



BOMA INTERNATIONAL

GREEN LEASE GUIDE

A Guide for Landlords and Tenants to Collaborate
on Energy Efficiency and Sustainable Practices



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A Guide for Landlords and Tenants to Collaborate on Energy Efficiency
and Sustainable Practices

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INTRODUCTION

For more than 30 years, BOMA International has provided the industry with a model lease agreement that is considered the “standard” for commercial leases. In 2005, BOMA “greened” its model lease to provide the industry with a step-by-step guide on how to execute a lease with sustainability attributes. It provided instructions to write green operations and management practices into lease agreements. Additionally, it included legal language to facilitate ongoing implementation of sustainable building practices. The green lease guide covers all aspects of a standard lease agreement, such as models for prime lease agreements, guaranty of lease and form subleases. The model lease has since been updated in 2008 and in 2011. The 2018 Guide includes references to third-party sustainability standards such as Green Globes, BOMA 360 and BOMA BEST, in addition to LEED; features concepts for ENERGY STAR Performance Ratings and Tenant Spaces, Zero Net Energy Buildings and EPA Climate Leaders; addresses PACE financing, renewable energy and clean tech concepts; and covers industry best practices for amortization of retrofits, and best practice guidance from DOE’s Better Buildings and Institute for Market Transformation.

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- 1 The Premises as shown on any Exhibit should be cross-hatched, outlined in black ink, or otherwise identified in a way that can be transmitted electronically and that photocopies well. The practice of identifying the Premises (or any other area) with colors—e.g., “the area outlined in red on Exhibit A”—is discouraged since colors are not always copied or scanned.
 - 2 Note that there are actually two different Work Letters attached to this model form. One is for use if the landlord does the build-out for the tenant. The other is for use if the tenant does its own build-out. Only one of the two samples should be used in any given lease.

BASIC LEASE INFORMATION

The following model document is provided with no warranty whatsoever and does not define a “minimum standard of practice.” The advice of competent counsel, with expertise in both the subject matter and local law, customs and practices, is recommended. Consent is granted to modify and adapt this document for specific transactions but not for actual or de facto resale. This consent does not extend to reproducing this document in whole or in substantial part in seminar materials, presentations, articles, books, other model forms, or other publications, in any format, whether for-profit or not-for-profit.

LEASE AGREEMENT

between

[NAME OF LANDLORD]

as Landlord

and

[NAME OF TENANT]

as Tenant

[DATE]

Basic Lease Information

Preamble Effective Date of Lease: [Date]

Preamble Landlord: _____,
a _____

Preamble Tenant: _____,
a _____³

Preamble Building⁴:
[Name of Property]
[Address of Property]
[Town/City, State Zip Code]

Section 1.1(a) Premises: Suite(s) [Suite number or identifier]

Section 1.1(a) Rentable Square Feet of Premises: approximately⁵ [insert number] rentable square feet,⁶
measured using Standard Method of Measurement ANSI/BOMA Z65.1-2010 Method B.⁷

³ Landlords are encouraged to independently verify the tenant's correct legal name, existence, and status. This can be in a few minutes on line by checking the state's website for business entities. Tenants can verify the same with regard to the landlord entity. Do not rely on letterhead and trade names.

⁴ This lease assumes that the building is a single, stand-alone, building, even if immediately adjacent to other buildings that are separately operated. If, however, this building is part of a multi-building complex with some operational overlap and/or cost-sharing or restrictions, such as an office park or industrial park, conforming changes should be made throughout. For example, it may be appropriate to add the concept of a "Complex" or "Project," provide for determinations of operating expenses and real estate taxes on a multi-building basis and/or for common areas, address access and parking issues if they are shared, and impose (or cross-reference) restrictions that may be imposed by any declarations of covenants, reciprocal easements or cross-easements, condominium declarations, subdivision agreements or the like.

⁵ BOMA measurement standards allow normal variations of plus-or-minus 2%. Hence the use of the word "approximately," an acknowledgement that precision is within certain professional tolerations. The word "approximately" is not intended to allow a party to simply estimate a measurement, which is addressed in the remainder of this clause and corresponding footnotes.

⁶ How does the tenant (or, for that matter, the landlord) know what the square footage is? A party may require architect certification as to measurement in accordance with the identified standard.

⁷ BOMA introduced a new measurement methodology in 2010 to replace the 1996 Standard Method of Measurement. As a further refinement, the 2010 Standard includes a choice of Method A (essentially the same as the 1996 Standard) and Method B (the entire building uses the same load factor, eliminating measurement differences between multi-tenant and single-tenant floors). The building's square footage remains the same under Methods A and B but the allocation between floors is different. If Method B is used, the landlord is required to disclose the existence of certain unusual physical conditions, such as areas with unusually low ceilings, vault space (subsurface building area that projects into the public space outside the building), mezzanine space and interbuilding connections).

- Section 2.1 Lease Term⁸: The term of this Lease (“**Lease Term**”) shall commence on the Lease Commencement Date and shall end at 11:59 p.m., local time, on (i) the day preceding the ____ (____) anniversary of the Lease Commencement Date, if the Lease Commencement Date occurs on the first day of a month,⁹ or (ii) the last day of the month which includes the ____ (____) anniversary of the Lease Commencement Date, if the Lease Commencement Date occurs on a day which is other than on the first day of a month, unless the Lease Term is terminated earlier in accordance with the provisions of this Lease. If there is any renewal or extension of the Lease Term, then the defined term “**Lease Term**” shall include any renewal or extension term.¹⁰
- Section 2.2¹¹ [IF TENANT DOES ITS OWN BUILD-OUT:] The Lease Commencement Date shall be _____, 20__ or the date on which Tenant commences beneficial use of the Premises, whichever date occurs first¹² (“**Lease Commencement Date**”). Tenant shall be deemed to have commenced beneficial use of the Premises when Tenant begins to move furniture and

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- 8 Obviously, the length of a lease term is dependent on many factors. A new factor is sustainability. Long-term leases are environmentally responsible because, due to lower turnover, they conserve resources, reduce waste and reduce the environmental impacts of tenancy as they relate to materials, manufacturing and transport associated with tenant improvements. Long-term leases also provide greater opportunity to recoup, via lower operating costs, the upfront cost of many sustainability upgrades. LEED 3.0 for Commercial Interiors (“LEED-CI”) provides credit for leases of 10 years or more. Conversely, however, new Financial Accounting Standards Board (FASB) accounting rules will require tenants to show most leases as capital expenses on their financial statements, instead of the traditional approach of accounting for lease obligations as off-balance sheet operating expenses. The new FASB requirements (ASU 2016-02 codification of ASC 842) take effect for public business entities with fiscal years beginning after December 15, 2018, and for most calendar year private companies in 2020. This change in accounting may discourage long-term leases and encourage shorter-term leases -- at least for tenants who are public companies -- because less lease obligation will appear on the tenant’s balance sheet for a shorter-term lease, all else being equal. Tenants who are privately owned and who need not disclose their balance sheets and who are motivated more by cash flow than by net operating income may not be affected by the change in accounting rules, unless, of course, they have loan covenants that mandate that certain financial performance ratios be maintained.
- 9 Certain leases choose to “round off” the lease term to always end on the last day of a calendar month; other leases do not “round off,” ending the lease term on the midnight before the anniversary of the commencement date. This is a matter of landlord preference. “Rounding off” allows greater ease in calculating operating expenses, minimizing mid-month prorations and other financial functions. This lease uses the “rounding off” approach in establishing the lease term and in defining “Lease Year.”
- 10 Many leases technically define the lease term to mean only the initial stated term. In that case, when the tenant is granted a renewal option, or the parties mutually agree to extend the lease term, the new time period is outside the defined term used to define the lease term. This is almost certainly not what was intended. Consequently, the landlord finds that every obligation in the lease qualified by the phrase “during the lease term” (or its equivalent) – e.g., that the tenant is obligated to vacate at the end of the lease term – is inadvertently moot. Of course, in most cases, there is no need to use the phrase “during the lease term” (or its equivalent) very often in a lease anyway because just about every obligation in the document is applicable “during the lease term.” It is more constructive to note only the exceptions that continue to apply after the expiration of the lease term, such as indemnification obligations, operating expense reconciliation obligations or security deposit provisions.
- 11 This lease assumes that the building itself has been completed and is ready for use except for the build-out of the tenant’s own premises. If that is not the case, addressing anything beyond that is critical to the tenant but too fact-specific for purposes of this lease.
- 12 Many landlord forms use this same definition of lease commencement (e.g., the earlier of a fixed date or actual occupancy) even when the landlord is doing the build-out. A tenant should not agree to this definition if the landlord is doing the build-out – it exposes the tenant to its obligations commencing even if the space is not ready for occupancy. If the landlord is doing the build-out, then lease commencement should more fairly be defined as set forth in this paragraph.

furnishings into the Premises¹³ and such beneficial use shall be deemed to be an acceptance of the nature and sufficiency of the entire Premises.¹⁴ *[IF LANDLORD DOES THE BUILD-OUT:]* The Lease Commencement Date shall be the earlier of the date Tenant begins to move furniture and furnishings into the Premises¹⁵ or the date on which Landlord substantially completes¹⁶ the initial Tenant Improvement Work in the Premises in accordance with Exhibit E attached hereto, notwithstanding that there may still be uncompleted work that does not materially affect Tenant's ability to beneficially use the Premises for the use permitted by this Lease.¹⁷

Section 3.1 Base Rent: Fixed Annual Rent is as follows:¹⁸

LEASE YEAR	FIXED ANNUAL RENT	FIXED MONTHLY RENT
1	\$	\$
2	\$	\$
3	\$	\$
4	\$	\$
5	\$	\$

Section 4.1(a) Base For Purposes Of Operating Charges:¹⁹ [Calendar year 20__] [\$_____ per rentable square foot]. Tenant's proportionate share of increases in Operating Charges is [_____%] [a percentage equal to the rentable square feet in the Premises divided by the rentable square footage of [the office space in] the Building].

13 Furniture move-in is a pro-landlord definition of lease commencement. Depending on the size of the tenant, it might occur days, or even weeks, before the tenant really begins using the space. A tenant should attempt to negotiate a more favorable definition of "beneficial use," such as when it begins to conduct actual business in the premises, so the lease commencement is not triggered by early access for furniture move-in or installation.

14 This clause strongly implies that move-in is a waiver of claims for punchlist, for latent defects, etc. A tenant may seek to make such acceptance subject to latent defects and punchlist items.

15 See Footnote 12 above discussing pro-landlord slant of this provision.

16 A tenant may want to negotiate for some grace period after substantial completion before the lease, or rent, commences so the tenant isn't liable in the interim for rent under two leases – this new lease and the lease that governs the tenant's existing space—during the gap between substantial completion of this new space and move-in. Most landlords don't accommodate that request and simply use "substantial completion." The tenant then assumes the task of keeping itself advised of the build-out schedule, as it probably should do anyway. If a landlord is willing to give notice of anticipated substantial completion but wants to give the notice sooner than substantial completion, a compromise is to allow the landlord to give advance notice of anticipated substantial completion and, as long as that notice is not materially inaccurate, consider the notice given to the tenant.

17 The existence of punch list items should not delay lease commencement. This lease addresses the completion of punch list items in the Exhibit E Work Letter.

18 This lease form chooses to state rent in actual dollar amounts, not as rent per square foot and not as an initial rent rate with stated percentage escalations. This method is more convenient for lease administration by both of the parties after the lease is executed. Take the extra few minutes to carefully calculate and insert the actual dollar amounts. However, if the rent obligation may increase or decrease due to remeasurement or expansion/contraction, including the formula provides clarity.

19 Omit this entry entirely if this Lease is a "triple net lease."

Section 4.1(b) Base For Purposes Of Real Estate Taxes:²⁰ [Calendar year 20__] [\$_____ per rentable square foot]. Tenant's proportionate share of increases in Real Estate Taxes is [_____%] [a percentage equal to the rentable square feet in the Premises divided by the rentable square footage of the Building].

Section 5 Security Deposit: \$_____.

Section 6.1 Permitted Use of Premises: _____²¹

Section 7 Number of Parking Permits/Spaces: _____ permits/spaces per _____ rentable square foot in the Premises.

Section 24.4 Tenant's Real Estate Broker: [Insert name, company and address]

Landlord's Real Estate Broker: [Insert name, company and address]

Section 24.6 Tenant's Address for Notices: [Insert tenant address]

Attn: _____

with a copy to: [Insert name, company and address]

Attn: _____

²⁰ Omit this entry entirely if this Lease is a "triple net lease."

²¹ "General office purposes" is customary but should be refined to meet specific tenant's needs—particularly if the tenant wants to assure itself that somewhat unusual uses are permitted, such as "heavy" uses like computer data centers or telephone call centers, cafeterias, exercise facilities, medical or dental offices, classrooms, or training facilities. A landlord may want to narrow the type of office use permitted. In a retail lease it is essential for the landlord to narrowly define the use (e.g., "the sale at retail of men's and women's shoes and footwear") and to distinguish between the primary use and any ancillary use (e.g., "and, incidental thereto, the sale at retail of socks, hose, shoe polish and accessories" so that what was initially expected to be an ancillary use doesn't become the primary use). If alcoholic beverages may be sold, consider clarifying whether sales are permitted only for on-premises consumption or off-premises consumption, or both, and whether sales are permitted of beer and wine only or of hard liquor as well.

Landlord's Address for Notices: [Insert tenant address]

Attn: _____

with a copy to: [Insert name, company and address]

Attn: _____

[Note: A separate guaranty of this lease has been provided by _____.]

Certain information relating to the Lease, including many of the principal economic terms, are set forth in the foregoing Basic Lease Information. In the event of any conflict or inconsistency between the terms of the Basic Lease Information and the terms of the Lease, the terms of the Lease shall control.

Lease Agreement

THIS LEASE AGREEMENT (the “**Lease**”) is made effective as of the ____ day of _____, 20____, by and between _____, a _____ (“**Landlord**”), and _____,²² a _____ (“**Tenant**”).

RECITALS:

A. Landlord is the owner of the Building (which is defined in the Basic Lease Information and, as used in this Lease, includes any parking garage underneath). The land on which the Building is located is known as _____ (the “**Land**”).²³ The Land, the Building and all other improvements thereon and the common areas and appurtenances thereto are collectively referred to herein as the “**Property**.”

B. Tenant desires to lease space in the Building, and Landlord is willing to lease space in the Building to Tenant, upon the terms, conditions, covenants and agreements set forth herein.

NOW, THEREFORE, in consideration of the foregoing, One Dollar (\$1.00), the agreements herein set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, covenant and agree as set forth below.

ARTICLE 1: THE PREMISES

Section 1.1 Premises

- (a) Landlord hereby demises and leases to Tenant and Tenant hereby hires and leases from Landlord, for the term and upon the terms, conditions, covenants and agreements herein provided, the Premises (as defined in the Basic Lease Information). The size of the Premises is agreed to be as set forth in the Basic Lease Information. The Premises shall not be subject to any re-measurement.²⁴ The actual square footage shall in no way affect the fixed rental hereunder or any other rent or sum payable hereunder, or any other provision of this Lease should any variance be found to exist between said agreed-upon square footage and actual square footage. The Premises are cross-hatched²⁵ on Exhibit A attached hereto and made a part hereof.
- (b) The lease of the Premises includes the right,²⁶ together with other tenants of the Building and their employees and business invitees, to use the common public areas of the Property for their intended use and subject to the other provisions of this Lease but includes no other rights not specifically set forth herein.

22 The lease should use the tenant’s full, legal name—not a trade name or a casual shorthand name. See Footnote 152 regarding trade name.

23 The sentence defining “the Building” is intended to use the street address. The sentence defining “the Land” is intended to use the legal description of the site, such as a block and lot or a metes and bounds description. The “Land” may well be a larger area than the “Building” itself because the Land may include exterior parking areas, landscaping and the like.

24 In this sentence and the following sentence, this lease chooses to fix the space measurement at the outset of the lease and leave it fixed for the entire lease term. Some leases call for a remeasurement at a specific time, such as within a certain number of days after lease commencement, or after substantial completion or after the demising walls are installed. Some leases allow the landlord to remeasure at any time. There is no “right” or “wrong” in this regard, but a landlord is incentivized to remeasure only if doing so increases the tenant’s obligations, and tenants seek to stabilize their obligations.

25 See Footnote 1.

26 If the tenant is leasing the entire building, omit the words “together with other tenants of the Building and their employee and business invitees.”

SECTION 1.2 Right to Relocate²⁷

Landlord reserves the right, at Landlord's option²⁸, to relocate Tenant during the Lease Term to similar quality office space within the Building²⁹ of approximately the same size as the Premises under this Lease, as selected by Landlord.³⁰ If both the relocation Premises and the original Premises are separately certified or benchmarked,³¹ Landlord's relocation of Tenant shall be to a relocation Premises that meets or exceeds the green certification, if any, of the Premises and/or meets or exceeds the energy efficiency of the space, as determined by the U.S. Environmental Protection Agency's **ENERGY STAR performance rating tool** or other green or energy certification rating system, and, if either the relocation Premises or the original Premises are not so certified or benchmarked, then the relocation Premises shall be comparable in energy efficiency to the original Premises by reviewing and comparing the equipment and systems in place at each.³² If Landlord exercises this right to relocate Tenant, then only reasonable moving expenses incurred by Tenant for physically relocating its furniture, fixtures and equipment (and no amount for any lost revenues, profits or other expenses) shall be paid by Landlord.³³ Landlord shall provide written notice to Tenant of relocation no less than sixty (60) days prior to the relocation, and Tenant shall relocate on or before the date set by Landlord. Tenant agrees to execute, upon Landlord's request, an amendment to this Lease confirming the change in location, but Tenant's failure to do so shall not negate, void or otherwise affect Landlord's rights under this Section.³⁴ All other terms and provisions of the Lease shall remain in full force and effect. Landlord shall have the right of self-help to implement the provisions of this Section.³⁵

-
- 27 Including a right to relocate is a business decision of the parties. Many landlords will omit it, either because it is not common in the marketplace or because it will displease a significant tenant and get stricken anyway or because, as a practical matter, there is no space to relocate the tenant. However, the right to relocate a small tenant may be valuable in a multi-tenant building.
- 28 This lease makes the right of relocation a unilateral right belonging to the landlord. Some leases are drafted only to give the landlord the right to ask the tenant if the tenant will relocate and then set forth the parameters under which the relocation will occur. The rationale for such a clause is unclear. If all the landlord can do is ask the tenant to relocate, the provision is nothing more than an invitation to further negotiation, if and when the situation arises, and that is allowed even without such a clause. In other cases, the landlord has the right to relocate the tenant, but such right is conditioned on specific term such as comparable relocation pace no increase in tenant's rent, or landlord paying all relocation costs.
- 29 If the Building is in a multi-building office park, the landlord may want to reserve the right to relocate the tenant to a different building as well.
- 30 A tenant may want to require that any substituted premises have the same view, or be on the same floor or higher, or have the same ratio of window wall to square footage, or have the same visibility from the elevator lobby, or otherwise set parameters on what constitutes acceptable substitute premises.
- 31 While it would historically be fairly unusual to find individual tenant spaces in a multi-tenant building that are separately ENERGY STAR benchmarked, with the development of the ENERGY STAR Tenant Spaces this will become more likely. Further, it is possible that individual spaces would be certified by a green certification such as LEED for Commercial Interiors or by others affecting overall health and wellness such as Fitwel.
- 32 A tenant concerned about the environmental quality of its space should assure itself that any substituted space is of comparable quality, which may include air quality testing.
- 33 A tenant should not agree to such a narrow provision without some attempt to broaden it. Because the relocation is being done at the landlord's initiative for the landlord's benefit and disrupting tenant, a tenant should ask that the landlord pay all expenses incurred by tenant incident to the relocation. These would include all moving expenses, cabling costs, and ancillary expenses such as new stationery and business cards (assuming the tenant's stationery and business cards use the tenant's old suite number or address, telephone number, etc.). In addition, and more importantly, a tenant might want to specify that, even if the new premises are larger than the initial premises, the aggregate rent payable by the tenant will not increase and its pro rata share of building operating expenses and real estate taxes will not increase.
- 34 This lease specifically addresses the consequence of the tenant's failure to sign the requisite document (i.e., we specify that the failure has no effect on the landlord's rights). This is consistent with the idea that the option to relocate the tenant is the landlord's unilateral right. Leases that require the tenant to sign something without addressing the consequences of the tenant's refusal or failure to sign introduce an ambiguity by implying that the landlord's option is not unilateral (i.e., that the landlord's option is dependent on the tenant consenting to its exercise).
- 35 A right of self-help may not be enforceable in all jurisdictions.

ARTICLE 2: LEASE TERM

SECTION 2.1 Term

- (a) The Lease Term shall be as set forth in the Basic Lease Information.
- (b) As used herein, the first “**Lease Year**” shall mean the period commencing on the Lease Commencement Date and continuing for any partial calendar month in which the Lease Commencement Date occurs and for twelve (12) full calendar months thereafter.³⁶ Each successive twelve (12) month period thereafter during the Term shall constitute a subsequent “**Lease Year**,” except that the last Lease Year shall end on the expiration of this Lease.

SECTION 2.2 Lease Commencement Date³⁷

- (a) It is presently anticipated that the Premises will be [IF TENANT DOES ITS OWN BUILD-OUT:] made available to Tenant for its build-out on or about _____, 20__ [IF LANDLORD DOES THE BUILD-OUT:] ready for occupancy by Tenant on or about _____, 20__; provided, however, if Landlord is unable for any reason to deliver possession of the Premises by such date,³⁸ Landlord shall not have any liability whatsoever to Tenant on account of Landlord’s inability to deliver possession of the Premises to Tenant, and this Lease shall not be rendered void or voidable as a result of such delay.³⁹
- (b) Promptly after the Lease Commencement Date, Landlord and Tenant, within fifteen (15) days after the request of either,⁴⁰ shall execute a certificate in the form attached hereto as Exhibit B setting forth the Lease Commencement Date and the date on which the Lease Term shall expire.

³⁶ See Footnote 9 about this lease form’s choice of “rounding off” the lease term to end at the end of a calendar month regardless of the actual commencement date.

³⁷ A lease should not condition either lease commencement or rent commencement on the building or the premises achieving any third-party green rating or accreditation. By definition, some of these cannot be obtained until months after a building or a tenant’s space is substantially completed and otherwise ready for occupancy. Other third-party ratings and certifications, like LEED-EB, Green Globes CIEB and ENERGY STAR, require that a building be in operation for a number of months (and may require a certain amount of lease-up or occupancy). And, of course, there are always the uncertainties of satisfying any third-party standard.

³⁸ Note that the only date stated here is the date of anticipated completion. There aren’t any interim or milestone dates specified here. Depending on the complexity of the project and the anticipated length of the build-out, it may be appropriate to insert milestone dates and try to craft remedies that play off them.

³⁹ A landlord is trying to protect itself against a holdover tenant refusing to yield occupancy, delays in construction, etc. Note that the clause as written is open-ended and applies to any inability to deliver possession, even if caused by the landlord or arising from the complete destruction of the building in the interim. A tenant should attempt to impose parameters on this clause, particularly regarding time limits. The tenant’s practical remedies are less clear. Indemnification against additional costs the tenant incurs is one option. Additional free rent or rent credit, whether day-for-day or a more punitive (e.g., two-for-one) basis, may be appropriate. The usual first thought, the option of the tenant terminating the lease, is of little practical use to the tenant precisely because it is so drastic and requires the tenant to put itself in the awkward position of destroying its own leasehold rights. If termination is to be an option, the landlord may require sufficient time and sufficient notice of termination so that it can deliver possession before the termination becomes effective absent a catastrophe. Also, of course, the terminating tenant must find alternative premises in a relatively short time period.

