be calculated to accommodate building shell heat/gain loss properties and Tenant's use. The specifications of the HVAC shall be subject to local codes.
 - (bb) Landlord is responsible for providing and installing all aspects of the HVAC system outside of, and stubbed to, the Premises, including, but not limited to:

package unit(s), structural support, roof curbs, roof penetrations, return air penetrations, chases, conduit, refrigerant piping, condensate lines and an empty conduit for future connection to power source, by Tenant. Shouldn't this be a complete operating unit, including within the space and more than empty conduit? I will confirm this with Rick.

(cc) ~~Hood~~ Exhaust requirements are as follows:

- (1) An exhaust system for public restrooms and employee restrooms
- (2) One ~~stainless steel aluminum~~ dishwasher exhaust ductwork riser from ~~scullery hood the ceiling of the first floor~~ to the floor of the penthouse (Is this a electrical/mechanical "penthouse"?). Each riser shall be sized for Tenant's use in compliance with applicable code, 2,000 cfm at 2,000 fpm. One conduit and wire to provide power to the fans.
- (3) Two kitchen exhaust ductwork risers from the ceiling of the first floor to the floor of the penthouse (same question). Each riser shall be sized for approximately 9,000 cfm at 2,000 fpm. Two conduits and wire to provide power to the fans.
- (4) Two kitchen exhaust fans, one dishwasher exhaust fan, all related ductwork in the penthouse (same question), 2-hour shaft to enclose the duct and conduits to provide power to the fans and necessary louvers.
- (5) Make-up air louvers in accordance with Tenant's plans and applicable code ~~in the store front glass for additional make-up air.~~
- (6) Make-up air system for the kitchens includes upgrading the base building outside air system to provide an additional approximately 13,000 ~~10,000~~

cfm of outside air for the Premises. Outside air will be stubbed out of the shaft for future connection by the Tenant.

- (7) A hood for an electrical prime rib cook and holding cabinet if required by applicable law.
- (8) U.L. listed ventilators above wood burning appliances (i.e. rotisserie and pizza oven) and constant misting and internal fire suppressant systems, manufactured by Gaylord Industries, as required by the specifications but subject to local codes.
- (9) In the event a trash and rubbish room is indoors, an exhaust system and/or air conditioning system may be required. Mike says there is no doubt this will be required.

(dd) Landlord shall provide pollution control equipment, if required by local codes.

(c) FIRE PROTECTION:

(i) Sprinklers:

(aa) General:

Landlord shall provide sprinkler main, distribution, drops and heads as required by code for restaurants as located on Tenant's Plans. System shall be maintained by Landlord. ~~(The drops and modifications to accommodate Tenant's store shall be made by Tenant, at Tenant's sole cost and expense.)~~

(bb) Locations:

Horizontal Mains in accordance with Tenant's Plans, which shall be not less than 13'-16' aluminum - 0" A.F.F. Horizontal branch lines shall not be less than 15'-0" AFF.

(ii) Fire Exit Corridor:

Landlord shall provide fire exit corridors, & ingress and egress ramps as depicted in the Shell Plans and as required by all governing agencies.

(iii) Fireproofing:

Landlord shall provide & install all fireproofing and insulation required for the shell of the Premises.

(iv) Alarm Detection System

Landlord shall extend ~~an adequate the~~ fire alarm/detection system into the Premises that meets code requirements for Tenant's use.

(d) RESTROOMS:

Landlord shall provide the following:

Adequate drain, waste and vent systems

One (1) 4" sewer stubbed ~~to out within~~ the Premises,

One (1) and such additional number as may be required to meet code requirements for Tenant's use 2" vent stubbed from ceiling within the Premises,

One (1) 2" cold water stubbed ~~to out within~~ the Premises at 50 p.s.i.,

One 4" vent stub out through roof for the future exhaust fan within the Premises for future restroom by Tenant. Mike asked me to review your plans on this.

~~Restroom design by Tenant must be approved by all governing agencies prior to construction.~~

(e) BUILDING SHELL:

Roof and outside walls (~~other than storefront~~) provided by Landlord, including entry doors, in accordance with Plans.

(f) DEMISING WALLS AND WINDOWS:

All demising walls (excluding masonry walls) shall be finished by Landlord in drywall (taped, sanded and ready for finish) from structure to structure. Landlord shall provide large windows, as specified in the Preliminary Plans, to accentuate the view of the pier and ocean. All windows and doors shall be provided by Landlord as part of the shell and shall comply with applicable code and be adequately soundproofed against highway noise. Landlord shall provide a thin railing system around the perimeter of the patio areas, that is attractive and which does not interfere with the views of the pier and ocean, subject to code requirements and conforming to Tenant's Plans.

(g) CEILING:

Landlord shall provide 16 foot minimum clear ceiling heights with space above for ducts, utilities and mechanical.

(h) ESCALATOR:

Landlord shall provide nonexclusive escalator service from the street level vestibule area to the second level. The escalator shall be oriented so its entrance is perpendicular to and faces 5th Street and is as close to the curb as possible, subject to code requirements.

(i) CABLE TELEVISION:

Landlord shall install cable lines and outlets stubbed to the Premises to extend cable television service to the Premises terminating at a location designated by Tenant.

~~Landlord shall use reasonable diligence in causing all Landlord's Work to be completed, provided Landlord shall not have any liability for late delivery of the Premises or late completion of Landlord's Work.~~

What about phone and data lines?

Landlord needs to provide ADA compliant path of travel to the Premises.

3.1.2 Subject to local code requirements, Landlord shall not construct (or alter) any portion of the Project which will result in the obstruction of Tenant's view of Huntington Beach, the Huntington Beach Pier and the Pacific Ocean. Landlord does not warrant against potential view obstructions installed or approved by the City of Huntington Beach on property, including but not limited to the property across Pacific Coast Highway from the Premises. I want to discuss this further with Rick. I understand that this is consistent with the Letter of Intent.

3.2 Construction by Tenant. The Tenant Improvements set forth in the Approved Plans shall be performed in accordance with the following:

3.2.1 The Tenant Improvements to the Premises shall be constructed in a good and workmanlike manner. Tenant shall diligently prosecute such construction to completion. Tenant shall have the work performed in such a manner so as not to (a) obstruct the access of any other tenant or occupant in the Project, (b) damage any portion of the Project, including Common Areas, ~~(c) create dust or dirt in any Common Areas, or (d) interfere with any construction or alterations being performed by Landlord at the Project~~ We need language that the parties will cooperate to reduce the interference with each other's work. Tenant shall cause the work areas to be cleaned on a daily basis to the extent required to avoid interference with other tenant's operations.

3.2.2 All Tenant Improvement work in the Premises shall be performed by Tenant's contractors and subcontractors strictly in accordance with the Approved Plans, the provisions of Title 24 of the California Administrative Code (State ADA?), the Americans with Disabilities Act, and all other applicable Laws, and shall satisfy the reasonable requirements of all carriers of insurance on the Premises and the Project, and the Board of Underwriters Fire Rating Bureau or similar organization.

3.2.3 All Tenant Improvements in the Premises shall be performed in accordance with the reasonable rules and regulations of Landlord which do not increase the cost or time for completing Tenant Work.