⁴⁰ Many leases state this certification option as a requirement (e.g., “within 30 days after the lease commencement date the parties shall ...”). This technically puts both parties into default if the requirement is not fulfilled. Presumably no landlord or tenant would seek to exercise remedies for such a default—particularly if the lease includes notice and cure periods for defaults—but it could happen. And because it creates a default, non-execution of the certificate can inadvertently create pointless complications under mortgage loan covenants, attempts to obtain estoppel certificates, and forfeitures of options (as in Section 2.3(a)).

SECTION 2.3 Extension⁴¹ Option⁴²

- (a) Provided no default under this Lease has occurred⁴³ [and is continuing beyond any applicable notice and/or cure period]⁴⁴ at the time notice is given or at the expiration of the initial Lease Term⁴⁵ and that Tenant is in occupancy of the entire Premises⁴⁶ at the expiration of the initial Lease Term, Tenant shall have the right and option, exercisable by giving written notice thereof at least _____ (—) months but not more than _____ (—) months⁴⁷ prior to the expiration of the initial Lease Term, to extend the Lease Term for one (1) period of [five (5)] years. Upon the giving of such notice, this Lease shall automatically be extended for such [five (5)] year period and no instrument of extension need be executed.

However, either party shall, upon the request of the other, execute and deliver a document evidencing such extension; the failure or refusal of a party to execute and deliver such a document shall not affect the effectiveness of the exercise of the extension.⁴⁸ In the event that Tenant fails to give such notice to Landlord as herein

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- 41 There is occasional law in some jurisdictions differentiating between the effect of a “renewal” vs. an “extension.” The word “extension” has been interpreted to mean what the parties have in mind as a matter of common sense, custom and practice (i.e., that the existing lease continues on as before except under the new rent and any specified new terms). The word “renewal” has been interpreted to mean that everything starts over again, that a new lease has been created, when the “renewal” term begins. This is generally a distinction without a difference.
- 42 Tenants should be aware that changes to the FASB accounting rules will require tenants to show lease obligations on their balance sheets as capital obligations, not as off-balance sheet annual operating costs (See Footnote 8). This change also proposes to require tenants to evaluate the likelihood of exercising a renewal option and, if there is more likelihood of renewal than not, to include the likely renewal term as part of their capital obligations. Thus, for accounting purposes, it might be advantageous to a tenant to not have a renewal option in its lease and to hope that it can later extend its term by mutual agreement with the landlord. As a practical matter, such voluntary mutual extensions seem to be more customary than exercising lease renewal options anyway. However, without the legal option to force a renewal, a tenant may find itself with less leverage to push the landlord able to negotiate a favorable or acceptable extension.
- 42 The condition that no default exist is so common as to be almost industry-standard. The landlord is presumably trying to protect itself from a longer-term relationship with a bad apple, and “default” is the closest polite word real estate lawyers can use to describe such a tenant. But a tenant should note that “default” is a very broad concept, it extends to a lot of trivial (mis)behavior, and such a condition can be used not only as a shield by a landlord but as a sword against a tenant. If the tenant is really such a bad apple that the landlord doesn’t want it as a tenant, should the landlord be required to terminate the lease and thereby prevent the extension? Also, keep in mind that a tenant who was in default before an extension term remains in default during the extension term, because prior obligations remain in effect, unless and until the default is cured. By extending its lease term that tenant is running the risk that it is taking on several more years of liability but could forfeit the benefits should the lease be terminated.
- 43 Using the word “default” without reference to the tenant’s cure right could create a barrier to the exercise of the renewal option since “defaults” for which applicable notice and/or cure periods have not yet expired can be found readily.
- 45 This is a common phrase, but consider the following questions: What would happen if the tenant was in default at the expiration of the expiring term? Would the tenant suddenly really find itself stripped of its previously-exercised right of extension/renewal? Would the extension/renewal automatically evaporate or must the landlord do something affirmative to deny the extension/renewal, and what/when would that be? What would the tenant do if it suddenly found itself without space to occupy? What would the landlord do if it suddenly found itself without a tenant? Is this a desirable outcome for either party?
- 46 Note that “in occupancy of the entire Premises” prevents the tenant from renewing if it has subleased any space at all, no matter how insignificant or no matter how short-term, even if the sublease ends at the end of the current term and doesn’t apply to the renewal term. Some extension clauses are even more aggressive making the extension option contingent on tenant having never sublet a portion of the premises. This has the effect of precluding the extension option in light of a long-expired sublet.
- 47 The landlord wants a minimum notice period so it has time to market the space if the tenant chooses not to renew. Additionally, the landlord requires a maximum notice period due to the difficulty of establishing a market rental rate too far in advance.
- 48 Most leases call for the parties to execute a document evidencing the extension/renewal, but do not state the consequences of non-fulfillment. This lease attempts to address these problems by making it clear that a lease amendment would be useful and customary but is not required.

provided, this Lease shall automatically terminate at the end of the initial Lease Term, and Tenant shall have no further right or option to extend this Lease.⁴⁹

- (b) The extended Lease Term shall be upon the same covenants, agreements, provisions, terms and conditions as the initial Lease Term, except that Tenant shall have no further options to renew or extend the Lease Term and that Fixed Annual Rent during the extended Lease Term shall be as follows [CHOOSE ONE OF THE FOLLOWING TWO OPTIONS FOR FIXED RENT OR FAIR MARKET RENT]:

[OPTION ONE FOR FIXED RENT]

EXTENSION YEAR	FIXED ANNUAL RENT PER SQ FT	FIXED ANNUAL RENT	FIXED MONTHLY RENT
1	\$	\$	\$
2	\$	\$	\$
3	\$	\$	\$
4	\$	\$	\$
5	\$	\$	\$

[OPTION TWO FOR FAIR MARKET RENT]

For the first Lease Year of the extended Lease Term, fixed annual rent shall equal the greater of Tenant's then current Fixed Annual Rent as of the commencement date of the extended Lease Term or the fair market rental value of the Premises as of the commencement date of the extended Lease Term, and shall be increased each Lease Year thereafter by consumer price index or fixed dollar or percentage increases corresponding to those applicable during the initial Lease Term. Fair market rental value shall be determined with reference to all then-relevant factors, including (without limitation) the average or normal value being achieved by landlords in lease renewals entered into with private sector tenants for comparable space in comparable buildings in equally desirable locations in the market in which the Building is located, assuming operating expense and real estate tax pass-throughs and consumer price index or fixed dollar or percentage increases corresponding to those contained in this Lease (if any). If the parties cannot agree on the fair market rental value within thirty (30) days after Tenant gives notice of extension, the fair market rental value shall be determined by the "**Three Broker Method.**" The Three Broker Method shall be applied as follows. Either Landlord or Tenant (the "**First Party**") may initiate a determination of the fair market rental value by delivering written notice to the other (the "**Second Party**") of the name of a licensed real estate broker⁵² who has at least ten (10) years of experience as a broker for the leasing of office space

49 Should the landlord be required to give the tenant a reminder notice that the renewal option is coming up? That is extremely unusual. Is the landlord itself in default if it fails to perform and what would that mean? Should the landlord be required to give the tenant a reminder notice that the renewal deadline has passed, with an additional grace period in which the tenant can exercise the renewal option? That also unusual, but may be more palatable because there is no connotation of landlord default, the only consequence being that the landlord can't re-let the space to a new tenant until the existing tenant consciously passes up a renewal opportunity.

50 This concept that renewal rent can't go down is obviously pro-landlord. Why can't renewal rent go down? There are downturns from time to time. Further, if a renewal tenant gets a smaller concession package (e.g., less tenant improvement allowance), than a new tenant shouldn't that be reflected in its base rent?

51 If the rent is a gross rent, the base rent should probably also be increased to account for operating expense increases since the expiring base was first calculated.

52 The word "broker" as used in this subsection is used in its plain English meaning of any licensed professional who performs leasing brokerage services, regardless of any technical terminology for different types of licenses under the local law where the premises are located.

in the market in which the Building is located. Within ten (10) days after receipt of such notice, the Second Party shall name a licensed real estate broker who meets the same criteria by written notice to the First Party. If the Second Party fails to name such a broker within such period, then the fair market rental value established by the broker named by the First Party shall be the rental. If the Second Party does name such a broker, then within fifteen (15) days the two brokers shall together appoint a third licensed broker who meets the same criteria. Within fifteen (15) days after the appointment of the third broker, the two brokers initially appointed by the parties shall present their respective proposals in writing to the third broker. Each proposal shall propose a rent rate for each year of the extended Lease Term, any adjustment to any operating expense or real estate tax pass-through, any rent abatement, any tenant improvement allowance, any other concession package, and any other applicable monetary provision that the broker believes should be applicable to the extended Lease Term,⁵³ taking into account all other provisions and components of this Lease without modifying any of them. A party or a broker who fails to timely submit a proposal shall be deemed to have waived the right to do so, and the proposal submitted by the other party's broker shall be the fair market rental value. Within thirty (30) days after his receipt of the two proposals, the third broker shall accept, in its entirety, one or the other of the two proposals and reject the other proposal, in "baseball style arbitration."⁵⁴ The third broker shall have no power to amend either of the proposals, or to accept a proposal in part, except that the third broker may correct obvious typographical or computation errors. The proposal accepted shall be binding and conclusive as to the fair market rental value for the extended Lease Term.⁵⁵ Each party shall pay all costs, fees and expenses of the broker selected by it, and the parties shall equally share the costs, fees and expenses of the third broker.

- (c) The extension option granted in this Section is personal to the original named Tenant and may be exercised only by it.⁵⁶

53 This provision asks for a complete package proposal and therefore makes explicit what is often left unclear in "three broker method" clauses: are the proposals supposed to propose only a face rent rate, without addressing a number of other monetary components (e.g., rent abatement, tenant improvement allowance), or is each broker expected to submit a complete package of rent and related clauses? Are the proposals supposed to apply only to the first year of the renewal term and, if so, how is rent determined for the remainder of the renewal term, or should the proposals cover the entire renewal term, year-by-year?

54 Baseball-style arbitration is preferred in this sample for a variety of reasons: (1) Baseball-style arbitration forces the two parties towards moderation in their respective proposals, lest they lose all by being too aggressive. Three broker methods using "averaging," on the other hand, encourages the parties towards the extremes as each party attempts to skew any "average" in its favor, although there are complicated methods of trying to address that (such as not averaging any proposal that is more than x percent more or less than the middle broker's proposal). (2) Baseball-style arbitration recognizes that competing proposals are often not comparable on an apples-to-apples basis, and therefore not easily subject to "averaging" in any event. Three broker methods using "averaging" tend to assume that the competing proposals will be identical in all their line items and methodology, which, in reality, they probably won't be. That is particularly true if there are multiple components to the proposal, not only a face rent rate, and/or if the proposal covers all years of an extension term, not only the first year. In effect, baseball-style arbitration allows the parties to make flexible proposals of some sophistication that cover the entire renewal package and term. (3) Baseball-style arbitration makes the third broker's job less subjective and that much easier and more understandable to him and to the parties (and to any court).

55 This lease does not permit a tenant or landlord to rescind the renewal if it doesn't like the outcome of the arbitration. The usual practice, followed here, is that upon exercising the renewal option the parties are bound to the renewal and to whatever outcome it leads to. Recognizing the potential unfairness of requiring a tenant to be obligated to a term without knowing the price, some renewal provisions permit a tenant to withdraw its renewal exercise at various points in the process, such as before arbitration commences.

56 This prevents the tenant from assigning all of its rights under the lease to an assignee. The assignee will have at least one less substantive right than the original tenant. Even a corporate successor after a merger or consolidation, or an affiliated successor, would not be able to extend the term. Thus the assignment of the lease becomes less attractive to a potential assignee. There are methods to dilute or eliminate this requirement. A landlord should note that this same concept can be applied to other options granted to the tenant in the lease, such as any expansion option. The application of such a limitation might be more acceptable to a tenant in the context of an expansion option than in the context of a renewal option because an expansion option may be more customized to the initial tenant and its growth expectations than a generic renewal option.

ARTICLE 3: RENT

SECTION 3.1 Fixed Rent

- (a) Tenant shall pay to Landlord as “**Fixed Annual Rent**” for each Lease Year for the Premises, the amount set forth in the Basic Lease Information, subject to adjustment as provided in Section 3.2 hereof:⁵⁷

[IF ANY OF THE FIXED ANNUAL RENT IS TO BE ABATED, ADD:] Notwithstanding anything to the contrary in the foregoing, [_____ percent (___%) of] the Fixed Annual Rent that would otherwise be due and payable for the first _____ (___) full calendar months of the Lease Term, not including any partial calendar month, shall be abated. The foregoing abatement does not apply to any parking charges or additional rent [or to any extension of the Lease Term].⁵⁸

- (b) Fixed Annual Rent shall be payable in equal monthly installments beginning on the Lease Commencement Date and thereafter monthly, in advance, on the first day of each calendar month during the Lease Term (each such monthly installment being referred to herein as “Fixed Monthly Rent”). Concurrently with the signing of this Lease, Tenant shall pay to Landlord a sum equal to one (1) month’s Fixed Monthly Rent, which sum shall be credited by Landlord against the Fixed Monthly Rent due for the first full calendar month of the Lease Term for which Fixed Annual Rent is payable.⁵⁹
- (c) If the Lease Commencement Date is a date other than the first day of a month, Fixed Monthly Rent from such date until the first day of the following month shall be prorated for each day within the partial calendar month that begins the Lease Term and shall be payable on the Rent Commencement Date.

SECTION 3.2 Increases in Fixed Rent⁶⁰

- (a) Commencing on the first (1st) day of the second (2nd) Lease Year and on the first (1st) day of each and every Lease Year thereafter during the Lease Term,⁶¹ the Fixed Annual Rent set forth in Section 3.1 hereof for the Lease Year in question shall be increased to reflect the increase in the cost of living in the following manner:

57 It is highly unlikely that a lease will call for both annual specified increases (as the chart in the Basic Lease Information anticipates) and Consumer Price Index (CPI) based increases per Section 3.2, but both are provided as samples.

58 This lease does not include a “clawback” provision that the tenant forfeits the entitlement to free rent if the tenant ever defaults during the lease term and, if the default occurs after the rent-free period expires, must repay any previously-forgiven rent. Although such clauses are often found in boilerplate leases, they ignore the business reality that as part of “the business deal” the landlord has already written off that rent, and that to allow the landlord to collect it would actually put the landlord in a better position if the tenant defaulted than if the tenant performed (nor is the threat of forfeiture of the free rent likely to incentivize a tenant to perform). Also, if the rental rate during the rent-paying portion of the lease term was increased to compensate for the rent-free period, then requiring payment of the otherwise-forgiven rent would be a double recovery to the landlord of the forgiven money.

59 If the prepaid rent is applied to the first full calendar month, the tenant will be required to pay pro rated rent on the rent commencement date for the first partial month (assuming a rent commencement date that is not the first day of a calendar month).

60 This entire Section may be omitted if the rent chart in the Basic Lease Information is used to show the rent increases over the lease term and if there is no percentage rent.

61 This lease chooses to apply CPI-based rent increases to each tenant individually, based on each tenant’s own lease commencement date. An alternative used by some landlords is to apply rent increases on January 1 to all tenants across-the-board.

- (i) The Consumer Price Index (CPI) for _____⁶² All Items (1984 = 100),⁶³ as published by the Bureau of Labor Statistics of the United States Department of Labor, which is published for⁶⁴ the month that is three (3) months⁶⁵ before the month that includes the last day of the Lease Year immediately preceding the Lease Year for which such adjustment is being made (“**Adjustment Index**”), shall be compared with the CPI published for the month that includes the date that is three (3) months before the month in which the Lease Commencement Date occurs (“**Beginning Index**”).⁶⁶ If no Adjustment Index or Beginning Index is published for the relevant month, then the Adjustment Index or Beginning Index shall be the CPI published for the month nearest to and preceding the relevant date. If the Adjustment Index has increased over the Beginning Index, the percentage increase between the Beginning Index and the Adjustment Index shall be determined.
- (ii) The percentage increase determined in Step (i) above shall be multiplied by _____ percent (____%).⁶⁷ The resulting percentage shall then be multiplied by the Fixed Annual Rent stated in the Basic Lease Information for the Lease Year immediately preceding the Lease Year as to which the calculation is being made, without any adjustment, to arrive at the amount of the increase in the Fixed Annual Rent.
- (iii) The amount determined in Step (ii) above shall be added to the Fixed Annual Rent stated in the Basic Lease Information for the Lease Year as to which the calculation is being made to arrive at the Fixed Monthly Rent payable each month during the Lease Year for which such calculation is made.
- (b) In no event shall the Fixed Annual Rent payable pursuant to clause (a) above be less than the Fixed Annual Rent payable hereunder during the Lease Year immediately preceding the Lease Year for which the calculation is being made.⁶⁸

62 Insert the applicable CPI, e.g., the national index or an appropriate metropolitan-area index. Also make sure to specify whether you are using the CPI for “All Workers” (the “CPI-W”) or for “All Urban Consumers” (the “CPI-U”). The CPI-U is more popularly used. There are deviations in the rate of increase from year-to-year between the CPI-W and the CPI-U. It doesn’t really matter whether the CPI-U or the CPI-W is used as long as the same CPI is used consistently throughout the lease term.

63 Keep in mind that the CPI base year in some areas has been updated to be more recent than 1984, but in other areas may still be 1967=100. Whichever CPI is used, use it consistently.

64 Note that the phrase “published for” is different than “published in” because the CPI for a given month is usually published several months after that month expires.

65 The seemingly complicated use of the CPI published for the month three months earlier than the rent adjustment date is intended (i) to overcome the lag time in publication addressed in a preceding footnote and (ii) to allow the landlord to institute the CPI increase when the new lease year begins without having to later implement a retroactive reconciliation of CPI-based rent increases (although a reconciliation is still provided for on a “just in case” basis in Section 3.2(d)). If the lease is administered each year consistently, always using CPI published for the month three months earlier, then neither the landlord nor the tenant gets an advantage.

66 This lease uses the “historic increase” method, comparing the rate of increase from the CPI at lease commencement to the CPI published currently. The other commonly used method is the “year-to-year” method, comparing the rate of increase each year during the lease term.

67 If the entire rate of increase in the CPI is used to increase base rent, then fill in 100%. If 100% is used, neither the “historic increase” method nor the “year-to-year increase” method has advantage or disadvantage over the other in calculating CPI increases. In many areas, it is customary to pass-through a lower percentage, e.g., 30% or 40%, of the rate of increase, in which case that percentage should be filled in. In that case, the landlord loses a fraction of rent each year if the lease uses the “year-to-year increase” method instead of the “historic increase” method.

68 Even without this subsection, there is no rent decrease under this particular lease if the CPI should happen to decrease. That’s because the formula used in this lease considers only increases, not decreases, in the CPI. This Section rebuts any implication that the parties meant to decrease rent and that the lease form ought to be construed against the landlord-draftsman if ambiguous in that regard—e.g., “that’s what would be fair,” at least in the view of a tenant who realizes after the fact that the lease does not provide for rent reduction, or in the view of a judge who is not conversant in real estate leasing practice.

- (c) If the CPI is changed so that a base year other than 1984⁶⁹ is used, the CPI used herein shall be converted in accordance with the conversion factor published by the Bureau of Labor Statistics of the United States Department of Labor. If the CPI is discontinued or otherwise revised during the Lease Term, such other index or computation with which it is replaced shall be used or Landlord shall choose a comparable index in order to obtain substantially the same result as would be obtained if the CPI had not been discontinued or revised.
- (d) Promptly after the determination of an increase in the Fixed Annual Rent pursuant to this Section 3.2, Landlord shall submit to Tenant a statement setting forth the amount of such increase and the computations by which it was determined. Until the receipt of such a statement from Landlord, Tenant shall in the interim continue paying the same Fixed Monthly Rent as was payable during the preceding Lease Year. Upon receipt of such a statement from Landlord, Tenant shall pay to Landlord on or before the next rental payment date an amount equal to the additional Fixed Monthly Rent that would have been payable if such adjustment had been in effect for the period from the commencement of the new Lease Year until the end of the month in which such statement is given. Thereafter, the Fixed Monthly Rent payable each month during such Lease Year shall be the increased amount determined in accordance with this Section 3.2. Notwithstanding any dispute which may arise in connection with the computation of the adjustment provided in this Section 3.2, Tenant shall be obligated to pay the Fixed Annual Rent as adjusted according to the computation of Landlord, without set-off, deduction, recoupment, abatement, counterclaim or adjustment of any kind, pending the resolution of any dispute.

[IF PERCENTAGE RENT IS TO BE USED: (1) RENAME SECTION 3.3 AS “**Percentage Rent**” AND ADD THE FOLLOWING SENTENCE: “ In addition to Fixed Rent, Tenant shall pay Percentage Rent in accordance with Exhibit F attached hereto.”; (2) ATTACH EXHIBIT F, PERCENTAGE RENT; AND (3) RENUMBER SECTIONS 3.3 THROUGH 3.5 ACCORDINGLY]

SECTION 3.3 Late Payment; Interest Charge

If Tenant fails to make any payment of rent on or before the date such payment is due and payable⁷⁰, Tenant shall pay to Landlord a late charge of five percent (5%)⁷¹ of the amount of such payment, together with interest⁷² on said overdue amount from the due date until paid at the rate of eighteen percent (18%) per annum or such lesser rate as may be the maximum allowed by applicable law. Such late charges and interest shall constitute additional rent due hereunder, shall be paid within five (5) days after demand therefor by Landlord⁷³ and shall be in addition to all other rights and remedies provided to Landlord in this Lease.

⁶⁹ Change this date if the applicable CPI uses a different base year.

⁷⁰ This lease gives neither a notice nor a grace period before a five percent late fee and late interest are imposed. A tenant should negotiate a grace period (five, seven or ten days) to avoid customary late payment penalties. Tenants may also negotiate notice—not just a grace period—before late fees and late interest can be imposed. Landlords should resist this; it allows the tenant to wait for a reminder that it will be financially penalized before it finally pays. The parties can also negotiate different penalties for various late payments (e.g., no penalty for the first late payment, or no grace period for subsequent late payments) in a specified time period (e.g., in a consecutive, rolling, 12-month period, or in a calendar year, or over the lease term). Note that this Section is separate from Article 20 addressing the determination of tenant “default.” It is possible to give the tenant different notice and cure provisions in this Section than in the definition of default.

⁷¹ Local custom and usury should be taken into account in setting the late fee and the number of days a payment is overdue before the late fee is imposed.

⁷² This lease imposes both a late fee (a short-term disincentive to late payment) and late interest (a long-term disincentive to late payment).

⁷³ Many lease forms make late fees and/or late interest payable “when the next monthly installment of rent is due” or words to that effect. This lease form avoids that practice.

SECTION 3.4 Rent Generally

As used in this Lease, “**rent**” includes all Fixed Annual Rent, Fixed Monthly Rent, adjustments thereto under Section 3.2, [Percentage Rent], all sums payable under Article 4, all additional rent and all other sums due to Landlord under this Lease, however called.⁷⁴ All rent shall be paid to Landlord in lawful money of the United States of America by check or wire transfer to such account as Landlord may designate from time to time or at the office of Landlord or to such other party or to such other address as Landlord may designate from time to time by written notice to Tenant. Unless specifically stated otherwise in this Lease, all rent payable under this Lease shall be paid in full by Tenant, in advance, without notice or demand and without set-off, deduction, recoupment, abatement, counterclaim or adjustment of any kind.⁷⁵ Tenant’s covenant to pay rent is an independent covenant.⁷⁶ If Landlord shall at any time or times accept rent to which Landlord is entitled hereunder after the same shall become due and payable, such acceptance shall not excuse a delay upon subsequent occasions, or constitute, or be construed as, a waiver of any or all of Landlord’s rights hereunder. Tenant’s obligation for the payment of rent shall survive the expiration or sooner termination of this Lease.