3.2.4 Prior to the commencement of the Tenant Improvements in the Premises, Tenant shall notify Landlord in writing of the anticipated date of the commencement of construction to enable Landlord to post a notice of non-responsibility.

3.2.5 Prior to the commencement of the Tenant Improvements in the Premises, Tenant shall furnish a copy of the Building Permit to Landlord.

3.2.6 Prior to and continuing during the period of Tenant's access, entry and construction, Tenant's prime contractors ~~and subcontractors~~ shall procure and maintain property damage and public liability insurance during the period of their performance of labor or the furnishing of materials to the Premises from an insurance company reasonably satisfactory to Landlord. Said insurance shall be (we need to specify the policy terms now) ~~in such amounts and in form satisfactory to Landlord~~, and shall name Landlord and, at Landlord's request, any Lenders of Landlord or any ground lessor, as additional insureds, as their respective interests may appear. Tenant shall also require its prime ~~each contractor and subcontractor employed to perform labor or furnish materials to the Premise~~ to procure and maintain, during the performance of the labor or the furnishing of the materials, a policy of workers' compensation or employer's liability insurance in compliance with state law ~~issued by an insurance company acceptable to Landlord for the protection of the employees of the contractors and subcontractors, including executive, managerial, and supervisory employees engaged in any Tenant Improvements to be performed in the Premises~~. Copies of the policies or certificates evidencing the existence and amounts of such insurance, and renewals or binders, shall be delivered to Landlord by Tenant at least ten (10) days prior to (a) the commencement of Tenant Improvements, or (b) the expiration of any such policy, as the case may be.

3.2.7 Landlord shall have no responsibility for the quality or adequacy of any work performed by Tenant's contractors or subcontractors, whether with respect to labor, material, or otherwise.

3.2.8 Tenant shall be solely responsible for security in the Premises during the period of construction. (Do you anticipate a security issue?) None of Landlord, Landlord's contractor, or their agents or employees shall have any responsibility whatsoever for the safety of any equipment, tools, materials, fixtures, merchandise, or other personal property located in the Premises during the period of construction except to the extent damage is caused by the ~~gross~~ negligence or willful misconduct of Landlord, Landlord's contractor, or their agents or employees.

3.2.9 The Project and the Premises shall be kept free and clear of any and all mechanics' or similar liens on account of work performed by Tenant, its contractors or subcontractors. If any such liens are filed, Tenant shall post a release bond pursuant to the provisions of California Civil Code Section 3143 within ten (10) days following written demand by Landlord that it do so ~~the filing of such lien~~, and shall further indemnify and hold Landlord, its partners, agents, and employees harmless from and against any claims, liability, costs, lawsuits, damages, or expenses (including attorneys' fees and court costs) arising out of work performed or to be performed in the Premises.

3.2.10 Landlord and Landlord's Lender shall have access to the Premises for purposes of inspection at all times during the period of construction.

3.2.11 Tenant shall be responsible for and shall indemnify and hold Landlord harmless from and against any liability, cost, claim, lawsuit, damage or expense (including court costs and attorneys' fees) arising out of any activity or omission of Tenant's contractors, subcontractors, or their agents and employees. ~~Such indemnity by Tenant shall also apply with respect to any and all costs, losses, damages, injuries, and liabilities related in any way to Landlord's performance of any ministerial acts reasonably necessary to (a) permit Tenant to complete the Tenant Improvements, and (b) enable Tenant to obtain any building permit or certificate of occupancy for the Premises.~~

3.2.12 Tenant shall reimburse Landlord for any and all expenses incurred by Landlord by reason of faulty work performed by Tenant or its contractors or subcontractors, damage to the Building or Project caused by Tenant's contractors or subcontractors, unreasonable delays in work performed in, on, or about the Building or Project caused by Tenant's contractors or subcontractors or as a result of their inadequate clean-up, including but not limited to legal fees and costs incurred in connection with Landlord's enforcement of the provisions of this Subparagraph.

3.2.13 Landlord shall be deemed to be the owner of all of the tenant improvements constructed by Tenant pursuant to this *Exhibit "C"*, with the exception of Tenant's trade fixtures which shall include, without limitation, furnishings and equipment, any portable, free-standing partitions, and folding partitions and items of the nature described in Exhibit – hereto (I provided a proposed list with my e-mail in August.).

4. Utilities.

Tenant shall pay for all utility services supplied to the Premises or to Tenant during the construction and completion of Tenant Improvements. Are these secured directly from the provider or through the Landlord?

5. Tenant Delays and Increased Costs.

5.1 Substantial Completion. For purposes of this Lease, "*Substantial Completion*" of the Landlord's Work shall occur, and the Landlord's Work shall be deemed to have been "*Substantially Completed*" upon substantial completion of construction of the Landlord's Work set forth in Section 3.1 hereof, with the exception of any "punch list items".

5.1.1 As used herein, the term "*punch list items*" shall mean any minor defects or incomplete details of construction, decoration, or mechanical adjustment which do not, either individually or in the aggregate, materially interfere with or affect, Tenant's construction of the Tenant Improvements.

5.1.2 Landlord shall provide Tenant with at least three (3) business days' prior written notice of the date on which, in Landlord's reasonable judgment, Substantial Completion will occur. Tenant shall inspect the Premises with Landlord's architect, construction supervisor or other designee of Landlord and shall prepare and submit to Landlord, within twenty-four (24) hours after such inspection, a list of all punch list items that can be observed by visual inspection of the Premises, which list shall be specific as to the location and description of such items. Landlord shall promptly complete and correct, at Landlord's sole expense, all punch lists items within thirty (30) days after the later of (a) the date the list of punch list items is delivered to Landlord or (b) the

date of Substantial Completion. We need to rework this language consistent with my comments in Section 4.2. We also need to rework 5.1.3 to reflect the fact that some of Landlord's Work will be done concurrent with Tenant Work and that much of it cannot be tested until the restaurant is up and running – thus, acceptance must occur after that time. Perhaps a second punchlist process would address these concerns. Acceptance must ultimately be subject to latent defects and Landlord's obligation to maintain structural components.

5.1.3 The occupancy of the Premises or any part thereof for business by Tenant or anyone claiming by, through or under Tenant shall be conclusive evidence that (a) Tenant accepts possession thereof; (b) the Premises were in good and satisfactory condition; and (c) Landlord's Work was satisfactorily completed at the time such occupancy was so taken, subject to punch list items, if any, indicated specifically as to location and description on a list delivered by Tenant to Landlord on or before the date Tenant takes occupancy of the Premises.

5.2 In the event that Substantial Completion shall be delayed in any way by reason of any act or omission of Tenant, including, without limitation, as a result of (a) any changes in Landlord's Work or the Tenant Improvements requested by Tenant this language will need to be cleaned up a little once we settle on the language for building in compliance with Plans., (b) early access by Tenant (or its contractors, subcontractors, agents, employees or representatives) to the Premises, or any installations by Tenant (or its contractors, subcontractors, agents, employees or representatives) in the Premises (including, without limitation, performance of the Tenant Improvements) this language will need to be revised to reflect the parties' commitment to cooperate in concurrent construction – some delays will occur, but no one should be penalized so long as both parties are acting in good faith; on the flip side of this, we need language extending the Opening Date if Landlord's Work causes us significant delays in completing our work., (c) the failure by Tenant to comply with any of its obligations under this Work Letter in a timely manner (including, without limitation, its obligations under Paragraph 1 hereof) same comment as above, (d) the failure by Tenant to respond promptly ~~(and in any event within one (1) business day after request)~~ to any request for consent or approval or information from Landlord (or Landlord's contractors, subcontractors, agents, employees or representatives) this too will need to be reworked and made mutual, or (e) any other act or omission by Tenant (or its contractors, subcontractors, agents, employees or representatives) this is too broad (a "**Tenant Delay**"), then Substantial Completion shall be deemed to have occurred on the date that Substantial Completion would have occurred absent such Tenant Delay, ~~as determined by Landlord.~~

5.3 In the event that the cost to Landlord for the performance of Landlord's Work shall be increased in any way by reason of any act or omission of Tenant, including, without limitation, as a result of (a) any changes in Landlord's Work or the Tenant Improvements requested by Tenant, (b) early access by Tenant (or its contractors, subcontractors, agents, employees or representatives) to the Premises, or any installations by Tenant (or its contractors, subcontractors, agents, employees or representatives) in the Premises, (c) the failure by Tenant to comply with any of its obligations under this Work Letter in a timely manner (including, without limitation, its obligations under Paragraph 1 hereof), (d) the failure by Tenant to respond promptly (and in any event within one (1) business day after request) to any request for consent or approval or information from Landlord (or Landlord's contractors, subcontractors, agents, employees or representatives), or (e) any other act or omission by Tenant (or its contractors, subcontractors, agents, employees or representatives), then Tenant shall be responsible for any increased costs resulting therefrom, and shall pay to Landlord such increased costs within ten (10) days after demand therefor. This

needs to be reworked and made mutual in much the same way as 5.2.

We will want to discuss further the status of the Project, your efforts to gain control of all the property to be included in the Project, the ownership relationship for the hotel, the anticipated timing and the status of other leases. We may need a contingency provision related to the leasing of the other space as well.

IN WITNESS WHEREOF, the parties have executed this Work Letter as of the date set forth in Paragraph 1.1 of the Lease.

LANDLORD:

a California corporation

By: _____
Name:
Title:

TENANT:

a _____

By: _____
Name:
Title:

By: _____
Name:
Title:

EXHIBIT C**SHOPPING CENTER SIGNAGE CRITERIA**

I am having XXXX review this section and will provide you specific comments later. However, I think most of this will be addressed by approving a sign package or sample prior to lease execution.

These criteria have been established for the purpose of assuring a coordinated sign program and maintaining a continuity of quality and aesthetics throughout the Project, for the mutual benefit of all tenants, and to comply with the regulations of the City where the Project is located ("City"). Conformance with these criteria will be strictly enforced. Any installed nonconforming or unapproved sign must be brought into conformance at the expense of the Tenant.

- A. Each tenant, prior to fabrication, shall submit or cause to be submitted to the Landlord for approval two (2) copies of detailed drawings indicating the location, size, layout, design color, illumination, materials and method of attachment.
- B. All permits for signs and their installation shall be obtained by Tenant or its representative.
- C. All signs shall be constructed and installed at Tenant's expense.
- D. Each Tenant shall be responsible for the fulfillment of all requirements and specifications, including those of the City.
- E. All signs shall be reviewed by Landlord for conformance with this criteria and overall design quality. The approval or disapproval of sign submittals based on aesthetics of design shall remain the sole right of Landlord or its authorized representative.
- F. Each Tenant shall be responsible for the installation (within 60 days after opening for business) and maintenance of its sign. Should Tenant's sign require maintenance or repair, Landlord shall give Tenant thirty (30) days written notice to effect said maintenance or repair. Should Tenant fail to do same, Landlord shall undertake repairs and said Tenant shall reimburse Landlord within ten (10) days from receipt of invoice.
- G. Signing for Tenants shall be consistent with the architecture of the Project, and shall be subject to the Design Requirements of the City.
- H. Wording of signs shall not include the product sold except as a part of the Tenant's customary trade name or insignia.
- I. Advertising devices, such as attraction boards, posters, banners and flags shall not be permitted.

EXHIBIT D

Form of Statement of Gross Sales

TENANT'S STATEMENT OF GROSS SALES

SALES VOLUME REPORT-PERCENTAGE RENTS
 _____/_____/_____

(
) Month
 Ended
 (
)
 Quarter
 Ended
 (
) Other

	<u>Rental</u>	<u>Item</u>	<u>Sales</u>	____%
1.	_____		\$ _____	_____
2.	_____		\$ _____	_____
3.	_____		\$ _____	_____
4.	_____		\$ _____	_____
5.	TOTAL (Add Lines 1+2+3+4 of Rental column)			\$ _____
6.	Less Minimum Rent paid for period covered			\$ _____
7.	Total Percentage Rental payable and enclosed (Line 5 less Line 6)			\$ _____

TENANT: _____

BY: _____

DATE: _____

ACCOUNT NUMBER: _____

Note: We encourage you to send as much detailed information as practical to support your calculations. However, in addition to documentation normally provided IT IS ESSENTIAL THAT THIS FORM BE COMPLETED AND RETURNED to ensure that all rental information is properly recorded to your account.

ANNUAL GROSS SALES VOLUME REPORT FOR 19__.

<u>Month</u>	<u>Sales</u>	<u>Month</u>	<u>Sales</u>
JANUARY	\$ _____	JULY	
\$ _____			
FEBRUARY	\$ _____	AUGUST	
\$ _____			
MARCH	\$ _____	SEPTEMBER	
\$ _____			
APRIL	\$ _____	OCTOBER	
\$ _____			
MAY	\$ _____	NOVEMBER	
\$ _____			
JUNE	\$ _____	DECEMBER	
\$ _____			

NOTE: If the figures you submit differ from the monthly reports, please include an explanation.

TENANT:
RUI ONE CORP.

By: _____
Name:
Title:

CERTIFIED TO BE CORRECT BY:

DATE: _____ ACCT.

NO. _____

EXHIBIT E**FORM OF GUARANTY OF LEASE***Are you requesting a guaranty?*

Landlord: **CIM/HUNTINGTON BEACH, INC.**, a California corporation

Tenant: **RUI ONE CORP.**, a _____ corporation

Premises: Described in the Lease

Date of Lease: June ___, 2000

Guarantor: _____

THIS GUARANTY OF LEASE (this "**Guaranty**") is dated for reference purposes and executed as of _____, by the guarantors identified above (collectively, "**Guarantor**"), with reference to the following facts:

A. Landlord and Tenant have entered into and executed the Lease described above by the terms of which Landlord leased to Tenant and Tenant leased from Landlord certain Premises more particularly described in the Lease.

B. Guarantor has a financial interest in Tenant and a material interest in ensuring that Landlord and Tenant enter into the Lease.