SECTION 3.5 Commercial Rent Control⁷⁷

In the event that any governmental authority having jurisdiction over the Property adopts any form of rent control or otherwise limits the rent that may be paid for the Premises: (a) this Lease shall remain in full force and effect, subject to the following provisions; (b) all rent shall remain payable hereunder to the maximum extent allowed by law; (c) any rent whose payment would violate applicable law shall not be waived or forgiven but shall accrue, without interest, until such time as the rent payable under this Lease is less than the maximum rent payable under applicable law, at which time such accrued rent shall be payable to the extent permitted by applicable law; (d) any accrued rent which has not become payable at the expiration of the Lease Term shall be forgiven and waived; (e) any accrued rent which has become payable prior to the termination of the Lease Term shall remain due and payable until all of Tenant’s other rent obligations have been satisfied to the maximum extent permitted by applicable law, at which time the accrued rent shall be payable to the maximum extent allowed by applicable law and any remaining accrued rent shall be forgiven and waived; and (f) Landlord shall determine which rent is payable and which rent is accrued, subject to applicable law.

74 This lease form defines all payments as part of “rent”, which simplifies cross-references and terminology in the remainder of this form.

75 A landlord should vigorously resist any request by a tenant for offset rights. Such a right could severely impact the landlord’s cash flow and the feasibility of the property. Any agreement by a landlord to an offset right should be narrowly applicable to specific, quantifiable, events, such as non-payment of a tenant improvement allowance or other reimbursable, and should not apply broadly to landlord defaults. In addition, a tenant should not be able to exercise a right of offset without giving clear and specific notice of its intent to do so and in what amount. A landlord may also require that it be given a second, reminder, notice before the offset is implemented, perhaps with bold face font. Finally, it is not unusual to limit an offset to fixed rent or base rent in a net lease so that ordinary property expenses and taxes can be paid from the pass-throughs under Article 4.

76 Making the tenant’s obligation to pay rent “an independent covenant” means that the landlord’s nonperformance does not excuse nonpayment. This is customary in real estate leasing even though it is not customary in other business transactions. Some states have begun to reverse this traditional rule by statutory change. How does the concept of “rent is an independent covenant” square with the “voluntary payment doctrine” that if a tenant makes a payment with knowledge of a landlord default but does not expressly preserve its rights then the tenant has waived its claim?

77 Provisions about commercial rent control are rarely seen in commercial leases in the United States. Usual practice is to omit this section. Inclusion of the section is not harmful. The section is moot if commercial rent control is never instituted. And, if commercial rent control is instituted, the provision is substantively the lease equivalent of the “usury savings clause” found in just about every commercial mortgage.

ARTICLE 4: ADDITIONAL RENT⁷⁸

SECTION 4.1 Increases in Annual Operating Charges and Increases in Real Estate Taxes

- (a) [FOR A “TRIPLE NET” LEASE:] Tenant shall pay to Landlord Tenant’s proportionate share of the Annual Operating Charges (as hereinafter defined) incurred by Landlord during each Operating Year falling entirely or partly within the Lease Term. [FOR A “FULL SERVICE” LEASE:] Tenant shall pay to Landlord Tenant’s proportionate share of the amount by which the Annual Operating Charges (as hereinafter defined) incurred by Landlord during each Operating Year falling entirely or partly within the Lease Term exceed [FOR A “FULL SERVICE” LEASE USING A “BASE YEAR:”] the Annual Operating Charges incurred by Landlord in the operation of [the office space in⁷⁹] the Property during calendar year 20__ (“**Operating Charges Base Year**”) [FOR A “FULL SERVICE” LEASE USING A FIXED “EXPENSE STOP:”] _____ Dollars (\$_____) per rentable square foot.⁸⁰ For purposes of this Section 4.1(a), Tenant’s proportionate share of such increase shall be [an agreed upon percentage equal to _____ percent (____%)] [a percentage equal to the rentable square footage of the Premises divided by the rentable square footage of [the office space in] the Building]. As used in this Lease, an “**Operating Year**” is the period beginning on January 1 and ending on the next December 31, both dates inclusive, or any portion of such period.⁸¹

78 There is a philosophical debate whether a “net” lease like this form can be a “green lease” at all (because it creates the “split incentive” of the tenant paying the operating costs while the landlord pays most capital costs, meaning the landlord arguably has no incentive to upgrade the building to save energy costs) or whether only a “gross” lease can be a green lease. Suffice it to say that the proponents of “gross” leases grossly (pun intended) oversimplify the dichotomy: even in a “net” lease the tenant usually does pay for some energy-saving capital expenses and in a “net” lease the landlord usually has issues of expense exposure, vacancy risk and market positioning that do provide it with other incentives to improve its building. Also, there are few pure “gross” leases in use, for good financial reasons from the perspectives of landlords and their mortgagees, and little actual evidence that landlords in gross-lease buildings actually operate more energy-efficiently. There are probably more “modified gross” leases, also known as “full service” or “base year” leases, than pure gross leases, but modified gross/full service/base year leases start splitting the difference, sharing some of the risk and some of the cost, between pure gross and net leases on matters of operating expenses. New FASB rules might further reduce the use of gross or modified gross/full service/base year leases (See Footnote 8). The new FASB rules recharacterize all operating leases as capital leases for accounting purposes. That means that fixed or base rent must be capitalized by the tenant and shown on the tenant’s balance sheet as a capitalized obligation, whereas operating expense and real estate tax pass-throughs do not have to be capitalized. All else being equal, a gross lease or a modified gross/full service/base year lease will have a higher base rent than a net lease even if the total rent payments are the same. The effect is that gross leases and modified gross/full service/base year leases will fare worse on tenants’ balance sheets than will net leases, so some tenants may also have financial accounting reasons to prefer net leases.

79 If the building contains retail space, experienced office tenants will usually contest paying a pro rata share of expenses that include the usually more costly retail space. The office tenant’s pro rata share of operating expenses in a mixed-use building may therefore be a higher percentage (i.e., the numerator, the rentable square feet leased by this tenant, remains the same, but the denominator is a lower number, i.e., the denominator is only the office space in the building) but, in theory, of a lower operating expense number (because operating expenses attributable to the retail areas are excluded from the office tenant’s pass-through obligation). This should not be objectionable to a landlord. In some circumstances, the landlord may charge the retail tenants directly for, or have the retail tenants obtain directly from outside service providers at their own expense, the more expensive services required by retailers.

80 A tenant under a lease using either a base year or a dollar baseline should try to make sure that calculations of future increases are done on an apples-to-apples basis in terms of line items and categories of services. Otherwise, if a new service is later added, the tenant will pay 100% of the cost as an operating expense pass-through.

81 Base rent increases may occur on a lease year basis, but increases in operating expenses and real estate taxes almost universally are calculated on a building-wide calendar year basis or a fiscal year basis.

- (b) [FOR A “TRIPLE NET” LEASE:] Tenant shall pay to the Landlord Tenant’s proportionate share of the Real Estate Taxes incurred by Landlord during each Operating Year falling entirely or partly within the Lease Term. [FOR A “FULL SERVICE” LEASE:] Tenant shall pay to Landlord Tenant’s proportionate share of the amount by which the Real Estate Taxes⁸² (as hereinafter defined) actually paid by Landlord during each Operating Year falling entirely or partly within the Lease Term exceed [FOR A “FULL SERVICE” LEASE USING A “BASE YEAR:”] the Real Estate Taxes actually paid by Landlord during calendar year 20__ (“**Real Estate Taxes Base Year**”) [FOR A “FULL SERVICE” LEASE USING A FIXED “EXPENSE STOP:”] _____ Dollars (\$____) per rentable square foot. For purposes of this Section 4.1(b), Tenant’s proportionate share of such increase shall be [an agreed upon percentage equal to _____ percent (____%)] [a percentage equal to the rentable square footage of the Premises divided by the rentable square footage of the Building].⁸³

SECTION 4.2: Annual Operating Charges Defined and Real Estate Taxes Defined

- (a)(i) The “**Annual Operating Charges**” are defined as the sum of all costs and expenses incurred by or on behalf of Landlord in operating, owning, managing, insuring, securing, maintaining, repairing and inspecting the Property or any part thereof including, without limitation, all costs and expenses of the items set forth below to the extent applicable to the Property: operating, equipping, maintaining, repairing, replacing⁸⁵, policing, painting and cleaning the lighting, electrical, plumbing, hydraulic, mechanical, heating, ventilating and air-conditioning, signage, and access control equipment for or of the Property; salaries, fringe benefits and other compensation, however denominated, of all personnel⁸⁶ engaged in operating and maintaining the Property (including, but not limited to, health, accident and group life insurance and the cost of uniforms, equipment and employment taxes), including those who may be located off-site; alarm systems; elevators and escalators; all insurance whatsoever, including, without

82 Some leases—in fact, many leases—include real estate tax increases as just another component of operating expense increases. This lease calculates them separately for two reasons: (i) in a mixed office-retail building, there might be different pro rata shares for each component, as discussed above; and (ii) if one component increases while the other decreases, the decrease in one component would not offset the increase in the other component under this lease, and the landlord could collect all of the increase in the component that went up while holding steady (not reducing) the tenant’s obligations in the component that decreased. (See the last sentence of Section 4.3 of this lease.)

83 The pro rata share for real estate taxes is usually a straight fraction, using the tenant’s rentable square footage as the numerator and the building’s square footage as the denominator. Unlike in the operating expense allocation, no allowance is made for distinctions between office and retail space for real estate tax pass-throughs because it is rare that a mixed-use building will bear separate real estate tax assessments for the retail and office components. If separate real property tax accounts exist for different uses (such as in a mixed-use condominium), the denominator for tenant’s share can be that portion of the profit that constitutes a given tax account.

84 This is a common method of defining operating expenses, starting with a general catch-all description and then segmenting into a long list of included expenses. Tenants should be aware that, as a result of the initial catch-all description, the list of what is included in operating expenses isn’t limited to what is in the list, and if a tenant wishes to exclude a type of expenditure then the lease should exclude that expenditure explicitly. (See Section 4.2(c)).

85 The word “replacing” implies that the tenant may be charged for capital expenses as an Operating Charge. This could open a tenant to paying for pass throughs that are generally landlord obligations. See Footnote 92.

86 Charging a tenant for “all personnel” is usually extreme. The most common tenant reaction is to request that the clause apply only to personnel working at the building and only to “personnel at or below the level of building manager.” The tenant does not want to pay for headquarters employees. If distinctions are made in this clause between personnel at the building (whose costs are passed-through to the tenant) and other personnel, the landlord should add a parenthetical that “the cost of personnel who spend some of their time at the building and some of their time elsewhere shall be equitably apportioned,” or language to that effect. The means of apportionment are left somewhat vague (by some allocation of time? or of value? or strict pro rata based on square footage?) but at least the principle is articulated.

limitation, liability insurance for personal injury, death and property damage (including, without limitation, to Landlord's personal property), insurance against terrorism, fire, extended coverage, theft or other casualties, worker's compensation insurance covering personnel, fidelity bonds for personnel, insurance against liability for defamation and claims of false arrest occurring in the Building or on and about the Property, rent loss insurance, sprinkler leakage insurance, and plate glass insurance; insurance endorsements applicable to green buildings, including (without limitation) coverage in order to repair, restore, replace and re-commission the Building for certification or recertification in accordance with standards applicable to the U.S. Environmental Protection Agency's ENERGY STAR rating,⁸⁷ the Green Building Initiative's Green Globes for Continual Improvement of Existing Buildings (Green Globes™ CIEB), the U.S. Green Building Council's then-current version of the LEED Green Building Rating System, the Building Owners and Managers Association (BOMA) International's 360 Performance Program or the Building Owners and Managers Association of Canada's Building Environmental Standards ("BOMA BEST") or any comparable rating, certification or performance program now or hereafter in existence (collectively, "Third Party Sustainability Standards") (without hereby obligating Landlord to seek such certification) or support achieving energy and carbon reduction targets;⁸⁸ all supplies and materials; maintenance, repair and replacement of all exterior glass; storage, removal and other costs associated with debris; costs and expenses of inspecting and depreciation⁸⁹ of machinery and equipment used in the operation and maintenance of the Property; the cost of all capital improvements to the Property made by Landlord, provided that the cost of each such capital improvement, together with any financing charges incurred in connection therewith, shall be amortized over the useful life thereof⁹⁰ in accordance with generally accepted accounting principles⁹¹ (GAAP) (or any generally accepted successor thereto or replacement thereof) and only that portion attributable to an Operating Year shall be included for

⁸⁷ This applies in the case of substantial building rehabilitation.

⁸⁸ "Carbon reduction targets" refers to potential future climate change legislation, targets set by the 2007 Energy Independence and Security Act's "Zero-Net Energy Buildings" goals, and participation in voluntary programs such as EPA Climate Leaders.

⁸⁹ Many tenants will refuse to pay for "depreciation" and other non-cash items. From the tenants' position, depreciation schedules can be calculated years in advance and so ought to be included in base rent to the extent the landlord wants to collect for predictable equipment replacements, and, as is noted below, tenants often refuse to pay for capital costs anyway as an operating expense. This would include depreciation.

⁹⁰ A landlord may prefer to fix an amortization period, e.g., ten years. Also see Exhibit K for life determination for roof top units.

⁹¹ Anecdotal evidence suggests that GAAP accounting is largely irrelevant to actual real estate accounting and practice. Nor, despite popular belief to the contrary, does GAAP provide specific amortization schedules.

such Operating Year;⁹² coordination and use of any loading dock serving the Building; repair or replacement⁹³ of awnings, paving, curbs, walkways, interior and exterior landscaping, drainage, pipes, ducts, conduits and similar items, lighting facilities and the roof; the rental of music program services and loud-speaker systems, and the maintenance and repair of such equipment; all costs and expenses associated with Landlord's management office,⁹⁴ Landlord's storage areas and other management facilities in the Building and the equipment therein; lobby attendant (if any) and concierge (if any); sustainability management services (including but not limited to energy and water consulting/management services), maintenance contracts, window cleaning, snow removal, elevator maintenance, janitorial service and trash

92 Charging tenants for "capital improvements" can be a contentious issue. Some leases charge tenants for all capital costs as an operating expense, presumably on the grounds that "if you do not ask, you do not get." If read literally, for example, that would make a tenant who is in the building at the time a roof is replaced liable for its pro rata share, in a single year, of the entire cost of the roof, ignoring that the expected life span of the new roof far exceeds the term of the lease. The clause suggested in this lease is more fair than that in that it offers to amortize the cost. But it still charges the tenant for capital costs and the underlying principle is still at stake. Another common compromise is to charge the tenant only for capital costs that are required to comply with new legal requirements (See Footnote 98 or that reduce—"or are intended to reduce"—what would otherwise be operating expenses — "or the rate of increase in operating expenses"—so that the landlord at least recovers the cost of expense-saving equipment. Of course, this compromise assumes the parties can agree later on what capital expenses save operating expenses and the dollar amount of actual savings. There may still be some further negotiation, such as a tenant request that the amount passed-through to the tenant under such a clause not exceed, in any given operating year, the amount of operating expense savings realized (or expected or estimated to be realized); this sounds fair but is extremely difficult to calculate, particularly given outside variables (such as the weather, the comparative cost per gallon of fuel oil, etc.). One problem with imposing these cost-saving conditions on what a tenant will pay for is that the landlord is still not, economically incentivized to do "green" capital improvements (e.g., upgrading indoor air quality, using green materials in alterations) if there isn't any cost-savings attributable to greening those capital improvements. And in all cases there is the issue of determining the useful life or other amortization schedule. (Contrary to popular belief, GAAP does not provide a hard-and-fast set of rules for that.) The result is that this pass-through of capital expenses can be one of the most contentious issues in negotiating a lease, particularly a green lease, and it can remain a point of contention throughout the lease term. While GAAP does not provide hard timelines for amortization, the guideline indicates amortization should be "over the useful life" of the improvement and there are general industry norms around what are acceptable useful life time frames depending on the nature of the improvement. Further with respect to the legitimate challenge of measuring operating cost savings overtime attributable to a capital investment, the criteria and intent should be around the concept whether the L/L reasonably expects for the improvement to save energy/operating costs. This reasonableness could be validated by the landlord simply providing an overview of the project components and associated energy and other savings associated. The evidence of this type of cost/benefit analysis should be used to demonstrate the reasonable expectation that the capital items save operating costs and are thus eligible for pass through. The intention has never been and should never be that the L/L is guaranteeing savings given the many variables that change over time affecting performance, many of which are beyond the L/L's control (weather, occupancy, density of occupancy, etc.)

But one point should be mutually acceptable to both parties from the start: a tenant should not be charged for the landlord's routine capital replacements (e.g., new roof, parking lot paving) or for casualty restoration under this clause, although even there issues can arise if the landlord upgrades to greener improvements. Also see Exhibit K regarding life determination for roof top units.

93 The foregoing clause charges the tenant for capital expense "replacements" as an operating expense. A tenant should resist this. See Footnote 85.

94 This vaguely worded clause could allow the landlord to charge the tenant for the "deemed foregone rent" attributable to an on-site management office space that otherwise could have been leased to a rent-paying tenant.

removal; sales and/or use taxes levied on any rent; carbon trading or offset costs ensuring compliance by the Building with greenhouse gas emission levels or energy consumption or conservation levels mandated by applicable law; carbon taxes, fees, charges and assessments levied against Landlord or the Building relating to the consumption of energy; personal property taxes on equipment and supplies used in connection with the Property; costs of continuing education and professional and trade association dues for Building management staff;⁹⁵ recycling expenses; the costs of any additional services not provided to the Property at the Lease Commencement Date but thereafter provided by Landlord;⁹⁶ cost of water and sewer services incident to general building use (any excessive use by Tenant shall not be an Annual Operating Charge but instead shall be subject to the payment of additional rent pursuant to Section 15.1);⁹⁷ parcel pick-up and delivery services; any costs and expenses of compliance with legal requirements;⁹⁸ legal fees not recovered from other parties; accounting fees; management fees and costs paid to the management company managing the Property;⁹⁹ fulfillment of Landlord's obligations under one or more

95 While some landlords will insist on the right to charge tenants the costs of continuing education or professional dues for building staff on the grounds that better-educated staff makes for a better building, most landlords will be (or should be) more sympathetic to the argument that building employees are movable items with no lasting benefit to a particular building, even if one assumes that there is a direct correlation between better-educated staff and building quality in the first place. Landlords can bear these costs as corporate overhead.

96 The preceding clause gives the landlord flexibility to charge the tenant for new services as building operations change and may cause tenant contention. For example, if the new service is provided as the result of an attempt to upgrade the building (e.g., adding a concierge service to attract upscale tenants), but the tenant was satisfied with the previous level of service, the tenant may object to the new charges incurred. One compromise is to pretend that the new service was provided during the base year or added to the expense stop so that the tenant pays on an apples-to-apples basis only for increases in costs, not for the initial cost of the new service. Alternatively, language can restrict new services to services provided in comparable buildings (which should be defined).

97 Many leases fail to make the basic distinction between building-wide expenses and expenses incident to a specific tenant. Only building-wide expenses should be shared pro rata by all tenants.

98 Tenant expect that the building complies with applicable laws as of the date of the lease. However, expensive modifications may be required during the term incident to new laws or laws newly in effect. A compromise is (i) to charge the tenant for the cost of compliance with any laws, statutes, ordinances, codes and other legal requirements not in effect (or existing but not yet in effect) on the date the lease is signed (not on "the commencement date," which is a too-frequent tendency of poor drafting, because using the commencement date as the baseline exposes the landlord to bearing the cost of new legal compliance that arises between lease signing and lease commencement and that the landlord might not have contemplated in establishing the base rent at the time the lease is signed), and (ii) to amortize those costs over the life of the compliance item or an agreed-upon shorter period.

99 Many tenants will, understandably, want the management fees capped because they are frequently payable to affiliates of the landlord. Fixed dollar caps should be resisted by the landlord. Fixed percentage caps (e.g., a management fee not exceeding three percent, or some other local rate, of annual gross revenues generated by the building) may be more palatable. Other ways to set a softer cap are to state that the fees chargeable by any affiliate of the landlord and passed-through to the tenant will not exceed market rate fees, or fees customarily charged from time to time in the geographic market for comparable buildings, or fees that would be chargeable by an unaffiliated management company. A tenant, particularly a tenant in a small market, might want to further define the "market" as excluding other buildings owned by the same landlord or its affiliates, because that allows the landlord to circularly establish its own market.

public space agreements with a governmental agency having jurisdiction over the Building¹⁰⁰ and under easements, covenants and cost-sharing agreements; and any costs, charges and expenses, in addition to those set forth in this definition, which according to GAAP (or any generally accepted successor thereto or replacement thereof) and practice would be regarded as costs to operate, own, manage, insure, secure or maintain the Property.

- (ii) Annual Operating Charges shall also include: (i) all costs of applying, reporting and commissioning the Building or any part thereof to seek certification under any Third Party Sustainability Standard applicable to the Building at any time, as in effect from time to time, except for any certification under the then-current version of LEED for New Construction (“LEED-CN”), then-current version of LEED for Core & Shell (“LEED-CS”) and then-current version of LEED for Commercial Interiors (“LEED-CI”) standards; and (ii) all costs of maintaining, managing, reporting, commissioning, and retrocommissioning¹⁰¹ the Building or any part thereof that is rated, certified or otherwise labeled under any Third Party Sustainability Standard applicable to the Building at any time, as in effect from time to time, provided however, the cost of such applying, reporting and commissioning of the Building or any part thereof to initially seek certification under clause (i) shall be a cost capitalized and thereafter amortized as an Annual Operating Charge under GAAP (or any generally accepted successor thereto or replacement thereof).¹⁰²

100 A tenant might legitimately object that this provision is overbroad: it will allow the landlord to pass-through to the tenants as an operating expense the rent the landlord pays to the government, while also allowing the landlord to recover that same cost by renting the same space out to a third party tenant. For example, if the building has below-grade basement space that extends beyond the building’s perimeter into the public right-of-way, and the landlord leases that space to a tenant as storage or for support service use, should the landlord be allowed to collect both rent from that tenant and also have all of the other tenants pay the costs of the public space agreement? Or consider a hypothetical involving the use of outdoor patio seating in the public sidewalk outside a building that is leased to a restaurant or bar. Adding “except to the extent any such public space is rented or held out for rent to tenants” or similar phrasing is fair.

101 For example, LEED3.0 for Existing Buildings (“LEED-EB”) requires that the building apply for recertification at least once every five years to maintain its status as a building certified under LEED-EB, even if the building is already certified under a LEED certification based on design and construction. Green Globes CIEB requires that the building be requalified every three years, at a minimum, to maintain its certification.

102 A landlord could offer to pay the cost of certification and only pass through the costs of reporting and compliance to avoid the perception of “I support green as long as I don’t have to pay for it.” However, a tenant might argue that these are all landlord’s costs that should not be passed on to a tenant because the landlord uses the “green” designation as a marketing differentiator for its own pecuniary benefit. (Question whether that is correct (1) if a “green” building’s operating expenses are lower, which benefits the tenant, or (2) if a “green” building is literally required by local code.) Note that this clause is somewhat pro-tenant in that the cost of the initial application process is amortized and only the cost of compliance with ongoing operational certifications (e.g. LEED-EB, Green Globes-CIEB, and ENERGY STAR) are passed through as annual expenses. In any event, the tenant should not and here does not pay for the cost of initial base building certification (e.g., LEED-NC and LEED-CS).