C. Landlord would not execute the Lease if Guarantor did not execute and deliver to Landlord this Guaranty.

NOW, THEREFORE, for and in consideration of Landlord's execution of the Lease and as a material inducement to Landlord to enter into the Lease, Guarantor hereby covenants with and represents and warrants to Landlord as follows:

1. Guarantor hereby jointly, severally, irrevocably and unconditionally guarantees, for and during the term of the Lease as extended or renewed, the prompt payment by Tenant of all rentals and all other sums payable by Tenant under the Lease and the faithful and prompt performance by Tenant of each and every one of the terms, conditions and covenants of the Lease to be kept and performed by Tenant. If, at any time, Tenant shall default in the payment of any sums payable by Tenant under the Lease or in the performance of any of the terms, conditions or covenants of the Lease to be kept, performed or observed by Tenant, Guarantor will immediately pay such sums payable by Tenant under the Lease and/or keep, perform and observe such terms, conditions and covenants in place and stead of Tenant.

2. The terms of the Lease may be altered, affected, modified, compromised, accelerated, extended or changed by agreement between Landlord and Tenant, or by a course of conduct, without notice to or consent from Guarantor. Landlord may, without notice to or consent from Guarantor, alter, modify, compromise, accelerate, extend or change the time or manner for the payment or performance of any of the obligations guaranteed hereunder, and Landlord may release, substitute or add any one or more guarantors of Tenant's performance under the Lease. The Lease may be assigned by Landlord or any assignee of Landlord without consent or notice to Guarantor. In any such event,

this Guaranty shall thereafter guarantee the performance of Tenant under the Lease as so changed, modified, altered or assigned. No exercise or non-exercise by Landlord of any right hereby given Landlord, no dealing by Landlord with Guarantor or any guarantor or any other person, and no change, impairment, release or suspension of any right or remedy of Landlord against any person, including Tenant and any other guarantor, shall in any way affect any of the obligations of Guarantor hereunder or shall give Guarantor any recourse against Landlord.

3. This Guaranty shall not be released, modified or affected by failure or delay on the part of Landlord to enforce any of the rights or remedies of Landlord under the Lease, whether pursuant to the terms thereof or at law or in equity. No provisions of this Guaranty or rights of Landlord hereunder can be waived in whole or in part nor can Guarantor be released from Guarantor's obligations hereunder except by a writing duly executed by an authorized general partner of Landlord.

4. Guarantor hereby expressly waives and relinquishes all rights, remedies and defenses accorded by applicable law to guarantors and agrees not to assert or take advantage of any such rights, remedies or defenses, including but not limited to (a) any right to require Landlord, as a condition to enforcement of this Guaranty, to proceed against Tenant or any other person or to pursue any other right or remedy in Landlord's power before proceeding against Guarantor; (b) the defense of the statute of limitations in any action hereunder or in any action for the collection of any indebtedness or the performance of any obligation hereby guaranteed; (c) any defense that may arise by reason of the incapacity, lack of authority, death or disability of any other person or persons or the failure of Landlord to file or enforce a claim against the estate (in administration, bankruptcy or any other proceeding) of any other person or persons; (d) any defense based upon the failure to give notice of the acceptance of this Guaranty by any person; (e) any defense based upon any modification, compromise, acceleration or change in the terms of the Lease; (f) any defense based upon the failure to make, give or serve demand, notice of default or nonpayment, presentment, protest and all other notices of any kind to which Guarantor might be entitled in connection with this Guaranty or the Lease; (g) any defense based upon an election of remedies by Landlord; (h) any defense based upon any lack of diligence by Landlord in enforcing the terms of the Lease; (i) any defense based upon any statute or rule of law which provides that the obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal; (j) any duty on the part of Landlord to disclose to Guarantor any facts Landlord may now or hereafter know about Tenant, regardless of whether Landlord has reason to believe that any such facts materially increase the risk beyond that which Guarantor intends to assume, or has reason to believe that such facts are unknown to Guarantor, or has a reasonable opportunity to communicate such facts to Guarantor, it being understood and agreed that Guarantor is fully responsible for being and keeping informed of the financial condition of Tenant and of all circumstances bearing on the risk of nonperformance of any obligations hereby guaranteed; (k) any defense arising because of an election made by Landlord under Section 1111(b)(2) of the Federal Bankruptcy Code or any similar statute; and (l) any defense based on any borrowing or grant of a security interest under Section 364 of the Federal Bankruptcy Code, it being agreed by Guarantor that this Guaranty is in the nature of an absolute guarantee of payment and performance and not of collection and that the failure of Landlord to exercise any rights or remedies it has or may have against Tenant shall in no way impair the obligation or liability of Guarantor hereunder.

5. No notice of default need be given to Guarantor, it being specifically agreed and understood that this Guaranty is a continuing guaranty under which Landlord may proceed forthwith and immediately against Tenant or against Guarantor following any breach or default by Tenant or for the

enforcement of any rights which Landlord may have as against Tenant pursuant to or under the terms of the Lease or at law or in equity.

6. Landlord shall have the right to proceed against Guarantor following any breach or default by Tenant without first proceeding against Tenant and without previous notice to or demand upon either Tenant or Guarantor.

7. Until all the terms, covenants and conditions of the Lease are fully performed and observed by Tenant, Guarantor (a) shall have no right of subrogation against Tenant by reason of any payments or acts of performance by Guarantor in compliance with the obligations of Guarantor hereunder, (b) hereby waives any right to enforce any remedy which Guarantor now or hereafter shall have against Tenant by reason of any one or more payments or acts of performance by Guarantor in compliance with the obligations of Guarantor hereunder, and (c) subordinates any liability or indebtedness of Tenant now or hereafter held by Guarantor to the obligations of Tenant to Landlord under the Lease.

8. Guarantor has made an independent investigation of the financial condition of Tenant and the ability of Tenant to perform the obligations hereby guaranteed prior to making this Guaranty, and Guarantor hereby waives any defense that Guarantor may have by reason of the failure of Landlord or any successor- in-interest to Landlord to provide Guarantor with any information respecting the financial condition of Tenant, or Tenant's ability to perform any of the obligations hereby guaranteed.

9. Guarantor shall file in any bankruptcy or other proceeding in which the filing of claims is required by law all claims which Guarantor may have against Tenant relating to any indebtedness of Tenant to Guarantor and will assign to Landlord all rights of Guarantor thereunder. If Guarantor does not file any such claim, Landlord, as attorney-in-fact for Guarantor, is hereby authorized to do so in the name of Guarantor or, in Landlord's discretion, to assign the claim to a nominee and to cause proof of claim to be filed in the name of Landlord's nominee. The foregoing power of attorney is coupled with an interest and cannot be revoked. Landlord or its nominee shall have the sole right to accept or reject any plan proposed in such proceeding and to take any other action which a party filing a claim is entitled to do. In all such cases, whether in administration, bankruptcy or otherwise, the person or persons authorized to pay such claim shall pay to Landlord the amount payable on such claim and, to the full extent necessary for that purpose, Guarantor hereby assigns to Landlord all of Guarantor's rights to any such payments or distributions to which Guarantor would otherwise be entitled; provided, however, Guarantor's obligations hereunder shall not be satisfied except to the extent that Landlord receives cash by reason of any such payment or distribution. If Landlord receives anything hereunder other than cash, the same shall be held as collateral for amounts due under this Guaranty.