- (iii) If at any time during the Term, the Building contains any facility that generates all or any portion of the electricity used by the Building, then Tenant shall acquire its electric supply from that facility¹⁰³ and Annual Operating Charges shall include all costs of operating, equipping, maintaining, and repairing the electricity generating and distribution equipment, including (without limitation) utility standby fees, such costs not to exceed the amount Landlord or Tenant would have paid to a third-party utility for the same electric service at the utility's rate schedule.¹⁰⁴ All proceeds received by Landlord for selling electric power to third parties, whether under net metering or otherwise, shall belong to Landlord.¹⁰⁵
- (b) If the Building is less than one hundred percent (100%)¹⁰⁶ occupied during any Operating Year or part thereof, Annual Operating Charges shall include all additional costs and expenses of operation, management, insuring, securing and maintenance of the Property which Landlord determines that it would have paid or incurred during such Operating Year if the Building had been one hundred percent (100%) occupied.¹⁰⁷

103 If the tenant is given the right (elsewhere in this lease) to acquire its electric power directly from third parties, that would be inconsistent with this requirement and an appropriate modification would be needed here.

104 Question whether the tenant should pay only the lesser of the foregone third-party utility cost or the landlord's own direct cost of producing and distributing the power.

105 On-site cogeneration facilities are an emerging field. This paragraph raises the topic but does not wrestle with any of the many fact-specific questions that arise. For example: (i) which party pays for the cogeneration facility (installation vs. ongoing maintenance); (ii) how does the landlord charge the tenant for the electricity produced, e.g., at the public utility company's rates, which are likely higher than the actual costs of cogeneration production, or at the landlord's actual cost; (iii) how do the parties account for any sale of electricity back to the utility grid, sometimes referred to as "net metering" or "making the meter run backward"; and (iv) what assurance does the tenant have that the cogeneration power will be qualitatively equal to the public utility's power, particularly if the tenant needs clean or uninterruptible power. As the property owner, the landlord is in the driver's seat with regard to these matters, but as cogeneration issues become more common, tenants may seek additional protections to limit tenant costs and for tenant to share in the benefits. While landlord generally controls utility provider selection, a tenant will nonetheless seek assurances that the landlord's selection of a utility provider does not materially and adversely impact tenant's business operations at the property.

106 Many tenants viscerally object to clauses (often called "gross-up clauses") that seem, on the surface, to have the tenant bear the risk of the building not leasing up by "grossing up" the tenants' payments of operating expenses. A fairly drafted gross-up clause should not be objectionable because a fairly drafted gross-up clause addresses the mathematical gap that doubly prejudices the landlord through the standard application of a pass-through clause. Some of the costs borne by the landlord are completely or relatively "fixed" (e.g., insurance, real estate taxes, landscaping, parking lot or garage maintenance, security, etc.) regardless of occupancy levels while others are "variable" (e.g., HVAC, some janitorial, some maintenance and repair). The ratio of fixed vs. variable depends on the building and the locale. A 50-50 ratio may be generally accurate. If there is no gross-up clause in the lease, a landlord of a partially-occupied building will recover only a portion of even the variable costs even though all of the variable costs are generated by the tenants in occupancy. Of course, not all gross-up clauses are fairly drafted. For example, the sample clause in this lease is triggered unless there is permanent full occupancy, which is highly unrealistic and therefore very pro-landlord. Depending on market conditions, a 95% or even 90% occupancy trigger may be more appropriate. Also note the distinction between "occupancy" and "leased." The percentage "leased" may well exceed the percentage "occupied" at any time as tenants move in or out, but only "occupancy," not "leased," affects variable costs. Another frequent flaw in gross-up clauses is that many allow the landlord to collect more than 100% of the landlord's actual costs, if read literally. That is not the point of a fair gross-up clause. A landlord should not object to a clause stating that the gross-up clause will not be implemented so as to allow the landlord to collect more than 100% of its actual operating expenses.

107 If the tenant is separately metered for electricity, then the tenant should not be paying a pro rata share of tenant-area electric (only a pro rata share of common area electric) as an operating expense pass-through. Such a tenant may want to specify that tenant-area electric is therefore not grossed up.

- (c) Notwithstanding [Section 4.2\(a\)](#), Annual Operating Charges shall not include the following:¹⁰⁸ (i) legal fees, space planners' fees, real estate brokers' leasing commissions and advertising expenses incurred in connection with the original or future leasing of space in the Building;¹⁰⁹ (ii) costs and expenses of construction of Tenant Improvements in the Premises or the leasehold premises of other individual tenants to prepare them for occupancy by the tenant thereof;¹¹⁰ (iii) depreciation and interest and principal payments on mortgages and other debt costs, if any, other than amortization of and the interest factor attributable to capital improvements to the extent permitted in [Section 4.2\(a\)](#); (iv) costs and expenses associated with the operation of the business of the person or entity which constitutes Landlord as the same are distinguished from the costs of operation of the Property, including accounting and legal matters with respect to same; (v) costs of selling or financing any of Landlord's interest in the Property; (vi) income, excess profits, franchise taxes or other such taxes imposed on or measured by the net income of Landlord from the operation of the Building; (vii) costs incurred by Landlord for the repair of damage to the Building to the extent that Landlord is reimbursed for same¹¹¹ by insurance proceeds; (viii) the costs of special services and utilities separately chargeable to individual tenants of the Building;¹¹² and (ix) Real Estate Taxes (as hereinafter defined) that are separately charged to Tenant.¹¹³
- (d) **"Real Estate Taxes"** means the total of all real estate taxes, business improvement district assessments, ad valorem taxes, special purpose district or project fees, taxes and charges, transit taxes and other assessments and charges (including payments in lieu of taxes), general and special, ordinary and extraordinary, foreseen or unforeseen, assessed, levied, or imposed upon Landlord, the Building and/or the Land which are actually paid¹¹⁴ during the Operating Year in question, net of any abatements, late payment charges and interest; provided, however, if any assessment is payable in installments, Real Estate Taxes for any Operating Year shall include only the installments payable in such Operating Year. Real Estate Taxes shall also include legal costs and other costs and expenses incurred in any appeal of the tax assessment upon which such Real Estate

108 This is an abbreviated list of exclusions from operating expenses. There is also the somewhat related issue of whether some sort of dollar or percentage cap should be imposed to protect a tenant against being charged excessive increases. See Footnote 120.

109 A common exclusion is "marketing costs" generally. A tenant should negotiate whether the cost of obtaining LEED certification or any comparable third-party certification is a direct benefit to the tenant or simply a marketing expense for the landlord. The answer may depend on whether the certification is required by law or by the tenant.

110 The costs listed in clauses (i) and (ii) are excluded from operating expenses payable by all tenants. They are expenses that should be built into the rent rate payable by the tenant for whose lease they are incurred.

111 Tenants may try to substitute "could be reimbursed" for "is reimbursed" or otherwise exclude any cost that is insured. The tenant's theory is that having paid for insurance coverage as an operating expense, it wants to see the landlord use insurance proceeds and not either waive an insurance claim or fail to diligently prosecute an insurance claim because the landlord knows that it can always make a claim against the tenant for the same expense. This position has a certain appeal (although it does ignore the possibility that the landlord's insurance premiums may increase, and therefore the tenant's pass-through obligations may increase, if the building becomes a thorn in the insurer's side). Landlords will, however, almost universally reject that request by tenants for not only the reasons stated in the preceding parenthetical, but also for the basic reason that the landlord desires to retain discretion and control over its relationship with its insurers.

112 If tenants are charged for parking, also consider whether some or all of the landlord's revenues from parking operations should be used to offset any costs incurred in operating the parking area, and if, therefore, operating costs should exclude such expenses to the extent of such revenues.

113 Real estate taxes are excluded from the definition of operating expenses here because they are addressed separately in this lease.

114 Note the use of the words "actually paid." Surprisingly few jurisdictions have real estate tax years that precisely coincide with calendar years with tax payments due at regular intervals throughout the same calendar year. Many real estate tax years are fiscal years, many jurisdictions collect real estate taxes at odd times, sometimes even a year or two in arrears of the tax year to which they apply, and sometimes both complications exist simultaneously. Questions arise as to which tax payments by the landlord are passed-through to a particular tenant. For simplicity, this lease form ignores fiscal years and deemed payment dates in favor of charging current tenants for current taxes. Local practice and custom may suggest otherwise. The methodology used should be discussed with the property manager to make sure that the building's books actually follow what is written in the lease.

Taxes are based, whether or not such appeal is successful.¹¹⁵ Such costs and expenses shall be included in Real Estate Taxes for the Operating Year for which appeal is made without regard to the date such costs are actually incurred.¹¹⁶ “Real Estate Taxes” shall not include any incremental tax or surcharge imposed on the Building or Land to repay any loan or leasehold financing advanced by a governmental agency to pay for any capital improvement to the Land or Building except to the extent payment of the expense would be an Annual Operating Charge if non-governmental funding had been utilized.¹¹⁷

SECTION 4.3 Statement of Annual Operating Charges

Except as provided in Section 4.4, Landlord shall submit to Tenant each year¹¹⁸ a statement setting forth the respective amounts payable by Tenant pursuant to this Article for the preceding Operating Year for increases in Annual Operating Charges and for increases in Real Estate Taxes.¹¹⁹ Within thirty (30) days after receipt of such statement, Tenant shall pay to Landlord the amount shown thereon.¹²⁰ For all purposes under this Article, Tenant’s liability for increases in Annual Operating Charges and Tenant’s liability for increases in Real Estate Taxes shall each be calculated separately from and payable in addition to one another.

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- 115 The tenant bears the cost of appealing real estate tax assessments. If the landlord wins the appeal, the cost should be netted out against the refund. If the landlord loses the appeal, there usually is not any cost because most appeals are handled on a contingency fee basis. A tenant should clarify this during lease negotiations.
- 116 Most leases do not address the issue of which tenants bear the costs of appealing real estate tax assessments if the appeal spans more than one tax year. This lease takes a straightforward approach that all costs, whenever incurred, are attributed to the real estate tax year appealed. This approach is not without a downside. For example, if the appeal runs on too long, some of the tenants against whom the costs would be levied may have vacated the space by the time the cost is incurred, leaving the landlord with no effective means of retroactively collecting the costs from those departed tenants if the appeal is unsuccessful, notwithstanding Section 4.4(c) of this lease. Even tenants who are still in the building may balk at a retroactive assessment if they have already closed their own books for that year. And, if the landlord agrees to an outside deadline for rendering reconciliation statements in an effort to address a tenant request for “closure,” the landlord may find itself submitting retroactive bills after the agreed-upon closure date so that the tenant is within its contractual rights in not paying.
- 117 Some local governments make financing available to building owners to provide energy efficiency upgrades to their properties and then collect repayment through a real estate tax surcharge rather than a traditional loan payment. These loan programs are often referred to as Property Assessed Clean Energy (PACE) financing. (The viability of PACE remains an issue because of objections raised by mortgage lenders who fear losing the priority of their mortgage loans to the repayment of PACE loans. Because repayment of the PACE loan is tagged on to the higher priority real estate tax bill, repayment of the PACE loan primes the mortgage loan.) By using real estate taxes as a repayment source, the loan essentially runs with the land (rather than attaching to the borrower entity) and the government has a ready-made lien on the property. However, in the context of the landlord-tenant relationship, there isn’t any reason for the tenant to pay this capital or financing expense to the landlord simply because the landlord chooses to characterize the expense as a real estate tax, except to the extent the tenant would pay the same expense as an operating expense pass-through., which is by definition what CPACE/PACE financing is structured to do is implement retrofits, including renewable energy solutions that lower operating costs.
- 118 Note the absence of any deadline for the landlord’s statement. Compare this to the deadline imposed on the tenant’s right to audit the statement, for example.
- 119 A tenant may dispute this stipulation, particularly if the payment demanded is either (or both) (i) too far in arrears, e.g., the tenant has already closed its books for that year and distributed its profits for that year to its then shareholders, members or partners, and/or (ii) too large. In the former case, in addition to the previously-identified lack of a deadline for the rendering of the landlord’s statement, note that the tenant’s obligation under this provision continues after lease expiration. In the latter case, a payment schedule can be specified in the lease, assuming that the parties can first agree on the definition of “too large”, e.g., a specified percentage in excess of what was previously calculated for the year in question. While tenants are eager and close the books on lease obligations, few landlords agree to a closure date or expiry date for their right to recover in arrears.
- 120 A tenant may want a cap on operating expense increases of all types. Caps are rare, but not unheard of. A landlord should not agree to cap expenses that are outside its control, such as insurance, taxes, and snow removal. The word “controllable” is often used for this purpose, even if still a bit vague. There are also different kinds of caps: year-to-year or annual caps (perhaps with provisions that allow a landlord to roll forward any unused cap from any one year to apply to an overage in a later year), compounded caps (where the rate of increase each year is a multiple of the previous year’s cap rather than of the initial cap), and cumulative caps, for example.

SECTION 4.4 Installment Payments; Proration

- (a) In lieu of accepting from Tenant one annual payment for Tenant's proportionate share of the increase in the Annual Operating Charges and one annual payment for Tenant's proportionate share of the increase in Real Estate Taxes, Landlord shall have the right, from time to time, to require Tenant to make estimated monthly payments on account of the respective amounts Tenant will be obligated to pay pursuant to this Article for each Operating Year falling entirely or partly within the Lease Term. If Landlord exercises such right, Landlord shall submit to Tenant a statement setting forth Landlord's estimate of each of the respective amounts Tenant will be obligated to pay pursuant to this Article for the Operating Year in question, which estimates may be revised by Landlord from time to time during the Operating Year,¹²¹ and Tenant shall pay to Landlord on the first (1st) day of each month following receipt of such statement during such Operating Year an amount equal to such respective estimated amount multiplied by a fraction, the numerator of which is one (1) and denominator of which is the number of months during such Operating Year which fall within the Lease Term and follow the date of the foregoing statement. After the expiration of such Operating Year, Landlord shall submit to Tenant a statement showing Tenant's proportionate share of the increase in the Annual Operating Charges incurred during such Operating Year and Tenant's proportionate share of the increase in Real Estate Taxes for such Operating Year, and the respective aggregate amount of the estimated payments made by Tenant on account of each of the increase in Annual Operating Charges and the increase in Real Estate Taxes. If the aggregate amount of such estimated payments paid by Tenant for the increase in Annual Operating Charges exceeds Tenant's actual liability for such increase, Landlord shall credit such excess to Tenant's account, subject to Section 4.4(d) below, to be applied to the installment(s) of Tenant's proportionate share of such increases next coming due from Tenant.¹²² If Tenant's actual liability for such increase in the Annual Operating Charges exceeds the estimated payments made by Tenant on account thereof, then Tenant shall immediately¹²³ pay to Landlord the total amount of such deficiency. If the aggregate amount of such estimated payments paid by Tenant for the increase in Real Estate Taxes exceeds Tenant's actual liability for such increase, Landlord shall credit such excess to Tenant's account, subject to Section 4.4(d), to be applied to the installment(s) of Tenant's proportionate share of such increases next coming due from Tenant. If Tenant's actual liability for such increase in Real Estate Taxes exceeds the estimated payments made by Tenant on account thereof, then Tenant shall immediately pay to Landlord the total amount of such deficiency.
- (b) In the event the Lease Term commences or expires during an Operating Year, then each of the increase in the Annual Operating Charges to be paid by Tenant for such Operating Year and the increase in Real Estate Taxes to be paid by Tenant for such Operating Year shall be determined by multiplying the amount of Tenant's respective proportionate share thereof for the full Operating Year by a fraction, the numerator of which is the number of days during such Operating Year falling within the Lease Term, and the denominator of which

121 A tenant might object to allowing any revisions (i.e., increases) during a year on the grounds that the landlord is protected by the annual reconciliation and/or that the tenant's budget is fixed and/or that this clause is open-ended. That last objection can be addressed by inserting limits (e.g., capping the number of revisions in any given year and/or capping the aggregate percentage increase in any revisions in any one year).

122 Under this lease overpayments of operating expenses are returned to the tenant as credits against future payments of operating expenses and overpayments of real estate taxes are returned to the tenant as credits against future payments of real estate taxes. The tenant does not get credit against future payments of real estate taxes for overpayments of operating expenses, and vice versa. There is no particular reason for this formulation except that it may enable a landlord to spread out the refund.

123 The parties may want to stipulate a more precise turnaround time other than "immediately," such as ten days or such other finite period applicable to additional rent payments.

is 365. At least thirty (30) days prior to the end of the Lease Term, Landlord may present to Tenant a written statement containing an estimate of the amounts Tenant would be obligated to pay under this Article if the actual Annual Operating Charges and the actual Real Estate Taxes for the Operating Year had been determined.¹²⁴ Tenant shall be required to pay such estimated amounts, to the extent not already paid by Tenant, on or before the last day of the Lease Term, and if all or any portion of the payments are not made, Landlord shall be entitled to deduct such amount from the Security Deposit, if any. Once the Annual Operating Charges and the Real Estate Taxes for the last Operating Year of the Lease Term have been determined, Landlord shall provide Tenant with a statement of the actual increase in Annual Operating Charges and the actual increase in Real Estate Taxes for which Tenant is liable. If Tenant owes an additional amount, such amount is due on or before sixty (60) days after receipt of the statement. If Tenant is entitled to a refund, Landlord shall have sixty (60) days from the date of the statement within which to remit payment to Tenant, subject to Section 4.4(d).

- (c) The parties' obligation to reconcile increases in Annual Operating Charges and Real Estate Taxes shall survive the expiration or termination of this Lease¹²⁵ and shall be applicable even if no estimated statement is provided under Section 4.4(a). Notwithstanding any dispute which may arise in connection with the computation or estimate of the amount due under this Article, Tenant shall be obligated to pay the amount specified by Landlord, without set-off, recoupment, abatement, counterclaim, adjustment or deduction of any kind, pending the resolution of any dispute.
- (d) In the event Tenant is in default under this Lease at the time any credit or payment is otherwise to be made to Tenant under this Section, Landlord may offset against such credit or payment to compensate it for any amount owed by Tenant or for damage incurred or that may be incurred by Landlord as a consequence of said default.¹²⁶

SECTION 4.5 Additional Taxes or Governmental Charges

In the event that any business, rent, sales, use or other taxes, or any governmental charges that are now or hereafter levied upon Tenant's use or occupancy of the Premises or Tenant's business at the Premises are charged, enacted, changed or altered so that any of such taxes are levied against Landlord, or the mode of collection of such taxes is changed so that Landlord is responsible for collection or payment of such taxes, Tenant shall pay any and all such taxes to Landlord upon written demand from Landlord.

SECTION 4.6 Change In or Contest of Real Estate Taxes

In the event of any change by any taxing body in the period or manner in which any of the Real Estate Taxes are levied, assessed or imposed, Landlord shall have the right, in its sole discretion, to make equitable adjustments with respect to computing increases in Real Estate Taxes. Real Estate Taxes which are being contested by Landlord shall be included in computing Tenant's proportionate share of the increases in Real Estate Taxes under this Article, but if Tenant shall have paid additional rent on account of contested Real Estate Taxes and Landlord thereafter receives a refund of such taxes, Tenant shall receive a credit toward subsequent rent payments in an amount equal to Tenant's proportionate share of such refund, net of the cost of obtaining such a refund.

¹²⁴ Most leases are silent on methods that the landlord can use to obtain a final payment from a tenant whose lease expires before the annual reconciliation is completed. If the lease is silent, the landlord either (i) trusts that its monthly estimated payment schedule results in an overpayment by the tenant, so that the tenant is owed a refund and not vice versa, or (ii) trusts that its monthly payment schedule is accurate enough that any underpayment by the tenant is negligible. Also note that under Section 5.2 of this lease, the landlord doesn't have to refund the security deposit until this final reconciliation payment is made.

¹²⁵ There is no time limit or dollar cap on the landlord's ability to make claims in arrears.

¹²⁶ Many leases are silent with respect to this right of offset. Such a right is worth including, particularly where the tenant's obligation to pay rent is an independent covenant.

SECTION 4.7 Tenant's Audit Rights

Landlord agrees to retain the books and records substantiating the Annual Operating Charges and the Real Estate Taxes incurred in each calendar year for a period of at least three (3) years¹²⁷ from the date Landlord submits an expense statement to Tenant. Tenant or its designee shall have the right, during business hours and upon reasonable prior notice, from time to time to inspect Landlord's books and records relating to Annual Operating Charges and Real Estate Taxes, and/or to have such books and records reviewed or audited at Tenant's expense by an independent certified public accountant whose fee is not in any manner contingent upon or determined by reference to any reduction in Operating Charges or Real Estate Taxes,¹²⁸ as applicable, resulting from such review. Such accountant shall be designated by Tenant and subject to Landlord's approval, which shall not be unreasonably withheld, conditioned or delayed. Any agreed-upon discrepancy¹²⁹ shall be promptly corrected by a payment of any shortfall to Landlord by Tenant within thirty (30) days, or by a credit against the next payment(s) of rent hereunder or (at Tenant's election) a refund of the overpaid amount within thirty (30) days, as may be applicable. In addition, notwithstanding anything to the contrary set forth in this [Section 5.3\(c\)](#), any inspection or audit that Landlord agrees discloses that Annual Operating Charges and Real Estate Taxes in the aggregate have been overstated by more than three percent (3%) shall be at Landlord's expense.¹³⁰ In the event Tenant does not contest a statement of Annual Operating Charges and Real Estate Taxes within six (6) months¹³¹ after it is rendered, such statement shall become binding and conclusive on Tenant except with respect to adjustments resulting from the final adjudication of any appeal by Landlord of Real Estate Taxes (even if not challenged by Tenant). Tenant shall keep the analysis and results of any audit confidential and shall require any independent auditor, reviewer or other consultant it engages to review Landlord's books and records to keep the analysis and results confidential. Any review or audit by or on behalf of Tenant shall be conducted solely for Tenant and shall not be part of any multi-tenant review and audit.¹³²

127 The period of three years specified here is entirely arbitrary. A tenant wants some assurance that prior years can be looked at, if necessary. In that regard, note that this particular clause does not address whether a tenant can retroactively audit any prior year or the base years if it finds discrepancies later, but the clear implication from the final sentence of this Section is "no."

127 Landlords hate auditors who work on contingency fees rather than hourly rates. Proponents of contingency fees argue that contingency fees should lead auditors to not waste time on small adjustments, but landlords do not buy that argument.

129 This section doesn't address how the landlord and the tenant reconcile their differences after the audit is performed. That omission is standard in leasing, perhaps because no formal method for dealing with the unknown is worth predicting. Consider addressing with arbitration or other dispute resolution procedures set forth in the lease.

130 The landlord offers to pay tenant's costs of the audit if landlord agrees that the results show a significant overcharge (here pegged at 3%). Should the adjective "reasonable" modify Landlord's cost reimbursement? Perhaps, but the requirement here that the tenant first pay out of its own pocket for the audit on a non-contingency basis without necessarily having any hope of recovery may moderate the tenant's spending to excess on the audit.

131 There should be some cut off of a tenant's right to audit (although, conversely, there is almost never a cut-off of a landlord's right to retroactively charge a tenant for earlier operating expense and tax pass-throughs that may not have been correctly handled). Six months is in the normal range, with three months and twelve months being at the outer limits. Also note that this deadline applies only to the tenant's notice challenging the reconciliation statement. This deadline doesn't apply to the conclusion of the audit itself. The latter is a clause occasionally proposed by the landlord. Deadlines for the conclusion of the audit itself are a bit more pro-landlord because, of course, the landlord can delay and be uncooperative to the tenant's detriment, running out the clock. Also, a tenant paying an auditor on a non-contingent basis has no motivation to delay the completion of the audit and a potential recovery.