10. The obligations of Guarantor hereunder are independent of the obligations of Tenant, and, in the event of any default hereunder, a separate action or actions may be brought and prosecuted against Guarantor whether or not Tenant is joined therein or a separate action or actions are brought against Tenant. Landlord's rights hereunder shall not be exhausted by its exercise of any of its right or remedies or by any such action or by any number of successive actions until and unless all indebtedness and obligations, the payment and performance of which are hereby guaranteed, have been paid and fully performed.

11. Guarantor shall pay to Landlord reasonable attorneys' fees and all costs and other expenses that Landlord expends or incurs in collecting or compromising any indebtedness hereby guaranteed or in enforcing

this Guaranty against Guarantor whether or not suit is filed, expressly including but not limited to all costs, attorneys' fees and expenses incurred by Landlord in connection with any insolvency, bankruptcy, reorganization, arrangement or other similar proceedings involving Guarantor which in any way affect the exercise by Landlord of its rights and remedies hereunder.

12. If any provision or portion thereof of this Guaranty is declared or found by a court of competent jurisdiction to be unenforceable or null and void, such provision or portion thereof shall be deemed stricken and severed from this Guaranty, and the remaining provisions and portions thereof shall continue in full force and effect.

13. This Guaranty shall inure to the benefit of Landlord, its successors and assigns, and shall bind the heirs, executors, administrators, personal representatives, successors and assigns of Guarantor.

14. When the context and construction so require, all words used in the singular herein shall be deemed to have been used in the plural and vice versa, and the masculine shall include the feminine and neuter and vice versa. The word "person" as used herein shall include any individual, company, firm, association, partnership, corporation, trust or other legal entity of any kind whatsoever.

15. In the event any action is brought to enforce or interpret the terms of this Guaranty, the prevailing party in such action shall be entitled to reimbursement by the other party of its costs and expenses, including without limitation its reasonable attorneys' fees, incurred therein.

16. This Guaranty and all matters that in any way relate to the transactions contemplated by this Guaranty shall be governed by the laws of the State of California, and venue of all court actions shall be in Los Angeles or Orange Counties, as selected by Landlord.

WHEREFORE, Guarantor has executed this Guaranty as of the day and year first above written.

GUARANTOR:

EXHIBIT F

LIST OF OTHER TENANTS AND EXCLUSIVES

Signed Leases Food Uses

<i><u>Tenant</u></i>	<i><u>Tradename</u></i>	<i><u>Space</u></i>	<i><u>Use</u></i>	<i><u>Exclusive Use</u></i>

Signed Leases Non Food Uses

<i><u>Tenant</u></i>	<i><u>Tradename</u></i>	<i><u>Space</u></i>	<i><u>Use</u></i>	<i><u>Exclusive Use</u></i>

Leases in Negotiation

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**ADDENDUM TO
THE PROJECT LEASE AGREEMENT,
DATED AS OF _____, 2000, BETWEEN
CIM/HUNTINGTON BEACH, INC. AND RUI ONE CORP.**

The terms of this Addendum shall supplement, amend and, to the extent in conflict with the provisions of the Lease, supersede the above-referenced Lease, to which this Addendum is attached. The paragraph numbers set forth below generally correspond to the related paragraph in the Lease, but shall not affect or limit the meaning of the particular Addendum provision.

1.8(a) Exclusive Use. During all time periods when Tenant is not in breach of this Lease ~~beyond an applicable cure period~~, Landlord shall not execute any lease for space in the Project ~~located on 5th Street west of Pacific Coast Highway~~ which ~~permits or otherwise permit (to the extent Landlord has an ability to control such use) the operation of a restaurant specializing in the sale of a combination of meat and seafood~~ ~~contains as a permitted use the Permitted Use listed in Paragraph 1.8 as such other tenant's primary business (the "Exclusive Use")~~, without the Tenant's prior approval, ~~which shall not be unreasonably withheld~~. The occurrence of a default past any applicable cure period shall cause the expiration of this Paragraph 1.8. ~~If Tenant changes the concept of the restaurant in accordance with this Lease, such new concept shall be protected in the same manner as the concept described above provided Landlord had not previously agreed to permit such a use in the Project.~~

(i) **Incidental Uses.** ~~Notwithstanding any provision of this Lease to the contrary, the Exclusive Use shall not restrict, in any manner whatsoever, the incidental use of any portion of the Project for the conduct of business in conflict with the Exclusive Use. Intentionally deleted.~~

(ii) **Prior Leases.** Notwithstanding anything to the contrary in this Lease, the Exclusive Use shall not restrict the use of any portion of the Project which is subject to a lease dated prior to the Date of Execution of this Lease (a ~~partial~~ list of the existing tenants and uses is attached to the Lease as ~~Exhibit F but is not definitive~~) ("**Prior Leases**") for the conduct of business in conflict with the Exclusive Use.

(iii) **Abandonment of Exclusive Use.** The failure of Tenant to continuously conduct business in the Premises primarily for the Exclusive Use ~~in violation of this Lease~~ shall constitute an abandonment of the Exclusive Use, which shall thereupon release Landlord from all obligations with respect to the Exclusive Use. Additionally, Landlord's obligations hereunder shall be conditioned upon Tenant's not being in default under the Lease ~~beyond any applicable cure period~~. No action shall be brought or prosecuted by Tenant against Landlord for any breach of the Exclusive Use if Tenant then is in default of any obligation of Tenant under this Lease ~~beyond any applicable cure period~~.

(iv) **Indemnification.** ~~If the Exclusive Use or Tenant's or Landlord's enforcement of the Exclusive Use violates, or is alleged or claimed to violate, any law or governmental rule or regulation, Tenant shall indemnify, defend and hold Landlord harmless from and against all claims, losses, damages and expenses, including reasonable attorneys' fees and court costs, asserted against or suffered by Landlord resulting from any liability or obligation of Landlord arising out of, or in connection with, such violation, or alleged or claimed violation. Intentionally deleted.~~

(v) **No Exclusive Right.** Except as expressly set forth in this Lease, Tenant shall have no exclusive right, express or implied, to conduct business of any nature whatsoever in the Project.

1.8.(b) Change of Use. Tenant, throughout the term of the Lease and any extensions thereof, shall have the right to change Tenant's design and concept (but not the requirement that the Premises be operated as a restaurant Permitted Use) of the Restaurant, subject to the following conditions:

(i) Said change shall have been implemented in not less than a majority of Kincaid's restaurants throughout North America or utilizes another concept operated by Tenant in at least three other locations.

(ii) Any new concept will be similar in quality ~~and consistent~~ with Kincaid's restaurants presently being operated.

(iii) Any new concept will not compete with the Permitted Use of any then existing tenant of the Project.

(iv) The change in concept may result in a change to the visual appearance of the interior of the Premises. The changes in visual appearance shall remain consistent in quality, ~~character and appearance~~ to those of the original Kincaid's Restaurant. All changes to the interior or exterior of the Premises shall be subject to Landlord's prior written approval, which shall not be unreasonably withheld, delayed or conditioned and shall otherwise be subject to and performed in accordance with the applicable provisions of this Lease.

1.10(a) Option to Extend. Provided Tenant is not in default of any term or condition of this Lease beyond any applicable cure period as of the exercise of the option or the commencement of the renewal term, Tenant shall have three (3) options to renew the term of the Lease, each option being for one additional five year term, on the same terms and conditions of the Lease, except that the Minimum Rent shall be adjusted to equal the following amounts:

For the Restaurant Space:

- | | |
|--|---|
| (a) First Renewal Term (Years 11-15): | During the first five year renewal term, the Minimum Rent shall be 80% of the average of aggregate of the Minimum Rent and Percentage Rent and Adjustments paid for years 6 through 10 of the Initial Term, but not less than \$29.00 per square foot per year, and not more than \$32.00 per square foot per year. |
| (b) Second Renewal Term (Years 16-20): | During the second five year renewal term, the Minimum Rent shall be 80% of the average of the aggregate of the Minimum Rent and Percentage Rent and Adjustments paid for years 11 through 15 (<u>i.e.</u> , the first renewal term), but not less than \$32.00 per square foot per year, and not more than \$34.00 per square foot per year. |

- (c) Third Renewal Term (Years 21-25): During the third five year renewal term, the Minimum Rent shall be 80% of the average of the aggregate of the Minimum Rent ~~and~~ Percentage Rent ~~and~~ Adjustments paid for years 16 through 20 (i.e., the second renewal term), but not less than \$34.00 per square foot per year, and not more than \$36.00 per square foot per year.

For the Storage Space:

- (a) First Renewal Term (Years 11-15): During the first five year renewal term, the Minimum Rent shall be \$8,000.00 per year, \$666.67 per month, \$8.00 per square foot per year.
- (b) Second Renewal Term (Years 16-20): During the second five year renewal term, the Minimum Rent shall be \$8,000.00 per year, \$666.67 per month, \$8.00 per square foot per year.
- (c) Third Renewal Term (Years 21-25): During the third five year renewal term, the Minimum Rent shall be \$8,000.00 per year, \$666.67 per month, \$8.00 per square foot per year.

Such option shall be exercised (if at all) by Tenant giving Landlord at least one hundred eighty (180) days prior irrevocable written notice. ~~This option shall be personal to the named Tenant.~~

7.2(e) Adjustment Cap. Notwithstanding the provisions of Paragraph 7.2(a), when used to calculate Adjustments for any given calendar year after the first full calendar year of the term of this Lease ("**Base Year Adjustments**"), Adjustments for such year shall not exceed the Base Year Adjustments increased at a compounded rate of three percent (3%) per annum ~~for the prior calendar year; provided that this expense cap shall not limit increases in Adjustments resulting from (i) a reassessment of the Project due to a change of ownership, nor (ii) increases in insurance, nor (iii) any capital improvements or repairs permitted as part of Adjustments.~~ Also, we need to clarify that \$6.03 per year in the first lease year is an annual charge. Finally, the first year charge in Section I is calculated at 9,620 square feet which means it is being assessed against either the patio or the storage, neither of which is acceptable.

10.1(a) Premises Modifications. Notwithstanding Paragraph 10.1, Tenant shall be permitted to make non-structural modifications to the interior of the Premises costing under \$100,000.00 and which do not materially change the appearance or atmosphere of the Restaurant, without Landlord's prior written consent. Non-structural modification to the interior of the Premises in excess of \$100,000.00 and structural modifications require Landlord's prior written consent. As used in this Paragraph 10.1(a), "**structural modifications**" include any modifications that affect the structural elements (including, without limitation, the roof or floor plate) or systems of the Project or are visible outside of the Premises, and "**non-structural modifications**" are any modifications that are not structural modifications.

13.2(k) General Conditions. If Landlord consents to a sublease or assignment of this Lease, all of the Excess Consideration (as hereinafter defined) received by Tenant from an assignment or sublease shall be paid to Landlord (which amount is to be prorated where a part of the Premises are subleased). Tenant shall pay the Excess Consideration to Landlord at the end of each calendar year during which Tenant collects any Excess Consideration. Each payment shall be sent with a detailed statement showing: (i) the total consideration paid by the sublessee or assignee; and (ii) any exclusions from the Excess Consideration permitted by this Paragraph. Landlord shall have the right to audit Tenant's books and records to verify the amount of Excess Consideration due to Landlord and the accuracy of the statement required herein. The term "**Excess Consideration**" shall mean all consideration received by Tenant from an assignment or sublease, after deducting, (a) in the case of a sublease, the amount of Minimum Rent plus Percentage Rent plus Adjustments for the applicable period, and (b) in the case of an assignment or subletting, reasonable leasing commissions paid by Tenant or other reasonable out-of-pocket expenses paid by Tenant directly related to obtaining a sublessee or assignee (including, without limitation, reasonable attorneys fees and the cost of reasonable and customary tenant improvements). Excess Considerations shall not include any payments received from the sale of furniture, fixtures and equipment or the going-concern value of the business.

13.4 Standards for Landlord's Consent. The consent of Landlord required under Paragraph 13.1 above to a proposed assignment, sublease, change in use or occupancy may not be unreasonably withheld, provided, should Landlord withhold its consent for any of the following reasons, which list is not exclusive, such withholding shall be deemed to be reasonable:

- (i) A conflict with one or more of the other uses (whether or not exclusive) of, or the rights given to other tenants in, the Project;
- (ii) A proposed use that is incompatible with the proposed use with others within the Project;
- (iii) Financial inadequacy or lack of business or management experience or reputation of the proposed sublessee, assignee or other transferee or user, or its guarantor;
- (iv) A proposed use or assignee, transferee, sublessee or new user which would cause a diminution in the reputation of the Project or the other businesses located therein;
- (v) The Percentage Rent provided for herein would not be suitable for the proposed new assignee, sublessee or other transferee or user, in that its sales volume from the Premises reasonably could be expected to be less than that of Tenant hereunder;
- (vi) A proposed transferee, assignee, sublessee, or user whose impact on the common facilities or the other tenants in the Project would, in Landlord's business judgment, be disadvantageous to them, to Landlord or to Landlord's lenders;
- (vii) A proposed sublease, assignment or other transfer or change in use of less than all of the Premises, which the parties acknowledge would result in an increased administrative burden to Landlord;
- (viii) A proposed transferee, assignee, sublessee, use or user which Landlord reasonably believes is likely to violate one or more of the terms, covenants, conditions and restrictions imposed upon Tenant

under this Lease (including, without limitation, those contained in Paragraphs 1.8 and 3), or on Landlord as set forth in any other lease, license, occupancy, or other agreement for the lease or use of space within, or a financing or other agreement entered into with respect to, the Project.

(ix) Any lender of Landlord shall have failed to approve the proposed transfer, assignment or subletting.

In any event, should Landlord reasonably decide to not give its consent for any reason other than those designated above, Landlord may do so.