132 The Landlord would strongly prefer that the tenants not be able to join together to collectively audit or even to be allowed to share information with each other or outsiders. Tenants may push back on the confidentiality requirements incident to the audit, arguing that tenant should not have to join in a cover-up of any identified overcharge.

ARTICLE 5: SECURITY DEPOSIT¹³³

SECTION 5.1 Definition

Simultaneously with the execution of this Lease,¹³⁴ Tenant shall deposit with Landlord the sum of _____ Dollars (\$_____)¹³⁵ as a security deposit [IF TENANT NEGOTIATES FOR AN INTEREST-BEARING SECURITY DEPOSIT, ADD: (together with any interest earned thereon,) the **“Security Deposit”**]. Landlord shall not be required to maintain the Security Deposit in a separate account. The Security Deposit shall not earn interest unless required by applicable law. The Security Deposit shall be security for the performance by Tenant of all of Tenant’s obligations, covenants, conditions and agreements under this Lease.

[IF THE SECURITY DEPOSIT MUST OR CAN BE POSTED IN THE FORM OF A LETTER OF CREDIT: (1) MAKE THE PRECEDING PARAGRAPH SUBSECTION (a); (2) ATTACH EXHIBIT J, “APPROVED FORM OF LETTER OF CREDIT” ATTACHED HERETO; AND (3) ADD THE FOLLOWING AS SUBSECTION (b):]

- (b) (i) Tenant shall [have the right to] deposit and maintain the Security Deposit as an irrevocable commercial standby letter of credit in form and substance acceptable to Landlord (the **“Letter of Credit”**). A letter of credit in the form of Exhibit J attached hereto will meet the technical terms of this subsection.
- (ii) The Letter of Credit must be issued by a commercial bank (the **“Issuer”**) reasonably acceptable to Landlord and must be presentable in the metropolitan area in which the Building is located.¹³⁷ The Letter of Credit must also be payable at sight without presentation of any other documents, statements or authorizations, must allow for partial draws and must have a term of not less than one (1) year from the Lease Commencement Date. The Letter of Credit must also provide for its automatic renewal on a year-to-year

133 Applicable law must be checked, particularly regarding use of commingled vs. segregated accounts, whether interest must be paid and whether administrative fees are chargeable.

134 Some leases allow the tenant to post the security deposit after the lease is signed. The landlord has little recourse to enforce that obligation if the tenant fails to post the security deposit. Unless the landlord has a right of offset against tenant improvement allowance or other funds otherwise owed to the tenant, the practical remedies available to a landlord in those circumstances are slim.

135 This lease form does not address the possibility of having the amount of the security deposit reduce (burn off or burn down) over time if the tenant has not defaulted in the interim. Such a clause would have to address the amount of the reduction, the frequency of the reduction, and the conditions of the reduction. In addition, if the security deposit in the form of a letter of credit, a process for manually providing an amendment (that the landlord would have to sign off on) should be established. If a stated percentage of the security deposit is to burn off, the parties should be clear to specify whether the percentage applies to the original principal balance of the security deposit or to the then-outstanding principal balance of the security deposit.

136 A landlord could offer to pay the tenant “interest earned thereon” by the landlord. Such a computation proves difficult given commingling of funds and rates of return that change daily. If the landlord agrees to pay the tenant interest on the security deposit, the landlord should also try to charge the tenant for the administrative costs of maintaining an interest-bearing security deposit, whether it is commingled or segregated. (Often those costs are more than the interest that might be earned, leading the tenant to drop the entire request.)

137 It is frequently stated that the issuer of the letter of credit must be located in the same community where the building is located. What difference does it make where the issuer is located or where presentment must be made? The landlord itself may not be in that community. The tenant and/or its regular banking relationship, which is critical to obtaining a letter of credit, may be located elsewhere. There may be no bank sufficiently large in that community, or there may be a satisfactory bank in the community but its letter of credit department may be located elsewhere. It is not really necessary that the issuer be located in the same community as the building. The letter of credit can always be presented by overnight courier to an out-of-town issuer. Or a landlord could require that the letter of credit be payable at a correspondent bank in a specified locale, even if issued by a different bank. (Warning: this is different than having the letter of credit “confirmed.”)

basis unless the Issuer gives Landlord at least two (2) months¹³⁸ written notice of nonrenewal, and the final expiration date of the Letter of Credit may not be any earlier than the date that is three (3) months after the scheduled Lease expiration date.¹³⁹ The Letter of Credit must also be freely transferable to any successor Landlord under this Lease, and Tenant shall be responsible for the payment of any transfer fee or other cost incident thereto; if Tenant fails to make such payment, Landlord may do so at Tenant's expense and Tenant shall reimburse Landlord for such costs upon demand as additional rent.¹⁴⁰

- (iii) The Letter of Credit may be drawn upon by Landlord as set forth in Section 5.2 below, or if the Issuer gives notice of nonrenewal to Landlord and a replacement Letter of Credit (or the cash equivalent) is not delivered to Landlord at least thirty (30) days prior to the non-renewed Letter of Credit's expiration date, or if there is a dispute between Landlord and Tenant on the date which is thirty (30) days prior to the stated expiration date of the Letter of Credit over whether Landlord may draw on the Letter of Credit, or if Landlord at any time reasonably determines that the Issuer is not solvent or that the Issuer has been put into conservatorship or receivership (or any similar program) by any governmental authority having regulatory oversight over the Issuer, or if Landlord at any time reasonably determines that there is a likelihood for any other reason that the Issuer would not honor the Letter of Credit if it was to be presented for payment.¹⁴¹
- (iv) Notwithstanding any implication to the contrary contained in the foregoing, it is understood and agreed that Landlord's willingness to accept a Letter of Credit as the Security Deposit in lieu of cash is an accommodation to Tenant¹⁴² and that Tenant bears all risk of the Issuer failing, refusing or being unable to honor a proper draw thereon. If the Issuer fails, refuses or is unable to honor a proper presentment of the Letter of Credit, Tenant shall be obligated to immediately deliver a replacement Letter of Credit meeting the terms of this subsection (or the cash equivalent) to serve as the Security Deposit.

138 This can be as little as one month's notice.

139 The landlord should require a decent interval between the expiration of the lease and the expiration of the letter of credit. A conscientious tenant shouldn't mind. Too short a period may lead the landlord to protectively draw on the letter of credit lest it expire, a bad outcome for a tenant.

140 The lease, not the letter of credit itself, is the place to allocate costs between the landlord and the tenant.

141 There are several circumstances other than a default by the tenant that would entitle the landlord to present the letter of credit for payment. Thus, it would be a mistake for any lease or any presentment form used by the landlord to state only that a "default" exists; the landlord may not be able to make such a statement at the applicable time and might then be unable to present the letter of credit for payment in accordance with its terms. The sample presentment form attached at the end of this lease avoids that flaw.

142 This is a bit disingenuous. Bankruptcy law has evolved to the point that a landlord may be better off holding a letter of credit than cash as the security deposit. The bankruptcy stay on enforcing remedies against a bankrupt tenant does not prevent the landlord from cashing the letter of credit because the letter of credit is an independent obligation of a not-bankrupt issuer. The same landlord holding a cash security deposit from the same bankrupt tenant wouldn't be able to seize the cash security deposit; the bankruptcy stay would apply because the cash is an asset of the bankrupt tenant. (Of course, the solvency of the issuer of the letter of credit must be analyzed too.)

SECTION 5.2 Application

In the event of any default by Tenant hereunder during the Lease Term, Landlord shall have the right, but shall not be obligated, to use, apply or retain all or any portion of the Security Deposit for (a) the payment of any rent as to which Tenant is in default, or (b) the payment of any amount which Tenant may be obligated to pay to repair physical damage to the Premises or the Building pursuant to this Lease, or (c) the payment of any amount which Tenant may be obligated to pay for the compensation to Landlord for any losses incurred by reason of Tenant's default, including, but not limited to, any damage or deficiency arising in connection with the reletting of the Premises. If any portion of the Security Deposit is so used or applied, then within five (5) days after written notice to Tenant of such use or application, Tenant shall deposit with Landlord cash or an endorsement to the letter of credit in an amount sufficient to restore the Security Deposit to its original amount, and Tenant's failure to do so shall constitute a default under this Lease.¹⁴³ The Security Deposit is not a measure of damages or liquidated damages, and Landlord's use of the Security Deposit is not a waiver of its other rights and remedies. Provided Tenant is not in default hereunder, Landlord shall return the Security Deposit to Tenant, less such portion thereof as Landlord shall have applied or be entitled to apply to satisfy any default by Tenant hereunder, after the last to occur of the making of the payment of the final Operating Year's increase in Annual Operating Charges and/or Real Estate Taxes under Section 4.4(b),¹⁴⁴ or within forty-five (45)¹⁴⁵ days following the later to occur of the expiration of the Lease Term or the vacating and surrendering of the Premises by Tenant to Landlord.

SECTION 5.3 Transfer to Third Parties

In the event of the sale or transfer of Landlord's interest in the Building, the transferor Landlord shall transfer¹⁴⁶ the Security Deposit to the transferee of Landlord's interest, in which event Tenant shall look only to the new Landlord for the return of the Security Deposit, and the transferor Landlord shall thereupon be released from all liability to Tenant for the return of the Security Deposit. Tenant hereby acknowledges that Tenant will not look to the holder of any Mortgage (defined in Article 21 hereof) encumbering the Building or the Property for return of the Security Deposit if such holder or its successors or assigns shall succeed to the ownership of the Building or Property whether by foreclosure or deed in lieu thereof, except if and to the extent the Security Deposit is actually received by such holder.

142 This lease attempts to require the tenant to very quickly replenish the security deposit, forfeiting the balance for non-compliance. Is restoration within five days likely?

144 This clause could entitle the landlord to hold the security deposit until the annual reconciliation is completed in the spring following lease expiration. Tenants may argue that it is a landlord-risk to accurately project the estimated monthly payments. (Also recall that this lease form tries to entitle the landlord to do an estimated post-expiration reconciliation before expiration. See Section 4.4(b).)

145 The 45-day return is arbitrary. If presented with a 45-day target, a tenant might argue for a 30-day target, which should still be likely acceptable to the landlord.

146 The phrase "Landlord shall have the right to transfer" the security deposit to a buyer is more customary. But why would or should the selling landlord be released of liability for the return of the security deposit simply because the selling landlord "has the right" to transfer the security deposit to the buyer? What if the selling landlord does not exercise "the right" but instead retains the security deposit? And what buyer would permit that anyway?

ARTICLE 6: USE

SECTION 6.1 Permitted Use

Tenant shall use and occupy the Premises solely for the Permitted Use and for no other use or purpose.¹⁴⁷ Tenant shall not use or occupy the Premises for any unlawful purpose¹⁴⁸ or in any manner that will constitute waste, nuisance or unreasonable annoyance¹⁴⁹ to Landlord or other tenants of the Building. Tenant shall not use or operate the Premises in any manner that will cause the Building or any part thereof not to conform with Landlord's sustainability practices¹⁵⁰ or the certification of the Building issued pursuant to any Third Party Sustainability Standard applicable to the Building at any time as determined by Landlord. The occupancy of the Premises shall not exceed reasonable limitations set by Landlord to prevent degradation, destruction, or overloading of the Building's heating or cooling systems or other Building infrastructure.¹⁵¹

[IF THIS IS A RETAIL LEASE, CONSIDER ADDING SOME OR ALL OF THE FOLLOWING] Tenant shall operate its business in the Premises under the trade name "_____" and no other trade name¹⁵². Tenant agrees not to operate any other business¹⁵³ within _____ (____) blocks/miles of the Premises, it being agreed that this is a reasonable provision to ensure that Tenant's operations in the Premises are not adversely affected by competing business interests. If any business is conducted in violation of the foregoing and if Percentage Rent is applicable to this Lease, then, in addition to any other remedy Landlord may have under this Lease or under applicable law, all sales made in or from said other premises shall be considered Gross Sales from the Premises under this Lease. For purposes of this subparagraph only, the term "Tenant" shall include not only the named Tenant but also its shareholders, partners, directors, officers, trustees and beneficiaries, and their respective spouses and children, and any corporation, limited liability company, trust, partnership or other entity under the control of the named Tenant or any of such other persons. Tenant hereby covenants to continuously

147 It is essential from the landlord's perspective to affirmatively prohibit other uses. Notwithstanding the common sense interpretation or perception that the use stated in the lease is supposed to be the actual use, courts almost invariably interpret the stated use as merely permissive, not as a limitation. In other words, the stated use is interpreted by courts to mean that the landlord specifically acknowledges that the stated use is allowed, but not to mean that other, unstated, uses are not also allowed. Therefore, if other uses are to be prohibited, an express prohibition must be stated.

148 Almost all lease forms prohibit "use for unlawful purposes." It makes violation of law by tenant a default by the tenant to the landlord.

149 "Unreasonable annoyance" is more pro-tenant than many lease forms, which prohibit anything that is an annoyance (without the modifier "unreasonable") or, even more sweepingly, prohibit anything that "is or might be" an annoyance. A tenant who agrees to those broader prohibitions might face claims of "annoyance" raised by overly-sensitive neighbors, including neighbors who move in later.

150 Tenants should note that this lease never defines the landlord's sustainability practices or plan. That is intentional – at this time the green movement is still too new to cast sustainability practices in stone—but leaves the tenant at the landlord's mercy. A tenant may prefer to simply require the parties to cross-reference reputable third party standards as done in the latter part of this sentence.

151 Consider inserting actual occupancy limitations, based on the tenant's permitted use and building systems.

152 In retail leases, the landlord may require the tenant to use a certain trade name for marketing cachet. Such a requirement may inhibit the tenant's ability to sublease the space or assign the lease because the subtenant/assignee would probably be operating under a different trade name. A tenant may therefore want to have the landlord agree not to unreasonably withhold, condition or delay its consent to a name change, particularly in the context of an assignment or sublease. While less common, similar issues arise in the office lease context.

153 The clause prohibits "any other business," related or not, and later attempts to bind not only the named tenant but its principals and their family members. Read literally, this clause would prohibit a family member of a principal of a retail tenant from operating any other business—retail, office or industrial—within the prohibited area. It is a rare tenant who will, or should, agree to such a sweeping prohibition. The landlord should be concerned only with protecting itself against a distracted tenant or a tenant who (or whose family) is operating a competing business that could affect this location, particularly if percentage rent is charged.

operate¹⁵⁴ in the Premises and to do so in a manner befitting a first-class, non-discount retail operation in a first-class building. Without limiting the foregoing, Tenant agrees to keep the Premises open for business between the hours of _____ a.m. and _____ p.m., Monday to Friday, [and _____ a.m. and _____ p.m. on Saturday [and Sunday],] or such other hours as Landlord may designate from time to time, well-stocked and fixtured and with an appropriate number and quality of personnel to maximize sales. The Premises shall be used for storage only to the extent necessary for ancillary support of an on-site retail operation.¹⁵⁵ All counters and display racks shall be professionally designed and no vendor racks shall be utilized. The backs of Tenant's fixtures and racks shall not be visible from the exterior of the Premises. Tenant shall keep the display windows in the Premises well-lighted during non-daylight hours, but not longer than one hour following the store closing hour.]

SECTION 6.2 Compliance with Laws

- (a) Tenant shall comply with all present and future laws, statutes, ordinances (including zoning ordinances and land use requirements), codes, rules, regulations, and orders of the United States of America and any other public or quasi-public authority having jurisdiction over the Premises concerning the use, occupancy, facilities in and condition of the Premises and all machinery, equipment, facilities, entrances thereto,¹⁵⁶ exits therefrom and furnishings therein¹⁵⁷ (including, without limitation, any requirements for structural changes¹⁵⁸). It is expressly understood that Tenant, at Tenant's cost and expense, will obtain an occupancy permit for the Premises.¹⁵⁹ If any future law, statute, ordinance, code, rule, regulation, or order requires another occupancy permit or other permit for the Premises, Tenant will obtain such permit at Tenant's sole expense. Tenant shall pay all costs, expenses, liabilities, losses, damages, fines, penalties, claims and demands, including reasonable counsel fees, that may in any manner arise out of or be imposed because of the failure of Tenant to comply with the covenants of this Section.
- (b) Tenant shall be responsible at its own cost for complying with the provisions of the Americans with Disabilities Act or any similar Federal or State, county, municipal or other governing jurisdiction's statute, law, ordinance or code, as they may be amended from time to time, and the rules and regulations which may be adopted

154 Covenants of "continuous operation" are frequently found in retail leases. Office building landlords do not want vacant storefronts, even if the tenants continue to pay the rent after moving out. Shopping center landlords worry about losing the synergy of a vibrant center, even if the tenants continue to pay the rent after moving out. The landlord can use this clause to create a default that really cannot be cured by the tenant. This covenant parallels a default for "vacating" the premises. In the office context, it is reasonable for a tenant to reject a continuous operation provision. The landlord wants an active retail operation, not a storeroom that generates no sales and no activity.

155 The landlord wants an active retail operation, not a storeroom that generates no sales and no activity.

156 If the tenant is responsible for building entrances (not applicable to multi-tenant office buildings but perhaps if the tenant is a full-building tenant, particularly in an industrial lease or a triple net lease), the tenant would be responsible for ramps, widened doorways and other ADA-compatible alterations. This would be in addition to the ADA obligations under the next subsection. Parties should allocate risk for any non-compliance existing as if the date of the lease.

157 Consider whether this clause should reciprocate with a representation by the landlord that the building and the premises are in compliance with code or, more palatably, that to the landlord's knowledge the building and the premises comply with code or that the landlord hasn't received any notice that they are not in compliance with code.

158 The tenant should be obligated to make structural changes to the building if the need arises from something the tenant does (e.g., from the tenant's own build-out). The clause as written here is broader in scope than that, however. Also, consider whether a landlord really wants a tenant performing structural work on the building, or whether a tenant has the expertise to do that.

159 The correct allocation of obligation to obtain the occupancy permit can be critical in determining whether a lease term has commenced or whether a party is in breach of its obligations. Make sure the lease properly allocates responsibility to the correct party. If the landlord is doing the build-out work, perhaps the landlord should be responsible for getting the certificate of occupancy.

thereunder from time to time, as the same may be applicable to the Premises.¹⁶⁰ Landlord's approval of any Alteration or other act by Tenant shall not be deemed to be a representation by Landlord that said Alteration or act complies with applicable law, and Tenant shall remain solely responsible for said compliance.

SECTION 6.3 Recycling and Waste Management

Tenant covenants and agrees, at its sole cost and expense: (a) to comply with all present and future laws, orders and regulations of the Federal, State, county, municipal or other governing authorities, departments, commissions, agencies and boards regarding the collection, sorting, separation, composting and recycling of garbage, trash, rubbish and other refuse (collectively, “trash”); (b) to comply with Landlord's recycling policy, if any,¹⁶¹ as part of Landlord's sustainability practices where it may be more stringent than applicable law; (c) to sort and separate its trash and recycling into such categories as are provided by law or Landlord's sustainability practices;¹⁶² (d) that each separately sorted category of trash and recycling shall be placed in separate receptacles as directed by Landlord;¹⁶³ (e) that Landlord reserves the right to refuse to collect or accept from Tenant any trash that is not separated and sorted as required by law or by Landlord's own sustainability practices,¹⁶⁴ and to require Tenant to arrange for such collection at Tenant's sole cost and expense, utilizing a contractor satisfactory to Landlord; and (f) that Tenant shall pay all costs, expenses, fines, penalties or damages that may be imposed on Landlord or Tenant by reason of Tenant's failure to comply with the provisions of this Section. Tenant shall provide Landlord annually or at such other times as Landlord may reasonably request with waste manifests for all waste that left the Building under Tenant's control, including, without limitation, off-site paper shredding and electronic waste [AND IN RETAIL LEASES ADD: and cardboard, glass, plastics, metals and food][IN INDUSTRIAL LEASES ADD: and pallets].

160 This clause is broader than a requirement that the tenant comply with the ADA to the extent the tenant's own build-out or use raises an ADA issue. Also, if the tenant's own build-out is generic office space (e.g., no steps, no raised flooring, no internal restrooms or water fountains) should the tenant be responsible for ADA compliance? Should it matter whether the build-out is designed and/or constructed by the landlord or by the tenant? Note that this lease at least restricts the tenant's obligation to ADA compliance “as [the ADA] may be applicable to the Premises.” There are leases that expressly or impliedly make the tenant liable for ADA compliance over the entire path of travel from the building entrance to the tenant's own suite, which is clearly unfair to the tenant.

161 The landlord's recycling policy should, at a minimum, meet the then-current version of the LEED-EB prerequisites and could address ongoing consumables (e.g., not just paper but also glass, aluminum, plastics, metals, batteries and fluorescent light bulbs), durable goods, and facility alterations and additions. A tenant should also note that this lease doesn't affirmatively require a landlord to implement a recycling program. If the tenant wishes to make that a requirement, it should be written into the lease and the scope of the program should be explained.

162 Among the items that could be recycled separately are beverage containers, paper, food products, batteries, light bulbs, toner cartridges, outdated computers and consumer electronics, and construction materials. It is also possible to recycle durable goods such as furniture, office equipment, appliances, televisions and other audio-visual equipment. If Landlord's sustainability practices include composting, Tenant shall separate organic or compostable material from non-compostable material; provided, however, that the organic or compostable materials are transported offsite for composting to occur.

163 Note that clauses (c) and (d) carefully impose compliance obligations on the tenant but do not affirmatively require a recycling program or the provision of separate receptacles to the tenant.

164 Note that if the landlord uses a single stream recycler, building occupants do not have to separate their trash with the exception of items contaminated by food. Paper, aluminum, plastic, glass, metal, cardboard, etc., go into one container and are sorted by the recycler at its site.

SECTION 6.4 Environmental Laws

- (a) Tenant shall not use any portion or all of the Property for the use, generation, treatment, storage or disposal of “toxic substances,” “contaminants,” “pollutants,” “hazardous materials,” “hazardous waste,” “hazardous substances” or “oil” (collectively, “**Hazardous Materials**”), as such terms are defined under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 et seq., as amended, the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 et seq., as amended, and any and all other Federal, State and local environmental statutes, codes and ordinances which regulate the use of hazardous and/or dangerous substances, and the regulations promulgated thereunder, without the express prior written consent of Landlord, and then only to the extent that the presence and/or discharge of the Hazardous Materials is (i) properly licensed and approved by all appropriate governmental officials and in accordance with all applicable laws and regulations and (ii) in compliance with any terms and conditions stated in said prior written approval by Landlord. Notwithstanding the foregoing, Tenant may use such Hazardous Materials as are used for ordinary office purposes in the ordinary course of Tenant’s business, provided that such use is in accordance with all applicable statutes, laws, codes, ordinances, rules and regulations,¹⁶⁵ any manufacturer’s instructions, and conditioned upon Tenant’s providing Landlord with all material safety data sheets applicable to those Hazardous Materials and to comply therewith.¹⁶⁶ Tenant shall be solely responsible for removing all Hazardous Materials from the Property at Tenant’s sole cost and expense, and Landlord shall have no liability or obligation with respect thereto. Notwithstanding the permitted use of certain Hazardous Materials, Tenant may not discharge any Hazardous Materials in any public sewer or any drain and/or drainpipe leading or connected thereto. Tenant shall promptly give written notice to Landlord of any communication received by Tenant from any governmental authority or other person or entity concerning any complaint, investigation or inquiry regarding any use, generation, treatment, storage or disposal (or alleged use, generation, treatment, storage or disposal) by Landlord or Tenant of any Hazardous Materials. Landlord shall have the right (but not the obligation) at Tenant’s expense to conduct such investigations or tests (or both) as Landlord shall deem necessary with respect to any such complaint, investigation or inquiry, and Tenant, at its expense, shall take such action (or refrain from taking such action) as Landlord may request in connection with such investigations and tests by Landlord. Tenant acknowledges that Landlord is not an environmental expert or consultant in the field of Hazardous Materials. Further, Landlord is not and shall not be deemed an “operator” or “generator” or “transporter” (or comparable legal status) for purposes of any law pertaining to Hazardous Materials by extending consent to the Tenant regarding any environmental activity under these laws. Notwithstanding any provision to the contrary, with respect to any Hazardous Materials that may be present below, on, or about or otherwise affecting the Property, as the result of Tenants activity, Landlord shall not be responsible for detecting, handling, removing, remediating or disposing of the Hazardous Materials.
- (b) The parties acknowledge that mold is a naturally occurring substance in many buildings and that there are concerns about the effect of certain molds on health, even if there is limited scientific evidence supporting those fears.¹⁶⁷ Landlord and Tenant represent and warrant to each other that neither has any actual knowl-

¹⁶⁵ This sentence has the effect of converting a violation of law, normally an issue only between the tenant and the government, into a contractual default by the tenant to the landlord.

¹⁶⁶ Many lease forms omit such a permissive sentence. The consequence of omitting such a permissive sentence is to technically put the tenant in default for everyday activities, such as the use of normal cleaning products, photocopier toner and other common office supplies that are “Hazardous Materials” under the sweeping definition used in this lease and most other leases.

¹⁶⁷ There is limited scientific evidence drawing Issues relative to mold, moisture and their impacts on human health and wellness are continuing to evolve. Because some individuals are unaffected while others have significant health impacts, the scientific evidence is evolving that draws a link between mold and significant health problems in buildings. In 2004, the Institute of Medicine found there was sufficient evidence linking indoor exposure to mold with upper respiratory tract symptoms, cough, and wheezing in otherwise healthy people; with asthma symptoms in people with asthma; and with hypersensitivity pneumonitis in persons with compromised immune systems (<https://www.cdc.gov/mold/faqs.htm#affect>).

edge of harmful mold in the Building. In the event that Tenant hereafter obtains actual knowledge of mold in the Building or that Landlord hereafter obtains actual knowledge of mold in the Building and believes that such mold could have an adverse effect on the health of any person of normal susceptibility¹⁶⁸ in the Premises,¹⁶⁹ the party with such knowledge shall promptly notify the other party. The parties shall then attempt in good faith to address any health concerns relating thereto and ameliorate the same consistent with the then-current state of scientific knowledge and industry standard in comparable buildings.¹⁷⁰

- (c) Notwithstanding anything in this Lease to the contrary, Tenant shall not materially adversely affect (as determined by Landlord) the indoor air quality of the Premises or the Building.¹⁷¹ Without limiting the preceding clause, it shall apply to (and take precedence over any other provision of this Lease concerning) the use of the Premises, the type of equipment, furniture, furnishings, fixtures and personal property that may be brought into the Premises, the construction materials used in the Tenant Improvements, the standard of maintenance required for the Premises, and compliance with any smoking policy now or hereafter adopted for the Building by Landlord or required by law.¹⁷² In connection therewith, no smoking (including use of e-cigarettes and similar products) is allowed anywhere in the Building. Smoking is allowed only in designated smoking areas that are at least twenty-five (25) feet from the Building and as may otherwise be permitted by applicable law.¹⁷³
- (d) This Section shall survive the expiration or termination of this Lease.

168 A landlord does not want to be liable for not knowing, or for forgetting, that there is a person of unusually high susceptibility in the Premises.

169 Note that landlord only has to give tenant notice if landlord believes that a health problem could be caused in the Premises, and not elsewhere in the building. A tenant may want notice of such a problem anywhere in the building. One compromise might be to include the building common areas in those areas of concern to the tenant.

170 This sentence is little more than an agreement to discuss the issue in the future. A landlord does not want to commit in advance to cure harmless mold situations or mold situations that haven't been proven to be materially harmful, or to spend disproportionately high amounts of money. This text leaves it open which party will pay for remedial work; the landlord might argue that problems caused by the tenant be remediated at the tenant's direct expense, even if the work is done by the landlord. Would expenditures by the landlord under this clause be recoverable as operating expenses? Probably yes, because there is no specific exclusion addressing such expenditures.

171 A sample clause requiring the landlord to operate the building within ASHRAE standards for indoor air quality can be found in Article 15.

172 This "indoor air quality" provision is unusual. This is surprising in light of common fears about chemical sensitivities (recall the prohibition against "unreasonable annoyance" in Section 6.1) and current interest in "green buildings," smoking policies, mold, and indoor air quality. For example, why should a landlord go to the effort of developing a "green building" yet not be able to prohibit tenants from using high-emission carpeting, paint and other products? A clause that gives the landlord the right to approve tenant build-out and subsequent alterations might, but might not, achieve some of the same goals. Keep in mind that such approval rights are often limited to the vague standard "reasonable" approval, which might imply use of a market standard and not a building-specific green standard, and oftentimes "minor" alterations (which usually include carpeting and painting and wallpapering because they are only "cosmetic" alterations that do not affect the "base building structure" even though they are precisely the sources of high VOC emissions) are exempt from the landlord's approval rights.

173 "No smoking" rules like this one are prerequisites to certification in LEED-EB and other rating systems. LEED recognizes that tenants, and even landlords, don't necessarily control the space outside their building envelopes, and doesn't strictly require that this prohibition be enforced by the private party. This provision was moved to the body of the lease because the U.S. Green Building Council, pursuant to a LEED-NC application requested that the smoking prohibition appear in the body of the lease rather than in an exhibit.

ARTICLE 7: PARKING¹⁷⁴ AND COMMUTING

SECTION 7.1 Tenant's Rights to Park

Tenant shall have the right to purchase one (1) unreserved ¹⁷⁵ parking contract¹⁷⁶ on the Property for every _____ square feet leased.¹⁷⁷ Tenant must exercise the foregoing right within thirty (30) days after the Lease Commencement Date (or, with respect to any expansion of the Premises, within thirty (30) days after the date such space is added to the Premises) or the right shall expire with respect to any unexercised contracts.¹⁷⁸ All parking contracts and arrangements must be handled by Tenant directly with the operator of the Property's parking lot and/or garage, and Landlord bears no responsibility or liability with respect thereto (unless and to the extent Landlord self-manages the parking lot and/or garage). Parking contracts will be made available on a month-to-month basis, and Tenant agrees to pay prevailing prices therefor, as said prices may change from time to time.¹⁷⁹ Tenant agrees to abide by, and to cause anyone acquiring a parking contract through Tenant to abide by,¹⁸⁰ all rules and regulations now or thereafter applicable to the parking lot and/or garage. Tenant further agrees that, without limiting any other right or remedy provided by this Lease or by applicable law, its rights under this Article may be revoked in the event of any Event of Default under this Lease¹⁸¹ or any default under the terms of

174 Article 7 assumes that the tenants pay for parking, and, more generally and implicitly, that parking is a relatively scarce and precious commodity. Yet, at the same time, it does not prohibit the landlord's use of parking area for fairs, kiosks, promotions and other events; a tenant worried about that should negotiate for appropriate restrictions. If parking is provided for free, the landlord can omit a large part of this Article. If parking is plentiful, much of this Article can be revised; for example, should spaces be set aside for visitors, for short-term parking (e.g., 30 minutes or less), or for deliveries? This Article also leaves it unstated (to the landlord's advantage) whether parking is surface parking (preferred by most tenants) or in an underground or above ground garage. From the tenant's perspective, whether parking is free and whether parking is surface parking or garage parking should be expressly stated in the lease, if applicable.

175 If any parking spaces are "reserved" for specific individuals or set aside for use only by the tenant's employees or customers, then a clause must be customized to address that.

176 A "parking contract" is not the same as a "parking space." A "parking contract" only entitles the holder of it to find a space on a first come, first served basis, and most garages overbook their actual number of parking spaces with additional parking contracts, just like airlines and hotels, on the theory that not every holder of a parking contract will be there on any given day.

177 LEED encourages landlords to provide the least amount of parking allowed by applicable law. This goal, adopted in the interest of reducing single-occupant automobile commuting and carbon usage, is antithetical to most lease negotiations.

178 The requirement that the tenant exercise its parking options within 30 days after lease commencement gives the landlord significant control over parking allocations. The landlord can reallocate to another tenant spaces "forfeited" by one tenant. Forfeiture is permanent and quick. If a tenant is slowly growing into or occupying its space, it might find that it has permanently forfeited some of its parking allotment. A tenant should resist this type of clause or at least negotiate for a right to recoup space, as needed and when available.

179 It is possible that ASHRAE Standard 189.1 will be interpreted to not allow parking rates to be subsidized by higher rent payments. The point is to not incentivize automobile commuting because of its carbon impact. Remember that many sustainability indices care about off-site environmental impacts created by the building, not only about the environmental impact of the building itself.

180 This phrase imposes a contractual obligation on the tenant to police its own employees' use of the parking facility.

181 Upon first reading, this sounds fair: tenant defaults, landlord has remedies. But can a tenant really afford to allow a landlord to revoke its parking rights while the lease is still in effect (and without regard to the materiality of the Event of Default or its nexus to parking)?

any parking contract.¹⁸² Landlord shall maintain, or cause any third-party operator to maintain, any area used for parking by Tenant in operable condition comparable to other comparable facilities.¹⁸³ If the Property's parking area includes any electric vehicle charging stations, Landlord shall have the right, in its sole discretion to restrict the use of such spaces, charge different rates for such spaces, and impose reasonable rules and regulations with regard to the same.

SECTION 7.2 Parking Surveys¹⁸⁴

Tenant shall cooperate with Landlord in implementing any survey or analysis of the commuting patterns of personnel working in the Building.

182 Notice that nothing in this lease requires the landlord to provide preferential parking for electric or hybrid vehicles or carpools, to provide bicycle racks and nearby showers, to adopt a transportation management plan, to provide shuttle service to a public transit facility, or otherwise promote alternatives to single-occupancy automobile commuting, nor is the tenant required to cooperate in reducing that type of commuting. Such programs and arrangements are becoming more and more common. If any of these are desired to the extent that they are to be mandatory, they should be written into the lease and, to the extent compliance with a specific sustainability standard, such as LEED-EB or Green Globes CIEB, is desired, the then-current standard should be checked (for example, if preferred parking (and defining what that means) is to be given to certain vehicles, "low-emitting vehicles" and "fuel efficient vehicles" can be defined as Zero Emission Vehicles by the California Air Resources Board or those that achieve a minimum score of 40 from the American Council for an Energy-Efficient Economy in its annual vehicle rating guide). Three to five percent (3-5%) of parking stalls might be reserved for hybrid, alternative fuel, and high occupancy vehicles (i.e., carpools). (LEED-EB has a specific methodology for measuring carpooling.) The current LEED standard for bicycle racks is on-site storage for at least 5% of occupants (not less than 4 storage spaces per building) and shower and changing facilities for the first 100 regular building occupants and one additional shower for every 150 regular building occupants thereafter. Green Globes CIEB incorporates similar requirements.

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184 This section anticipates that more holistic energy-saving measures will be introduced to the market (voluntarily or by law) over time, including efforts to reduce automobile commuting and electric vehicle charging stations. Note that electric vehicle charging stations may be charged to the driver incident to each use and provided as a building amenity with installation costs passed through with operating expenses. While charging per use is most common, the installation, maintenance, and ongoing monitoring costs need to be accounted for, either through operating expenses or recovered through usage charges. Lease language should be modified in accordance with the building structure. This lease does not address implications of the growing popularity of car sharing or the inevitable rise in driverless cars. Both developments will alter the demand and market provisions for parking matters.

ARTICLE 8: ASSIGNMENT AND SUBLETTING

SECTION 8.1 Landlord's Consent Required¹⁸⁵

- (a) Tenant shall not sell, assign, or transfer its interest in this Lease (collectively “**assign**” or “**assignment**”) or sublet, rent or permit anyone to occupy the Premises, or any part thereof (collectively “**sublet**”),¹⁸⁶ without obtaining the prior written consent of Landlord,¹⁸⁷ which consent may be granted or withheld in Landlord's sole and absolute judgment as to any assignment and which consent shall not be unreasonably withheld, conditioned or delayed as to any subletting.¹⁸⁸ Notwithstanding the foregoing, this Lease may not be assigned, and the Premises may not be sublet, to any person or entity who may claim the defense of sovereign immunity or any similar defense.¹⁸⁹ When Landlord's “consent” is referenced herein, it shall refer to the need for both approval of the proposed assignee/subtenant and approval of the instrument of assignment/sublet and any amendment, supplement or other modification thereof.¹⁹⁰ Without limiting Landlord's right to withhold

185 The predominant rule in the United States is that tenants can freely assign and sublease except to the extent that the lease expressly prohibits assignment and subleasing, although that predominant common law rule may be altered in some states. The law favors “free alienability”—use without restrictions—of real estate. Therefore, although many people conceptually approach the assignment and subleasing provisions of a lease as if the landlord is doing the tenant a favor in bestowing rights on the tenant, the legal rule is just the reverse: the assignment and subleasing provisions of the lease are restricting, for the landlord's benefit, a right given to the tenant by law. Thus, a landlord must be very explicit in protecting itself; any assignment or sublease that is not prohibited will be impliedly permitted. (This is a similar concept to the “permitted use” clause.)

186 Note that this lease distinguishes between “assignments” and “sublets.” Most leases do not distinguish between them. There are differences between them in terms of the bundle of rights they convey to the assignee/subtenant, and, therefore, on the landlord's relationship with the third party. Also, be aware that state laws may differ on where an “assignment” begins and ends and where a “sublease” begins and ends; for example, some states will require a “sublease” to end at least a day before the prime lease term expires or the law will deem it to be an “assignment,” even if the prime tenant and ostensible subtenant call it, and write it as, a sublease.

187 A tenant should consider possible exemptions from transactions requiring the landlord's consent. These exemptions could include: assignments in corporate merger and acquisition transactions, lest “the lease tail” wag “the corporate dog”; subleases to parents, subsidiary and affiliated companies; office-sharing or subleasing with customers or suppliers; very short-term subleases; and small subleases.

188 This lease consciously differentiates the standard of landlord consent applicable to “assignments” vs. “subleases.” Most leases do not. The rationale for the difference is that the landlord has a different legal relationship—direct privity—foisted upon it in an assignment, and so wants greater veto power, than the legal relationship foisted upon it in a subtenancy—indirect, no privity. Therefore, this lease implicitly assumes that an “assignment” is a more serious transaction and/or that the prime landlord still has more practical control over the initial tenant in a “sublease.” This is not necessarily the case in reality. A tenant could sublease all of its space for all of the remainder of the lease term, which is in effect, even if not by law, equal to an assignment. In either case, the assignor tenant/sublandlord has no more emotional or physical attachment to the premises and the legal distinction between the assignor's continued joint and several liability and the sublandlord's continued prime liability is probably more theoretical than real.

189 This sentence is intended to prevent the landlord from finding itself with governmental tenants and subtenants. Although U.S. government agencies have excellent credit ratings, and state and local governments generally have excellent or at least good credit ratings, the creditworthiness of foreign governments varies widely. Landlords also often believe, rightly or wrongly, that government tenants are not high-quality users of the space and worry that government tenants will use the space for undesirable uses. Landlords also know that government tenants, including foreign government tenants, are exempt from the standard landlord remedies available in the local courts, such as eviction and suits for damages.

190 The document necessary to evidence consent varies greatly by locale, and from landlord to landlord. Some landlords use a single, short sentence, relying on the language in a well-written prime lease to provide the terms and conditions under which the consent is given. Alternatively, some landlords present lengthy forms establishing the terms and conditions of the consent, forms that are often inconsistent with the terms of the lease itself. The landlord, the tenant and the subtenant should attempt to make any such consent form consistent with the language used in the prime lease regarding similar subject matter.

consent for any other reason deemed “reasonable” under applicable law, it shall be a reasonable basis¹⁹¹ for Landlord to withhold its consent if Tenant tenders for Landlord’s approval an assignment of this Lease or a sublease of the Premises or any part of the Premises to a proposed assignee/subtenant who proposes to pay a base rent lower than the Fixed Annual Rent payable hereunder (after adjusting for any differences between net rent and gross rent) [or, if Percentage Rent is payable under this Lease, is expected to pay less Percentage Rent than the assignor or sublessor Tenant], who has been in negotiations with Landlord for space in the Building within the past three (3) months or who is already a tenant or subtenant of other space in the Building, who has been in litigation with Landlord within the past five (5) years, for whom there is other space available for lease in the Building and which Landlord is willing to lease to the prospective assignee/subtenant, whose use is unknown, whose use will significantly increase the number of visitors to the Building (including, without limitation, an employment agency or training facility), whose use or occupancy poses a safety risk to other tenants or to the Building (either directly or by virtue of anticipated protesters), whose use would violate any exclusive use clause granted to any other tenant in the Building or otherwise compete with the use by any other tenant then in the Building, whose primary or significant business is in competition with Landlord’s primary or other significant business, whose financial condition indicates that it may not be able to perform its leasehold obligations or who, in the context of an assignment, does not assume the obligations of Tenant, who is of poor reputation in the local business community, who has been convicted of any crime of moral turpitude or involving securities or tax law violations, or whose proposed use or operation in the Premises may or will cause the Property or any part thereof not to conform with the environmental and sustainability clauses in this Lease.¹⁹²

- (b) In all cases where Tenant seeks permission to take or do an act referred to in this Article, Tenant first shall give Landlord thirty (30) days prior written notice enclosing a full and complete copy of the bona-fide sublet, assignment or other agreement applicable to the proposed transaction¹⁹³ and any processing fee required hereunder. The notice shall expressly refer, in all capital letters or in bold font, or both, to Landlord’s right of recapture under this subsection.¹⁹⁴ For thirty (30) days following receipt of Tenant’s notice and processing

191 What constitutes “reasonable” consent varies by locale. Depending on the jurisdiction, it might be very difficult for a landlord to “reasonably” refuse its consent to almost any proposal. Court decisions vary widely. Some of the reasons listed here may not hold up under a court challenge but others have. Personal taste or personal pique are not “reasonable” grounds on which to withhold consent. If a landlord has a particular political, religious or other point of view that would make it uncomfortable for that landlord to allow occupancy by others with other views, it is unlikely that it would be “reasonable” to withhold consent, at least not unless the lease specifically adds that right to these enumerated standards (and even then the outcome is not clear). Recognizing assignment and sublet as key options for tenant to work through lease obligation when circumstances turn south, tenants will seek to limit this list. A Sublease or assignment will typically have a lower rent, so the first restriction could preclude the effectiveness of any tenant sublet/assignment rights. Similarly, current building tenants are the most likely target of an assignment or sublet, so including them on this list significantly diminishes the likelihood that tenant can effectively enter an assignment or sublease.

192 The final clause of this sentence, and perhaps some of the other clauses, allow a landlord to withhold consent on the grounds that the transferee’s use will be in default or may be in default of this lease, rather than wait for the default to occur. This may be somewhat unusual, but given the practical difficulty a landlord will have in enforcing remedies against a subsequently-defaulting tenant, particularly if the default is nonmonetary, a landlord may want to proactively protect itself.

193 It is difficult for many tenants to comply with this requirement because surprisingly few assignment/sublease transactions are that firm as far as 30 days in advance. Even fewer have the legal document (the assignment or the sublease) drafted that far in advance.

194 This requirement that the tenant remind the landlord of the landlord’s right of recapture is rare and one-sided.

fee, Landlord shall have the right, exercisable by sending notice to Tenant, to retake from Tenant.¹⁹⁵ (i) all of the Premises for the balance of the Lease Term in the event Tenant notified Landlord of its intention to assign this Lease; or (ii) only so much of the Premises for so much of the Lease Term as Tenant intends to sublet in the event Tenant notified Landlord of its intention to sublet the Premises or a portion thereof.¹⁹⁶ In either of the events described in clause (i) or (ii) above, this Lease shall be terminated as of the date specified for such termination in Landlord's notice aforesaid as to the portion or all of the Premises so retaken,¹⁹⁷ provided that any and all liabilities of Tenant which accrued and remained unsatisfied prior to the date of such termination shall survive such termination.

- (c) In the event Landlord does not exercise its aforesaid right within thirty (30) days of receipt of said notice and any processing fee required hereunder, Tenant then may assign or sublet, as the case may be, to the intended sublessee or assignee, provided Tenant obtains the prior written consent of Landlord, which may be given or withheld according to the standard set forth in Section 8.1(a). Anything herein to the contrary notwithstanding, if Landlord shall not elect to exercise the right to retake the Premises set forth in the immediately preceding paragraph, such election shall not under any circumstances be deemed a consent to the proposed subletting or assignment of Tenant's interest in and to this Lease and/or the Premises, and it is expressly understood that any determination by Landlord not to exercise such right to retake the Premises shall not preclude Landlord from withholding its consent to such proposed subletting or assignment.
- (d) Tenant shall be responsible for and agrees to pay (i) a non-refundable processing fee of _____ Dollars (\$_____) ¹⁹⁸ upon submission of a proposed sublet or assignment to Landlord and (ii) any costs and expenses, including (without limitation) reasonable legal fees, ¹⁹⁹ incurred by Landlord in connection with

195 The "right of recapture" is common in leases. It is a one-sided right because a landlord will only exercise it if either (i) the landlord can recapture the space and re-lease it in a rising market or (ii) the landlord wants to recapture the space to accommodate another significant tenant who wants to expand. A tenant may argue that the right of recapture should be deleted because giving the landlord a unilateral right of recapture is conceptually inconsistent with the landlord's earlier agreement to be reasonable in approving subleases and assignments (assuming that the landlord has agreed to a "reasonableness" standard). The merits of each party's position aside, however, tenants rarely win this argument. Nor should a tenant particularly mind. After all, if the landlord recaptures the space from the tenant, at least the tenant is rid of the lease obligation, which was its original objective.

196 This lease ties the recapture only to the portion of the premises affected by the proposed transaction. Many lease forms provide that "the lease" terminates in the event of a recapture, thus creating a scenario where a proposed sublease of a small amount of space or a short-term sublease could result in a termination of the entire lease. Some leases provide that what actually happens is that the landlord sublets from the tenant and can then sub-sublet, usually exempt from all of the other restraints of this Article. That is extremely disadvantageous to the tenant: it leaves the tenant liable to the landlord for the sublet space even though the landlord has sole control over it, even to the point that a default by the landlord as subtenant (or by its sub-subtenant) can result in the tenant being in default to the landlord!

197 Some tenants may be able to negotiate for a right to retract the proposed assignment/sublease transaction if the landlord exercises its right of recapture. (This is particularly useful to a tenant if the right of recapture applies to the entire lease even if the proposed sublease was only for a small portion of the premises or for a short period of time.) That retraction restores the parties to their original positions.

198 Specifying a processing fee can become problematic for the landlord. First, many tenants see the fee as abusive and as a pretext for the landlord to make money if the landlord is also charging the tenant for its costs under clause (ii). Second, the landlord invariably forgets to index the fee to the CPI or otherwise increase it over time, so that the fee remains fixed over the entire term of the lease and is too low to be meaningful after a while. This may not be much of a problem for a landlord that also recovers its out-of-pocket costs under clause (ii).

199 Many tenants attempt to cap the landlord's legal fees for this work during lease negotiations. It is a curious provision for a tenant to focus attention, but it occurs frequently. A landlord should resist any cap for two reasons: (i) the cap will be set for the entire lease term, and usually no CPI escalation is built into the cap, so the cap quickly becomes an historical anachronism; and (ii) the amount of time and attention a landlord's counsel must devote to a proposed

any actual, proposed or purported assignment or sublease, whether or not Landlord consents thereto²⁰⁰ and whether or not implemented by Tenant.