~~At the expiration or earlier termination of this Lease, Tenant shall, upon the request of Landlord, execute, acknowledge, and deliver to Landlord, within five (5) days after such request, any quitclaim deed or other documents to remove the cloud of this Lease from the Premises. Duplicates a provision already in the lease body.~~

25.3(a) Parking Fees. Parking fees in the Common Areas shall not exceed parking rates for the City of Huntington Beach operated parking lots.

25.3(b) Parking for Tenant's Managers. Tenant shall have the right, during the Lease Term or any extension thereof, to lease five (5) parking spaces for use by its managers only, at a monthly parking rate which shall not exceed the City of Huntington Beach's designated rate for monthly parking (the "**Tenant's Monthly Parking Fee**"). Tenant shall not be entitled to any designated, reserved, assigned or valet parking hereunder. Except for transfers of the monthly parking permit between Tenant's managers, Tenant may not sell, assign, or transfer its parking rights hereunder. Can we increase the number of spaces to 10 at our option if we want to provide to some of our staff?

25.4 Valet Parking. Landlord shall contract for professional valet service for the Project, which shall be available during normal operating hours for the Project and the Restaurant. The valet station shall be visible to arriving guests and located along 5th Street. The valet parking shall not be exclusive to any tenant. The cost of the valet parking service shall be included in the Adjustments for all tenants of the Project. Valet charges to patrons, customers and visitors shall not exceed the then going market rate for professional valet parking in the geographic area.

29.2(a) Hours of Operation. Tenant will be open for lunch seven days per week for the first twelve (12) months of operation from the opening of the Restaurant for the normal conduct of its business (the "**Opening**"). Beginning in the thirteenth (13th) month of operation from the Opening, Tenant may elect to close for lunch or adjust lunch hours of operation on either Saturday or Sunday or both and in the event the number of lunches, served for any full month following the first (1st) day of thirteenth (13th) month following the Opening, falls below an average of 125 per Saturday or Sunday of actual operations serving lunch. ~~Tenant may close during or adjust lunch operation hours.~~

29.5 Tenant Termination Rights. In the event Tenant's Gross Sales for the fourth Lease Year a consecutive twelve (12) month period commencing on the third (3rd) anniversary of the Rent Commencement Date and ending on the fourth (4th) anniversary of the Rent Commencement Date shall do not exceed Four Million Dollars (\$4,000,000.00), and provided that prior to the exercise of any right set forth in this Paragraph 29.5 Tenant has not defaulted in any monetary obligation under this Lease and is not in default under the terms of this Lease beyond any applicable cure period, then by written notice sent to Landlord no later than the last day of the fifty-first (51st) full calendar month from the Rent Commencement Date ~~(which notice, in order to be effective, must be accompanied by a certified check, subject to collection, in an amount equal to~~

~~| \$457,550 [the unamortized cost of the T.I. Allowance for half of the Term]), Tenant shall have the one time right to terminate this Lease effective as of the last day of the sixtieth (60th) full calendar month from the Rent Commencement Date. TIME IS OF THE ESSENCE FOR THE SENDING BY TENANT OF SUCH NOTICE. If Tenant shall fail to timely and effectively send the forgoing notice of termination, or if during the fourth Lease Year consecutive twelve (12) month period, commencing on the third (3rd) anniversary of the Commencement Date and ending on the fourth (4th) anniversary of the Rent Commencement Date, Tenant's Gross Sales shall exceed \$4,000,000.00, then Tenant's right to terminate under this Paragraph 29.5 shall terminate and not be applicable. In addition, upon delivery of Tenant's notice of termination, all rights of Tenant under Paragraph 1.10(a) of this Lease and Paragraph 1.10(a) of this Addendum shall terminate irrevocably effective upon the giving of such notice (and if Tenant shall have previously exercised the option to extend, such exercise shall be deemed null and void ab initio as if never exercised). The termination of the Lease shall be conditioned upon Tenant paying Landlord \$452,000 [the unamortized cost of the T.I. Allowance based on amortization over the ten year initial Term] upon the effective date of the termination.~~

40.4 Non-Disturbance Agreement. ~~It is a condition precedent to the application of the subordination provisions of Paragraph 40 that Landlord shall deliver to Tenant a commercially reasonable non-disturbance agreement (a "Non-Disturbance Agreement") from the applicable lender which Non-Disturbance Agreement provides that, subject to such lender's normal exculpations (including, without limitation, the exculpations set forth in Paragraph 40.2(a) through (f) of the Lease), Tenant's possession of the Premises, and this Lease, including any options to extend the term hereof, will not be disturbed so long as Tenant is not in default hereunder and attorns to the record owner of the Premises. See edits in the body of the lease. We will require SNDAs to be executed by the current lender(s) and ground lessor(s) at the time of lease execution.~~

IN WITNESS WHEREOF, the parties have executed this Lease as of the date set forth in Paragraph 1.1, above.

LANDLORD:

a California corporation

By: _____
Name:
Title:

TENANT:

—

By: _____
Name:
Title:

BRMFSLA 15483v3

FILED FOR RECORD AT REQUEST OF
 And
 AFTER RECORDING RETURN TO:

Document Name: Subordination, Non-Disturbance and Attornment Agreement

Date:

Landlord:

Tenant:

Lender:

Legal Description:

This Subordination, Non-Disturbance and Attornment Agreement (this "Agreement") is made among the above-named Landlord, Tenant and Bank as of the date written above.

RECITALS:

- A. Tenant and Landlord are parties to a lease dated June 16, 1981-August 8, 1996 as amended by agreements dated November 30, 1989, September 26, 1990, September 26, 1990 (Landlord Certificate), November 29, 1994 (Mortgage Consent Letter), June 16, 1996 (Mortgage Consent Letter), July 24, 1996 (exercise of option), August 6, 1996 (Landlord Consent and Release), September 1, 1996, May 3, 2002 (the "Lease"), covering premises (the "Premises") which are located on the real property legally described in Exhibit "A" attached hereto and incorporated herein by reference.
- B. Bank has made or agreed to make a loan or loans to Landlord secured by a Mortgage or Deed of Trust covering ht Premises date on or about December 30, 2003 and recorded in the office of the _____ for _____ County _____ on _____ as Document No. _____ in Book _____ of _____ at Page _____ (as previously modified, supplemented, renewed, extended, consolidated, increased or replaced, and which may also secure future advances made by Bank, the "Mortgage"); provided, however, that said Lease is subordinate to the lien of the Mortgage. Please add mortgage recording information.
- C. Tenant has requested covenants of non-disturbance from Bank.