SECTION 8.2 Transfers of Interests in Tenant²⁰¹

If Tenant is a partnership or limited liability company or any other non-corporate entity, a withdrawal or change (whether by way of one or more withdrawals or changes)—whether voluntary, involuntary or by operation of law—of partners or members or other owners or principals, however called, owning a controlling or majority²⁰² interest in Tenant shall be deemed a voluntary assignment of this Lease and subject to the provisions of Section 8.1. If Tenant is a corporation, any dissolution, merger, consolidation or other reorganization of Tenant, or the sale or transfer or issuance (whether by way of one or more sales, transfers or issuances) of a controlling or majority interest of the capital stock of Tenant shall be deemed a voluntary assignment of this Lease and subject to the provisions of Section 8.1. However, the preceding sentence shall not apply to corporations whose stock is traded through a national or regional exchange or over-the-counter.²⁰³ It is understood and agreed that a controlling interest for purposes of this Article may be less than a majority interest.

SECTION 8.3 General Principles Applicable to Assignment and Subleasing

- (a) In no event may this Lease be assigned in part,²⁰⁴ nor may the Premises be subleased in part.²⁰⁵
- (b) No assignment or sublet may be effectuated by operation of law (including, without limitation, whether by merger or consolidation, by executorship, to a legatee, in bankruptcy, through receivership, or via a judicial sale) or, except as may be expressly allowed in Section 8.2 above, otherwise without the prior written consent of Landlord as set forth above. This prohibition shall apply even if no interest in the Property is impaired by the assignment or sublet by operation of law or otherwise.

200 This is supposed to be a processing fee—not an approval fee. Occasionally, a landlord’s form makes the mistake of making the fee payable upon receipt of the landlord’s approval, arguably meaning that no fee is payable if the landlord disapproves.

201 The law favors free alienability of interests in real estate. Therefore, the majority rule in the United States is to allow sales of stock, partnership interests, membership interests, etc. or other alleged subterfuges to get around a provision prohibiting straightforward assignment or subleasing unless the lease expressly prohibits the end around. From the landlord’s point of view, the ultimate effect may be the same, but the law sees it differently. This lease attempts to close that loophole.

202 This lease attempts to cover both “controlling” interests and “majority” interests. It is possible to transfer a “controlling” interest without transferring a “majority” interest, particularly in a limited partnership (the general partner is in control, regardless of how small an interest it owns) or in a corporation with multiple classes of stock. It is also possible to transfer a “majority” interest without transferring a “controlling” interest. The last sentence of this subsection makes it explicit that both types of transfer are covered by this section.

203 Although there probably are instances where a publicly-traded company is acquired by stock purchase in order to circumvent an anti-assignment clause, that is not the evil this clause is generally intended to prevent. Publicly-traded entities are exempt from this subsection.

204 Under the law, a lease can be “assigned” in part although it is legally awkward to do so. Large, multi-floor tenants are the most likely to want partial assignments. An assignment in part has serious risks for both landlords and tenants and should be seriously discouraged (e.g., which co-tenant gets to exercise renewal and expansion options? What if one co-tenant defaults and the other does not?). This lease prohibits partial “assignments.” If partial assignments are permitted, a cap may be placed on the number in which a tenant may engage.

205 There is no “legal” reason a landlord should not waive the prohibition against “subleasing” only part of the premises. A partial sublease may be preferable from the landlord’s point of view because perhaps the prime tenant remains in occupancy as well, providing control over the activities of its subtenant. As an example of one compromise, a landlord could agree to a clause capping the percentage of the premises that can be sublet. If the premises are subleased in part, building and fire code issues must be addressed, particularly emergency egress and partition walls. The lease should clarify that tenant is responsible for such cost and for complying with all alteration provisions elsewhere in the lease.

- (c) In no event whatsoever may this Lease, or any interest herein or in or to the Property derived hereunder, be mortgaged, pledged, hypothecated, collaterally assigned, made subject to a security interest, or otherwise encumbered by Tenant.
- (d) The consent of Landlord to any assignment or subletting, or the implementation of any assignment or subletting that may be permitted hereunder without Landlord's consent, shall not be construed as a waiver or release of Tenant from liability for the performance of all covenants and obligations to be performed by Tenant under this Lease, nor shall the collection or acceptance of rent from any assignee or subtenant constitute a waiver or release of Tenant from any of its liabilities or obligations under this Lease.²⁰⁶
- (e) The assignor Tenant shall remain jointly and severally liable with the assignee Tenant for the continued payment and performance of Tenant's obligations arising or accruing following the effective date of the assignment.²⁰⁷
- (f) Tenant hereby waives all suretyship and similar technical defenses, including, without limitation, defenses arising from the amendment, renewal, termination or expiration of this Lease without the assignor's Tenant's knowledge or consent.²⁰⁸
- (g) Landlord's consent to any assignment or subletting shall not be construed as relieving Tenant from the obligation of obtaining Landlord's prior written consent to any subsequent assignment or subletting.²⁰⁹
- (h) If the assignor Tenant has posted a Letter of Credit as its Security Deposit, Landlord shall release the assignor Tenant's Letter of Credit upon receipt of a replacement Letter of Credit from the assignee Tenant.
- (i) If Tenant is in default hereunder, Tenant hereby assigns to Landlord the rent due from any subtenant of Tenant and hereby authorizes each such subtenant to pay said rent directly to Landlord; any rent so received shall be credited against the rent payable under this Lease but the receipt of such money shall not otherwise affect or release Tenant from its obligations under this Lease.
- (j) The cost of any construction required to permit the operation of any subleased space separate from the balance of the Premises shall be an Alteration, and the cost thereof shall be borne solely by Tenant.

206 Tenants sometimes think that if they find a replacement tenant then the original tenant is released from liability. That is rarely the case. This paragraph affirmatively rejects that idea and the following paragraph establishes the principle of joint and several liability for the assignor and the assignee.

207 Because of the pro-tenant laws governing the right to assign, the landlord wants to make sure that the assignor tenant is not released from obligation by virtue of the assignment. Even if the landlord has the right to consent in its absolute discretion, it is the assignor tenant who is responsible for introducing the assignee tenant (or the subtenant) to the lease, and the landlord therefore wants the assignor tenant to remain responsible. This is routine.

208 Notwithstanding the use of the phrase "joint and several" liability, it is possible that the assignor will be considered to be only a guarantor or surety—the assignor is physically gone from the scene, the rent is collected directly from the assignee as the successor prime tenant, and to outward appearances the assignor is only secondarily liable. Guarantors and sureties often have technical defenses available to them that the primary obligor does not have. This lease attempts to rebut all of those implications.

209 This sentence attempts to rebut an old English rule adopted in the American colonies that one consent by the landlord waives the requirement of consent to later assignments/subleases. The rule was later abandoned in England but is still alive in some states.

- (k) If Landlord withholds, conditions or delays its consent to a proposed assignment or sublease, Tenant's sole remedy shall be to bring an action for equitable relief, including (without limitation) injunction. Landlord shall not be liable for any damages whatsoever under this Article.²¹⁰
- (l) In the event of any assignment or sublet, then any²¹¹ purchase price, assignment fee, furniture or equipment purchase or rental payment, incremental monthly rent or other payment due to Tenant,²¹² if any, as the result of any such assignment or sublease which is in excess of the rent (or pro rata portion thereof) then payable by Tenant under this Lease²¹³ shall be paid by Tenant to Landlord as additional rent as and when received by Tenant. If such sum is payable to Tenant in a lump sum, the lump sum shall be amortized on a straight-line basis over the then-remaining Lease Term to determine if the payment is in excess of the rent then payable by Tenant.²¹⁴

210 Although versions of this clause are often found in leases, the clause obviously denies the tenant any effective remedy should the landlord not abide by any "reasonable consent" standard. It is highly unlikely that even injunctive relief can be obtained quickly enough to prevent a prospective assignee/subtenant from moving on to another transaction. Therefore, in effect, this clause converts this Article into a "sole and arbitrary consent" provision. Assuming that the parties have otherwise agreed on any "reasonable consent" standard, the tenant should strike this clause and a reasonable landlord should not object to deleting it.

211 This clause calls for 100% of the profit realized by the tenant to be paid to the landlord. The actual percentage shared, however, will most likely depend on local custom and practice. A landlord should consider that if it demands that all profit be paid over to it, it is disincentivizing the tenant from attempting to get any profit at all.

212 This formulation attempts to broadly cover any payments the tenant might receive. This particular formulation is so broad that even late fees and similar charges received by the sublandlord would have to be disgorged to the landlord.

231 This formulation fails to give the tenant any first offset against its own costs and expenses in implementing the transaction. The tenant therefore bears these costs itself. An alert tenant would presumably negotiate for a sharing only of its net profit, which is typical and fair, not its gross profit. The costs and expenses a tenant could first recoup might include brokerage commissions, legal fees for negotiating the transaction, build-out costs and/or tenant improvement allowances, moving expenses, assumption of other lease liabilities, and other transaction costs. (Sometimes a landlord will limit the tenant's recoupment to "reasonable" costs. It is not clear what that limitation accomplishes or how it incentivizes good behavior by the tenant because, unless the tenant is siphoning off fees by paying fees to affiliated entities, any money paid by the tenant to third parties is as lost to the tenant as it is to the landlord.) More unusual would be getting a landlord to agree that a tenant could also first recoup any "vacancy loss" arising from any period in which the tenant had vacated the premises but still paid the rent while marketing the premises for assignment or sublease.

214 Subrent is usually payable monthly, just like rent, so calculating profit in a sublease situation is usually fairly straightforward. But payment for an assignment is usually in a lump sum up front. This sentence attempts to calculate profit even if the payment is front-end (or back-end) loaded.

ARTICLE 9: MAINTENANCE AND REPAIRS

SECTION 9.1 Maintenance and Repairs

- (a) Tenant will keep and maintain the Premises and all fixtures and equipment located therein in a clean, safe and sanitary condition, will take good care thereof and make all required repairs and replacements thereto (whether structural²¹⁵ or non-structural, foreseen or unforeseen), will suffer no waste or injury thereto, and will, at the expiration or other termination of the Lease Term, surrender the Premises, broom clean, in the same order and condition they were in on the Lease Commencement Date unless a lesser standard is expressly agreed to by Landlord,²¹⁶ ordinary wear and tear²¹⁷ excepted. All maintenance and repairs made by Tenant must comply with Landlord's sustainability practices, including any Third Party Sustainability Standard adopted for the Building and of which Tenant is given notice, as the same may change from time to time.
- (b) Landlord shall provide and install all original bulbs and tubes for Building standard lighting fixtures within the Premises and all replacement tubes for such lighting as an Annual Operating Charge; all other bulbs, tubes and lighting fixtures for the Premises shall be provided and installed by Tenant at Tenant's cost and expense, and must comply with Landlord's sustainability practices, including compliance with any of Third Party Sustainability Standards adopted from time to time for the Building by Landlord and of which Landlord gives notice to Tenant from time to time.

SECTION 9.2 Landlord's Maintenance and Repairs

Landlord shall endeavor to maintain²¹⁸ and keep in repair²¹⁹ and in compliance with law the common areas of the Property, any parking facility, the roof, foundation and exterior walls of the Building and the Building heating, ventilating and air-conditioning, plumbing, electrical and elevator systems and shall make such repairs as become necessary after obtaining actual knowledge²²⁰ of the need for such repairs. The need for such maintenance and repairs may require that portions of the Property be closed or taken out of service from time to time in Landlord's reasonable discretion; Landlord shall use reasonable efforts to ameliorate any adverse effects on Tenant, but such closures shall not affect Tenant's obligations under this Lease, including the obligation to pay rent, nor shall any such closure entitle Tenant to a claim of eviction, constructive eviction, or reduction in or offset against rent.

215 Note the imposition of "structural" repair obligations on the tenant. A tenant should resist. In a multi-tenant building would a landlord even want a tenant to make structural repairs? Is a tenant really qualified to make structural repairs? Or is this requirement just a set-up to make the tenant responsible and then allow the landlord to do the work anyway, but at the tenant's expense?

216 This requirement would strongly suggest that the tenant is required to remove all alterations except any initial tenant build-out. Aside from whether a tenant will agree to such a requirement, note the inconsistency between this section and Section 10.4, which more vaguely suggests that the landlord will have to affirmatively tell the tenant what alterations, if any, the tenant is required to remove. The approach in Section 10.4 is reasonable, as it allows landlord to require removal of certain items, but recognizes that tenant is not in the construction or demolition business.

217 Some leases also require the tenant to return the premises free from damage caused by casualty loss or insured casualty loss. In this lease, the landlord owns the building and owns the tenant's alterations as soon as they are made, and the landlord is charging the tenant for insurance premiums as an operating expense, so the landlord is accepting responsibility for damage to the premises (exclusive of personal property).

218 Note that the landlord's obligation is only to try to maintain the base building. So, as long as the landlord tries, the landlord is not in default for failing to actually maintain the base building. A tenant might note that the performance of its own obligations are not limited to simply "endeavoring" but require actually "doing."

219 An alert tenant may want the maintenance and repair obligation to hew more towards a market test, such as by adding "in accordance with standards customary from time to time for comparable buildings in the market in which the Building is located."

220 The requirement that the landlord attend only to maintenance and repair that it has "actual knowledge" of limits the landlord's liability, particularly with respect to obvious conditions it has not yet received "actual knowledge" of or that are hidden (e.g., latent defects).

SECTION 9.3 Damage Caused by Tenant

All injury, breakage and damage to the Premises and to any other part of the Building caused by any act or omission of Tenant or any agent, employee, subtenant, licensee, contractor, customer, client, family member or invitee of Tenant,²²¹ shall be repaired by and at the sole expense of Tenant, except that Landlord shall have the right, at its sole option, to make such repairs and to charge Tenant for all costs and expenses (including a market rate project management fee) incurred in connection therewith as additional rent hereunder. The liability of Tenant for such costs and expenses shall be reduced by the amount of any insurance proceeds received by Landlord²²² on account of such injury, breakage or damage.

ARTICLE 10: ALTERATIONS AND TENANT IMPROVEMENTS

SECTION 10.1 As-Is Condition of Premises

The Tenant Improvement Work (as defined in Exhibit E (the “**Work Letter**”)), if any, to be made to the Premises by Landlord to make the Premises ready for Tenant’s use and occupancy or, in lieu thereof, the allowance, if any, to be provided by Landlord toward such Tenant Improvement Work, shall be solely to the extent and subject to the provisions of this Lease governing Alterations generally and the terms and conditions set forth in the Work Letter²²³ Except as so provided in the Work Letter, Tenant agrees to and shall lease the Premises in its “AS IS” condition as of the date of this Lease, and it is understood and agreed that Landlord will not make or pay for, and is under no obligation to make or pay for, any structural or other alterations, decorations, additions or improvements in or to the Premises.

221 Some tenants may argue that they cannot and do not control the behavior of their customers, clients or invitees, although a landlord may counter that a tenant is in a better position to do that than the landlord. This clause broadly makes the tenant responsible for damage caused anywhere in the building, not just in the premises, by these enumerated persons, making the tenant responsible for their behavior even when outside the tenant’s premises and control. Also keep in mind that, aside from the somewhat emotional issues of fault and control, the landlord’s insurance should be covering mishaps in the common areas. Thus, a tenant should win this argument, which is not to say that it always does because parties often remain fixated on fault rather than insurance.

222 This implies, but does not require, that the landlord will actually carry insurance and that the landlord will press to recover proceeds from its insurer instead of trying to collect from the tenant. A tenant may want to clarify that, although a landlord may be reluctant to commit to pressing its insurer. Of course, as a practical matter of looking to “deep pockets,” it is probable that all but the most well-heeled tenants cannot compete with the cash the landlord can collect from its insurer.

223 Because of the complexity of these seemingly simple issues, describing the work to be done, which party is to do it, and the terms under which the work is done—and, oftentimes, the effect that has on lease commencement and rent commencement—is usually more easily handled in a separate agreement attached to the lease. In this lease, Exhibit E is that separate agreement. Note that in many lease forms, the work letter, even when attached to the lease as an exhibit, is set up to be separately signed by the parties. No other exhibits are separately signed by the parties, and it is not clear why that practice is followed for the work letter, particularly since it is often the case that the parties forget to sign the separate work letter. Therefore, this lease form treats the work letter as just another exhibit in form, even if it is far more complicated in substance. If local law or local custom dictate otherwise about signing the work letter, follow local law or local custom.

SECTION 10.2 Alterations

- (a) Tenant will not make or permit anyone to make any alterations, decorations, additions or improvements (herein referred to collectively as **“Alterations”**), including, without limitation, its Tenant Improvement Work, structural or otherwise, in or to the Premises or the Building without the prior written consent of Landlord.²²⁴ In addition, Tenant shall not be permitted to make Alterations that Landlord reasonably anticipates will adversely affect the Building’s ENERGY STAR rating.²²⁵ If any Alterations are made without the prior written consent of Landlord,²²⁶ Landlord shall have the right to remove and correct such changes and to restore the Premises and the Building to their condition immediately prior thereto, and Tenant shall be liable for all expenses incurred by Landlord in connection therewith. When granting its consent, Landlord may impose any conditions it deems appropriate,²²⁷ including without limitation, the approval of plans and specifications, approval of the architect, contractor or other persons to perform the work, and the obtaining of a performance bond in an amount specified by Landlord²²⁸ and specified insurance.
- (b) All Alterations must conform to all rules and regulations established from time to time by the Board of Fire Underwriters having jurisdiction or any similar body exercising similar functions, and to all laws, statutes, ordinances, codes, rules, regulations and requirements of the Federal and/or State, county, municipal or other applicable governments. In addition, all cable installed by or for Tenant must be tagged every three (3) feet with an identification tag or other distinguishing mark to clearly identify it as relating to Tenant and/or the Premises, and Landlord must be given notice of the location of all such cable as and when it is installed.²²⁹

224 A tenant will frequently ask that the landlord’s consent not be required at all for certain de minimus (minor) alterations. What constitutes a de minimus alteration is subjective. One distinction is “cosmetic” alterations, usually defined to mean painting, carpeting and wallpapering (although even that could be controversial in a “green building”). A second distinction is between “structural” and “non-structural” alterations, “non-structural” being somewhat broader than “cosmetic” because non-structural could also apply to non-load-bearing walls, partitioning, cable installation, etc. A third distinction is alterations that do not require the issuance of a building permit. This works only in jurisdictions where the rules governing building permits are clearly understood and substantively meaningful. A fourth distinction is for alterations costing less than or more than a stated dollar threshold, although this approach suffers from several defects: (i) it is rarely clear how the dollar amount applies to an individual project that has different component parts and whether the tenant can break the project down into components and claim that none of them exceed the threshold for landlord approval; (ii) the parties usually fail to index the threshold amount to inflation, to the tenant’s detriment over time; and (iii) most significantly, the use of a dollar threshold proceeds from the mistaken view that the dollar cost of an item is proportional to the effect that item has on a building. The parties may agree to a hybrid of these four (4) approaches.

225 The ENERGY STAR rating is retrospective, it looks back at past performance to provide an energy efficiency rating. But (dis)approving an Alteration is prospective, it requires projecting the future effect that a change in the building will have on energy efficiency. As a result, this lease gives the landlord some control over the situation if a deleterious effect can be predicted, but it is not anticipated that many proposed Alterations will run afoul of this.

226 If Section 10.2 is amended to allow some Alterations to be made without the landlord’s consent, then modify this clause by adding “when such consent is required pursuant to Section 10.2.”

227 Tenants will routinely ask that the landlord’s consent “not be unreasonably withheld, conditioned or delayed.” This is usually acceptable to landlords for some types of alterations but, from the landlord’s point of view, should not be applied to all alterations (such as those impacting building systems, structural matters and exterior appearance). In this lease, the landlord’s discretion is essentially unfettered.

228 A tenant should oppose bonding requirements, particularly if the project is small and/or if the landlord has otherwise approved the contractor without a bond. Performance bonds can be expensive and may not be of much value to a landlord who is a step or two removed from the project.

229 This sentence is intended to extrapolate from recent changes to various building and fire codes that have determined that excessive cable is a fire hazard or a potential source of contamination in the event of fire because of the materials used in its manufacture. (All of which is in addition to the long-standing point that too much cable in a ceiling plenum will inevitably degrade the functioning of the building’s HVAC system.) Therefore, those codes are demanding that cable be removed when it is no longer in use. Of course, demanding the removal of cable can prove a difficult task for a landlord given traditional cable installation methods (in common raceways with no tenant-specific identification), the relatively inaccessible places cable is traditionally installed, and the risk to the landlord and other tenants of the erroneous removal of, or damage to, the building’s trunk lines or another tenant’s cable. This sentence attempts to require that the cable at least be identifiable. The actual removal requirement is found in Section 10.4.

- (c) Tenant and Tenant's contractors²³⁰ shall abide by Landlord's Contractor Rules and Regulations attached hereto as Exhibit D and any modifications thereto by Landlord.²³¹
- (d) Tenant agrees to obtain and deliver to Landlord written, unconditional waivers of mechanic's and materialmen's liens²³² against the Building and the Land from all work, labor and services to be performed, and any materials supplied, in connection with any Alterations. It is further understood and agreed that any Alterations, other than those made by Landlord directly, shall be conducted on behalf of Tenant and not on behalf of Landlord, and that Tenant shall not be deemed to be the agent of Landlord.²³³ It is further understood and agreed that in the event Landlord shall give its written consent to the making of any Alterations, such written consent shall not be deemed to be an agreement or consent by Landlord to subject its interest in the Premises, or any leasehold or other interest of Tenant in the Premises, the Building or the Land, to any mechanic's or materialmen's liens which may be filed in connection therewith. If, notwithstanding the foregoing, any mechanic's or materialmen's lien is filed against the Premises, Tenant's interest therein, the Building and/or the Land for work claimed to have been done for, or materials claimed to have been furnished to, the Premises or to Tenant, such lien shall be discharged by Tenant within ten (10) days²³⁴ after notice, at Tenant's sole cost and expense, by the payment thereof or by the filing of a bond.²³⁵ If Tenant shall fail to discharge any such mechanic's or materialmen's lien, Landlord may, at its sole option, discharge such lien and treat the cost thereof (including attorney's fees incurred in connection therewith) as additional rent payable with the next Fixed Monthly Rent payment falling due. It is expressly agreed that such discharge by Landlord shall not be deemed to waive or release the default of Tenant in not discharging such lien.

230 Tenants should note that the requirement of abiding by Exhibit D, which includes extensive provisions mandating sustainable construction practices, applies only to the tenant and any authorized assignees. The landlord is not required by this lease to use sustainable construction practices, e.g., when it builds out other space in the building, nor is the landlord required to see to it that other tenants in the building abide by the same sustainability standards. Of course, it makes little sense for a landlord operating a green building to require tenants to abide by sustainable construction practices but not do so itself, so a landlord in such a building would presumably act accordingly. But if the tenant wishes to make that mandatory on the part of the landlord as well, it should do so by making this provision reciprocal. Such a request would be extremely rare and such a provision would be rarer still; however, as sustainability issues become more commonplace and the interdependency of various areas in the building becomes more clear, perhaps more such clauses will evolve.