Memorandum of Lease Palomino/Dallas

AGREEMENT:

In consideration of the above recitals and of the promises and mutual covenants hereinafter contained, the parties hereto mutually covenant and agree as follows:

1. **Subordination.** The Lease and any extensions, renewals, replacements or modifications thereof, and all of the right, title and interest of Tenant in and to the Premises, including but not limited to any option or right of first refusal to purchase the Premises, or any acquisition of title to the Premises by Tenant during the term of the Mortgage, are and shall be subject and subordinate to the Mortgage and to all of the terms and conditions contained therein and herein, including without limitation any future renewals, modifications, replacements, increases, consolidations and extensions thereof.
2. **Non-Disturbance.** Bank acknowledges ~~consents to~~ the Lease and, in the event Bank comes into possession of or acquires title to the Premises as a result of the enforcement or foreclosure of the Mortgage or any note or other agreement secured by the Mortgage, Bank agrees that Bank shall not disturb Tenant in its possession of the Premises under the Lease for any reason other than one which would entitle Landlord to terminate the Lease under its terms or would cause, without further action by Landlord, the termination of the Lease or would entitle Landlord to dispossesses Tenant from the Premises. In such event Landlord will assume all obligations of Landlord under the Lease subject to section 4 below.
3. **Attornment.** Tenant agrees with Bank that if the interest of Landlord in the Premises shall be transferred to and owned by Bank by reason of foreclosure or other proceedings brought by it, or by any other manner, Tenant shall be bound to Bank under all of the terms, covenants and conditions of the Lease for the balance of the term thereof remaining and any extensions or renewals thereof which may be effected in accordance with any option therefor in the Lease, with the same force and effect as if Bank were Landlord under the Lease, and Tenant does hereby attorn to Bank as its Landlord, said attornment to be effective and self-operative without the execution of any further instruments on the part of any of the pare parties hereto immediately upon Bank succeeding to the interest of Landlord in the Premises. Tenant agrees, however, upon the election of and written request by Bank after Bank receives title to the Premises, to promptly execute an instrument in confirmation of the foregoing provisions, reasonably satisfactory to Bank and Tenant, in which Tenant shall acknowledge such attornment ~~and shall set forth the terms and conditions of its tenancy.~~
4. **Bank Not Bound by Certain Actions or Agreements.** Tenant agrees with Bank that if Bank shall succeed to the interest of Landlord under the Lease, Bank shall not be (a) liable for any action or omission of any landlord under the Lease prior

to Bank becoming landlord thereunder ("Prior Landlord"), or (b) subject to any offsets or defenses which Tenant might have against any Prior Landlord, or (c) bound by an rent or additional rent which Tenant might have paid for more than the current month to any Prior Landlord, unless such deposit is in an escrow fund available to Bank, or (e) bound by an amendment or modification of the Lease altering the rent or altering Landlord's duties under the Lease made without Bank's consent, or (f) bound by any provision in the Lease which obligates Landlord to erect or complete any building or to perform any construction work or to make any improvements to the Premises; provided however, this provision shall not relieve Bank of ongoing repair obligations of the Landlord, even if such repair obligation arose prior to Bank assuming Landlord's obligations under the Lease. ~~Landlord and Tenant agree that they will not amend the Lease without Bank's prior written consent. Tenant further agrees with Bank that Tenant will not voluntarily subordinate the Lease to any lien or encumbrance without Bank's prior written consent.~~

5. **Notice; Bank's Right to Perform Under Lease.** ~~Tenant shall provide Bank with a copy of any written notice that Tenant send to or receives from Landlord no later than 10 days after transmission or receipt. In the event that Landlord shall default in the performance or observance of any of the terms, conditions or agreements in the Lease, Tenant shall give written notice thereof to Bank and Banks shall have the right (but not the obligation) to cure such default. Tenant shall not take any action with respect to such default under the Lease, including without limitation any action in order to terminate, rescind or void the Lease or withhold any rental thereunder, for a period of ten (10) days after Tenant provides Bank written notice of a Landlord default giving rise to such action receipt of such written notice thereof by Bank with respect to any if such default is capable of being cured by the payment of money and for a period of thirty (30) days after Tenant provides Bank written notice of a Landlord default giving rise to such action receipt of such written notice thereof by Bank with respect to for any other ~~such~~ default (provided, that in the case of any default which cannot be cured by the payment of money and cannot with diligence be cured within such thirty (30) day period because of the nature of such default or because Bank requires time to obtain possession of the Premises in order to cure the default, if Bank shall proceed promptly to attempt to obtain possession of the Premises, where possession is required, and to cure the same and thereafter shall prosecute the curing of such default with diligence and continuity, then the time within which such default may be cured shall be extended for such period as may be necessary to complete the curing of the same with diligence and continuity).~~

~~**1.No Amendment with out Bank's Consent; No Conveyance or Encumbrance of Tenant's Estate.** Until the Mortgage has been fully released, satisfied or reconveyed, (a) the Lease shall not be amended without the prior written consent~~

~~of Bank, and (b) Tenant's estate in the Premises shall not be conveyed or encumbered without the prior written consent of Bank.~~

7.6. **Successors and Assigns; Certain Defined Terms.** This Agreement shall bind and inure to the benefit of all parties hereto, their successors and assigns. As used herein the term "Tenant" shall include the Tenant herein specifically named and any party who shall succeed to Tenant's interest under the Lease; the words "foreclosure" and "foreclosure sale" as used herein shall include judicial and non-judicial foreclosure and shall also be deemed to include the acquisition of Landlord's estate in the Premises by voluntary deed (or assignment) in lieu of foreclosure, and the work "Bank" shall include anyone who shall succeed to Landlord's interest in the Premises by, through or under foreclosure of the Mortgage.

8.7. **Miscellaneous.** This Agreement shall be governed by the laws of the state in which the Premises are located. This Agreement shall not be modified or amended except in writing signed by the parties hereto. The use of the neutral gender in this Agreement shall be deemed to include any other gender, and words in the singular number shall be held to include the plural, when the context requires.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date set forth above.

Landlord's Perspective
Prepared by Angela L. Humphreys

When responding to issues raised by a tenant and/or tenant's attorney, I first need to evaluate the tenant's profile when formulating my response as that will dictate many of my responses and what issues I will focus on. For example:

1. Is it national tenant with many operations vs. a "mom & pop" single business or a moderately successful regional operator?

If the former, I can generally trust that their comments will be made with consideration and necessitated by the practical needs of their business and I usually find that I can understand and empathize with the concerns, vs. unsophisticated tenants and/or tenant attorneys inexperienced in commercial leases tend to focus on lease issues that are oftentimes difficult for me to change (and impractical) and they do not understand the risks that I face by doing so.

2. Is the Tenant experienced with a long operating history and strong financials vs. start up with little or no experience and weak financials?

If a tenant is not strong, then I do not what to "give up" any protections for the landlord in the lease.

3. Have we/landlord negotiated deals with this tenant previously?

I always try to respect the previous deal terms unless circumstances have changed significantly, both in the legal context as well as with the relationship.

4. What restrictions has my lender proposed? Am I still under construction financing or under permanent financing? (i.e. tenant mix, lender consent if significant changes to "form" lease, insurance, co-tenancy, termination rights, damage/ destruction/ condemnation provisions)

5. Are we/landlord providing a tenant improvement allowance and if so, how much? Is the landlord performing all TI work? How much are we at risk financially if this tenant defaults before the lease and rent commences?

6. What is the marketing plan for the center? Where are we in the life cycle of the center? How important is this tenant to the project? i.e. First few tenants vs. final few tenants

7. Will the deviation from the "standard lease form" cause significant problems for property management in their management of the project? i.e. a lease with a variety of non-standard provisions can be difficult to manage, especially if non-anchor.