231 Very few lease forms contain detailed rules for construction activity. This lease provides sample rules. In addition to customary construction regulations familiar to building managers, the construction rules in this lease essentially require that all alterations meet sustainability standards. There isn't any exception made here for small projects. Sustainability goals (and costs) are not materially different for large and small projects: use low-VOC materials, don't use toxic chemicals, protect indoor air quality, recycle waste material, buy energy-efficient and water-efficient fixtures, furniture and equipment, etc. Similarly, the same rules apply to premises that aren't currently green. There is no harm to greening space incrementally as non-green space is altered and there is harm to overall building sustainability if some areas are exempted from these requirements.

232 In some states, it is illegal to request unconditional mechanics' lien waivers in advance. In other states, contractors will only give conditional lien waivers, i.e., they are given conditioned upon payment of the currently outstanding contract amounts. A landlord should not insist on requiring what cannot be legally required or is against local custom and practice.

233 This sentence and the following sentence are intended to defeat a contractor's claim that the landlord is liable for the tenant's debt to the contractor because the contractor thought that the tenant was acting on the landlord's behalf.

234 Ten days to discharge a mechanic's lien is at the short end of the usual grace period for this offense. Up to 30 days is acceptable.

235 The filing of a bond removes the threat to the landlord's interest in the building—i.e., there is no longer a threat of foreclosing on the building to enforce the debt. Once the bond is posted and the mechanic's lien is released, the dispute between the tenant and its contractor or supplier then becomes a normal civil lawsuit between them over money that cannot directly threaten title to the building. Thus, if bonding is allowed in the relevant state for the type of claim at stake, there is no reason for a landlord to insist that the tenant pay the claimant any amount in dispute, which a significant number of lease forms require.

SECTION 10.3 Indemnification for Alterations

Tenant shall defend, indemnify and hold Landlord harmless from and against any and all claims, suits, actions, proceedings, liens, liabilities, judgments, damages, losses, costs and expenses (including, without limitation, attorneys' fees) based on or arising directly or indirectly by reason of the making of any Alterations by Tenant.

SECTION 10.4 Ownership and Removal at End of Lease Term

Alterations made by either party shall immediately become the property of Landlord and shall remain upon and be surrendered with the Premises as part thereof at the end of the Lease Term except that (a) if Tenant is not in default under this Lease, Tenant shall have the right to remove,²³⁶ prior to the expiration of the Lease Term, all movable furniture, furnishings and equipment installed in the Premises solely at the expense of Tenant, and (b) Landlord shall have the right²³⁷ to require Tenant to remove all Alterations²³⁸ except Tenant Improvement Work (except to the extent Landlord conditions its approval of any specific item of Tenant Improvement Work on its removal) at the end of the Lease Term at the sole cost of Tenant. All warranties on Alterations shall run to the benefit of Landlord.²³⁹ Unless Landlord otherwise specifically agrees in writing at or prior to the installation of the same, all data and communications cabling and equipment installed in the Premises or the Building for the exclusive use of Tenant, whether originally installed by Landlord or by Tenant, shall be removed by Tenant at its own cost and expense upon the expiration or termination of the Lease Term. *Tenant shall dispose of in an environmentally sustainable manner any equipment, furnishings, or materials no longer needed by Tenant and shall recycle or re-use in accordance with Landlord's sustainability practices. Tenant is responsible for reporting this activity to Landlord in a format determined by Landlord.*²⁴⁰ All damage and injury to the Premises or to the Building caused by such removal shall be repaired by Tenant, at Tenant's sole expense. If such property of Tenant is not removed by Tenant prior to the expiration or termination of this Lease, the same shall be deemed to have been abandoned by Tenant and shall be surrendered with the Premises as a part thereof, which property may be retained by Landlord or disposed of at Tenant's expense. Tenant's obligation to pay for any costs incurred by Landlord for the disposal of such abandoned property shall survive the expiration or earlier termination of this Lease.

236 Note that there is a substantial difference between the tenant having the right to remove some or all alterations (which is what this clause (a) addresses) and the landlord having the right to require the tenant to remove some or all alterations (which is what following clause (b) addresses). A lease can have either right, or, like this lease, both rights. And what can be, or must be, removed need not be parallel.

237 This clause ignores when the landlord must exercise this right. As written here, the landlord can make such a demand at the very end of the lease term. A tenant should demand more certainty earlier in the process, such as requiring the landlord to make this decision when it approves alterations. (Which raises the question of what to do about alterations that do not require the landlord's consent, assuming the tenant negotiates for that freedom.) In implementing such a requirement, a landlord should prefer that an affirmative waiver of removal is the only effective waiver of the removal requirement (which also has the advantage of solving the problem of what to do about alterations that do not require the landlord's consent), so that the landlord's silence in this matter means the tenant must remove the alterations. The tenant, on the other hand, prefers a clause that says it must remove only what the landlord affirmatively, timely and in writing, tells the tenant to remove.

238 Allowing a landlord to require the tenant to remove all alterations may need some revision, depending on what right is given to the tenant to perform alterations without the landlord's approval.

239 A tenant will want a landlord to commit to enforce warranties. A landlord may not want to do so for reasons unrelated to any particular tenant, a difficult position to argue to a tenant.

240 A tenant should note that these sentences about environmental sustainability are quite vague, quite open-ended, apply to off-premises behavior, and have little benefit to the tenant unless the tenant has its own commitment to sustainability.

ARTICLE 11: SIGNS²⁴¹

No sign, advertisement or notice shall be inscribed, painted, affixed or otherwise displayed by Tenant on any part of the interior²⁴² of the Premises if visible from the exterior of the Premises or elsewhere in or on the Building except on any Building directory and the doors of offices and such other areas as may be designated by Landlord. All signage, advertisements or notices must be only in such place, number, size, color and style as are approved by Landlord²⁴³ in its sole and absolute discretion. Signage on any Building directory shall be provided solely by Landlord and subject to any charges levied by Landlord²⁴⁴ for any changes to any initial listing, the initial listing of Tenant's name and the names of its principals with offices in the Premises²⁴⁵ being provided at no charge.

Without limiting the foregoing, lit signs must comply with Landlord's sustainability plan regarding light pollution, intensity and hours of operation. All of Tenant's signs that are approved by Landlord shall be obtained by Tenant at its sole cost and expense and installed by Landlord at Tenant's sole cost and expense. Tenant shall reimburse Landlord for such amount upon written demand from Landlord.²⁴⁶ If any sign, advertisement or notice that has not been approved by Landlord is exhibited or installed by Tenant, Landlord shall have the right to remove the same at Tenant's expense. Landlord shall have the right to prohibit any advertisement of or by Tenant which in Landlord's opinion tends to impair the reputation of the Building or its desirability as a high-quality office building, and, upon written notice from Landlord, Tenant shall immediately refrain from and discontinue any such advertisement.²⁴⁷ Landlord reserves the right to affix, install and display signs, advertisements and notices on any part of the exterior or interior of the Building except in the Premises.²⁴⁸ Landlord shall display any ENERGY STAR or other third-party sustainability certification plaques the Building may have from time to time.²⁴⁹

241 The general rule is that the tenant's premises, and therefore the tenant's physical control, extend to both the inside and the outside walls of the premises. Therefore, unless the lease affirmatively prohibits signage on the outer walls of the premises, the tenant may have the right under State law to place signs on the outside of the premises' walls, whether those walls are inside or outside the building. That is rarely the parties' expectation, but it is the rule. So much of this Article is motivated by the landlord's need or desire to affirmatively restrict the tenant's common law rights.

242 In a retail lease, care should be used to make sure that the display windows in the front of the store must be used, or not used at all, consistently with the landlord's overall vision of the building's appearance.

243 A standard office tenant, particularly in a multi-tenant building, may not much care about signage as long as it gets listed on the building directory and gets a suite entry sign. However, a tenant with a logo or a significant presence in the building may want more prominent signage and/or of its own design. And, of course, a retail tenant will definitely care about its own signage as well as advertising in the street front windows. A retail tenant should also consider whether any signage required by any franchisor should be automatically permitted by the lease and, if there is more than one tenant, whether any issues of co-locating signs exists.

244 A tenant may want to know and fix the charge in advance—which is often to the tenant's detriment since the landlord probably has no particular charge in mind and may not even levy one in the ordinary course but, if forced to come up with one, will throw out a high number. A tenant may prefer to simply state that any such charges to it won't be applied on a "nondiscriminatory" basis or, if the tenant has real clout and the landlord isn't paying attention, get the landlord to agree to a "most favorable nation" rate (e.g. "such charge to Tenant being no more than any other tenant in the Building is then paying").

245 The parties, or more likely just the landlord, may prefer to be more specific about the number of listings the tenant will get on the building directory, whether by stating an actual fixed number or a number-per-square-foot or some other measurement.

246 If the landlord provides building standard suite entry signage at its own expense, or customized initial signage at its own expense, revise the preceding two sentences accordingly.

247 This standard is clearly vague and subjective, and how it would be applied in any particular circumstance is unclear. Tenants may seek to strike or specify this language.

248 A sizable tenant may want to prohibit exterior signage by its business rivals, or at least get a "most favored nation" clause or a "nondiscrimination" clause so it can match signage by others.

249 The point of this requirement is really only to enhance the tenant's ability to promote its own sustainability.

ARTICLE 12: TENANT'S EQUIPMENT

SECTION 12.1 Electrical Capacity

Landlord shall provide adequate electrical wiring and facilities to the Premises for Tenant's lighting, not to exceed 0.85 watts²⁵⁰ per usable²⁵¹ square foot, and for equipment reasonably appropriate to the Permitted Use, taking into account Tenant's usage of personal computers and other standard office machines to the extent such usage is consistent with other similar users in the Building and in the submarket in which the Building is located in other buildings that are comparable in class, age and size.²⁵² The foregoing allocation is in addition to the electric usage by the Building's own central systems.²⁵³ Tenant will not install or operate in the Premises any electrically operated equipment or machinery that utilizes more than the foregoing electric load or anything other than normal office equipment and appliances,²⁵⁴ without first obtaining the prior written consent of Landlord, which consent may be withheld in Landlord's sole and absolute discretion. Tenant shall pay additional rent in compensation for the excess consumption of electricity or other utilities (including, but not limited to, any excess utility, sales or

250 This is the current LEED-EB-recommended standard for lighting load.

251 "Rentable" square feet don't use electricity, only actual square footage uses electricity, hence the use of the word "usable" in this context.

252 Like this lease, some leases avoid specifying the building's electrical capacity and the amount of capacity used by the tenant. This approach at least has the advantage of sidestepping an issue that often doesn't need to be addressed and that often leads to extensive (and largely fruitless) negotiations when it is addressed. Assuming that the landlord wants to address the issue more specifically, the most common method to address the issue seems to be to limit a tenant's electrical consumption by reference to permitted watts per square foot. Some leases go further and distinguish between lighting load and tenant plug load. The problem with that approach is that in most cases where the permitted wattage is negotiated, the negotiation is based on faulty or outdated assumptions. Thus, while tenants instinctively press for more and more electric capacity (because of their desktop computers, printers, copiers, etc., not realizing that the efficiency of that equipment has vastly improved) and modern office buildings might provide 6-8 watts/sf, neither party may understand how grossly excessive that is. To put that in context, current LEED-EB standard lighting load (not including plug load for the tenant's other electrically-operated equipment) is 0.85 w/sf. The ASHRAE 90.1-2007 Standard for plug loads allow 1.1 watts per square foot for both enclosed and open office spaces and only 1.0 watt per square foot of plug load for an entire office building. The ASHRAE 90.1-2010 Standard is even lower, allowing only 0.94 watts per square foot for plug load. A conscientious landlord could limit tenants to 1.85 watts per square foot for lighting and plug load as an overall rule. Any capacity above that for generic office use wastes resources and money because an oversized electric system is built, the HVAC system must be comparably oversized to cool a building with that electrical capacity, and the HVAC system then operates sub optimally. Tenants who can demonstrate that their usage will be higher, such as tenants operating internal data centers on-premises, can be allocated additional capacity. To avoid penalizing energy-efficient tenants, any tenant using above-standard electricity should bear the additional cost, which can be handled through the submetering clauses of this lease if the space is submetered or via electrical surveys by electrical engineers.

253 It may be possible for a building to separately monitor various electric systems, with a goal of being able to report on usage of the individual systems to encourage better practices. Among the different measurements that might be feasible are total load (of the entire building), mechanical load, lighting load (overhead lighting, exit lighting, facade lighting, and parking area lighting) and tenant plug loads. Additionally, the consumption of various users can be monitored via separate meters, submeters or check meters (See Section 15.2). Such specific system and user information can inform and potentially reduce overall consumption.

254 "Normal office equipment and appliances" is vague. A list of permitted equipment often works to the tenant's disadvantage, as many older lease forms use lists of now obsolete or obsolescent equipment (e.g., electric typewriters) as examples of permitted equipment but do not address desktop word processors, personal computers, photocopy machines and other standard modern equipment. Under a Latin legal maxim whose English translation is that a sample listing of specifics sets the parameters of the general rule is used, a listing of permitted office equipment that is out-of-date will work to the tenant's disadvantage.

other taxes, resultant increases in electricity charges for the Building and Renewable Credits) and for the cost of any additional wiring or apparatus that may be occasioned by the operation of such equipment or machinery.²⁵⁵

SECTION 12.2—Other Infrastructure

Tenant shall not install any equipment of any type or nature that will or may necessitate any changes, replacement or additions to, or in the use of the water system, heating system, plumbing system, air-conditioning system or electrical system of the Premises or in the Building, without first obtaining the prior written consent of Landlord, which consent may be withheld in Landlord's sole and absolute discretion.²⁵⁶ Any machines, systems and mechanical equipment belonging to Tenant which cause noise or vibrations that may be transmitted to the structure of the Building or to any space therein to such a degree as to be objectionable to Landlord or to any tenant in the Building shall be installed and maintained by Tenant, at Tenant's expense, on vibration eliminators or other devices sufficient to reduce such noise and vibration to a level satisfactory to Landlord.

[IF TENANT IS PERMITTED TO PLACE COMMUNICATIONS OR SOLAR EQUIPMENT ON THE BUILDING'S ROOF: (1) ADD SECTION 12.3, BELOW; AND (2) ATTACH THE APPROPRIATE PORTION(S) OF EXHIBIT G, "ROOFTOP EQUIPMENT" ATTACHED HERETO]

SECTION 12.3—Rooftop Equipment

Tenant shall be entitled to place communications equipment and/or electrical generating equipment on the Building's roof pursuant to the terms and conditions set forth in Exhibit G attached hereto. All of the terms of this Lease shall be applicable to Tenant's Communication Equipment and/or Generating Equipment (as defined in Exhibit G) as if the Communications Equipment and/or Generating Equipment were part of the Premises, but Tenant acknowledges that the Communications Equipment and/or Generating Equipment is not part of the Premises.

[IF TENANT IS PERMITTED TO OBTAIN TELECOM SERVICES FROM ITS OWN SERVICE PROVIDER: (1) ADD SECTION 12.4 BELOW; AND (2) ATTACH EXHIBIT H, "TELECOMMUNICATIONS PROVIDERS" ATTACHED HERETO]²⁵⁸

SECTION 12.4—Third Party Telecommunications Service Providers

Tenant shall be entitled to obtain telecommunications services from third party service providers pursuant to the terms and conditions set forth in Exhibit H attached hereto.

SECTION 12.5—Rooftop Units

Any rooftop units ("RTUs") exclusively serving the Premises during the Term shall be subject to the provisions of Exhibit K attached hereto.

²⁵⁵ Depending on circumstances, excess usage could affect environmental reduction targets and LEED, Green Globes and ENERGY STAR certifications. In light of ENERGY STAR disclosure scores and recommissioning requirements, as well as the increased prominence of LEED-EB, this issue is becoming increasingly important. One option is to require the purchase of certified renewable credits by the tenant. This won't mitigate the certification risk but it would support achieving reduction targets. Another option may be to work with the tenant to adjust operating hours and temperature set points until any "spike" in usage is leveled. In negotiating such provisions, tenants may seek a notice and cure to protect against incurring such costs/obligations unannounced.

²⁵⁶ This clause provides another level of protection to a landlord who is concerned about tenant alterations that affect base building operations. In that sense, it is a backstop to, Section 10.2(a). If Section 10.2(a) is revised to grant a tenant some flexibility in making alterations, this provision may also need to be revised to conform, depending on what is done in Section 10.2(a).

²⁵⁷ This Section should be added only if a tenant specifically requests this right. This Section should not be offered in a landlord's standard lease form.

²⁵⁸ Add this Section only if a tenant specifically requests this right. This Section should not be offered in a landlord's standard lease form.

ARTICLE 13: INSPECTIONS BY LANDLORD

Tenant shall permit Landlord or its agents or representatives to enter the Premises, at any time and from time to time,²⁵⁹ without charge to Landlord and without diminution of the rent payable by Tenant, to examine, inspect²⁶⁰ and protect the Premises and the Building, to make such alterations²⁶¹ and/or repairs as in Landlord's sole judgment may be deemed necessary, or to exhibit the same to prospective purchasers and Mortgagees and, during the last twelve (12) months of the Lease Term²⁶² or at any time following Tenant's vacating the Premises or the initiation of any eviction proceeding,²⁶³ to exhibit the same to prospective tenants. In connection with any such entry, Landlord shall endeavor to minimize the disruption to Tenant's use of the Premises, but Landlord shall not be required to perform any alterations or repairs or make any entry at a time other than normal working hours.

ARTICLE 14: INSURANCE

SECTION 14.1—Tenant's²⁶⁴ Insurance

Tenant covenants and agrees to procure at its expense on or before the Lease Commencement Date and to keep in force during the Lease Term the following insurance naming Landlord, its management agent for the Property (the **"Building Manager"**), any Mortgagee and/or ground lessor of the Building and/or the Land, and Tenant as insured parties: (a) a commercial general liability²⁶⁵ insurance policy or such successor comparable form of coverage in the broadest form then available (a **"Liability Policy"**) written on an "occurrence basis" including, without limitation, blanket contractual liability coverage, business interruption, automobile, broad form property damage, independent contractor's coverage and personal injury coverage, protecting Landlord, the Building Manager, any Mortgagee and/or ground lessor, and Tenant against any liability whatsoever occasioned by any

259 Some tenants will want notice of such entries. A landlord can readily agree to give notice (e.g., "reasonable" notice) of these entries except in the case of emergency, but a landlord might want to specify that notices of these entries can be oral (notwithstanding what the generic notice clause found later says). Also, some tenants may want to restrict entries to "normal business hours" (again, this is usually acceptable, with an exception for emergencies). Some tenants may want to require that landlord's representatives be accompanied by tenant personnel, which can be troublesome because tenant personnel presumably have more pressing, at least to them, job obligations and certainly have little or no ability to sit and watch over longer-term entries (such as repair projects); but such a request can usually be accommodated with exception made in emergencies and maybe with some covenant on the tenant's part to make its personnel available. Finally, some tenants (such as government agencies or defense contractors) may simply not be allowed by law to authorize entries to the premises or to designated areas, and a landlord must respect that. In exchange, a landlord ought to make it clear that it does not have to provide services (e.g., janitorial, repairs) to any part of the premises to which it doesn't have access, and a landlord should ask the tenant to indemnify the landlord for any harm that comes to the building or its occupants and visitors as a result of anything happening in the off-limits areas.

260 The right to enter simply to "inspect," often not addressed in leases, takes on additional importance if the landlord is to effectively police a tenant's compliance with sustainability requirements.

261 Tenants may object to giving the landlord an open invitation to make "alterations" in their premises, even if they don't object to the landlord making "repairs." The tenant's fear is that "alterations" could be substantial and long-lasting and affect a significant part of the premises. Such an objection usually can be addressed by limiting the landlord's right to make "alterations" to "alterations that do not materially adversely affect Tenant's use and enjoyment of the Premises."

262 Some leases do not contain any time restriction on entry for the landlord's marketing purposes. This lease form does. The use of 12 months is arbitrary. Earlier access for marketing purposes may be needed in the context of a very large tenant, and, if a tenant has a right to renew, symmetry may make it palatable to allow landlord entries for marketing only after the tenant's renewal notice period has lapsed.

263 If the landlord agrees to a time restriction on entry for the landlord's marketing purposes, then add some flexibility so it is clear that the landlord can re-enter for marketing purposes if it is trying to evict the tenant.

264 Notice that there really isn't anything obligating the landlord to maintain any particular insurance. That is traditional.

265 "Commercial general liability" insurance was formerly known as "comprehensive general liability" insurance

occurrence on or about the Premises or any appurtenances thereto; (b) a fire and other casualty policy (a “Fire Policy”) insuring the full replacement value of all Alterations, regardless by whom installed,²⁶⁶ and all of the furniture, trade fixtures and other personal property of Tenant located in the Premises against loss or damage by fire, theft and such other risks or hazard; and (c) a policy of insurance against loss or damage to the major components of the air-conditioning and heating system, flywheels, steam pipes, steam turbines, steam engine, steam boilers and other pressure vessels, high pressure piping and machinery, if any, such as are installed by or on behalf of Tenant in the Premises.²⁶⁷ Such policies shall also insure against physical damage to the Premises arising out of an accident covered thereunder. Such policies are to be written by good and solvent insurance companies licensed to do business in the jurisdiction in which the Building is located satisfactory to Landlord, shall have not less than a Best’s A+ 10 rating and shall be in such limits and with such maximum deductibles as Landlord may reasonably require from time to time. As of the date of this Lease, Landlord requires limits of liability under: (x) the Liability Policy of not less than \$3,000,000 combined single limit per occurrence for bodily or personal injury (including death) and property damage combined plus business interruption coverage for at least 12 months of operations ; (y) the Fire Policy equal to the value of Tenant’s Alterations, furniture, trade fixtures and other personal property with a deductible of no more than \$1,000.00; and (z) machinery insurance for full replacement cost of equipment with a deductible of no more than \$1,000.00. Tenant will furnish Landlord with such information as Landlord may reasonably request from time to time as to the value of the items specified in clause (y) above within ten (10) days after request therefor. Such insurance may be carried under a blanket policy covering the Premises and other locations of Tenant, if any, provided that each such policy shall in all respects comply with this Article and shall specify (i) that the portion of the total coverage of such policy that is allocated to the Premises is in the amounts required pursuant to this Section and (ii) such policy shall also specify, or Tenant shall furnish Landlord a written statement from the insurer under such policy, that the protection afforded Tenant under any such blanket policy shall be no less than that which would have been afforded under a separate policy relating only to the Premises. Prior to the time insurance under this Section is first required to be carried by Tenant, and thereafter at least thirty (30) days prior to the expiration date of any such policy, Tenant agrees to deliver to Landlord an ACORD 27 certificate evidencing such insurance and payment of the premium therefor. Said certificate shall contain an endorsement that such insurance may not be²⁶⁹ canceled or amended except upon thirty (30) days’ prior written notice to Landlord. Notwithstanding anything to the contrary contained in this Lease, the carrying of insurance by Tenant in compliance with this Section shall not modify, reduce, limit or impair Tenant’s obligations and liabilities under any and every indemnity by Tenant to Landlord set forth in this Lease.

SECTION 14.2—Increases in Insurance Rates

Tenant shall not do or permit to be done any act or thing upon or about the Premises or the Property which will (i) result in the assertion of any defense by the insurer to any claim under, (ii) invalidate, or (iii) be in conflict with, the policies covering the Property, and fixtures and property therein, or which would increase the rate of fire insurance applicable to the Property to an amount higher than it otherwise would be; and Tenant shall neither do nor permit to be done any act or thing upon or about the Property which shall or might subject Landlord to any liability or responsibility for injury to any person or persons or to property; but nothing in this Section shall

266 Why is the tenant required to insure alterations when the landlord owns the alterations (see Section 10.4)?

267 Depending on local circumstances, it may be appropriate for a tenant to also carry specific coverages, such as flood, earthquake, terrorism, etc.

268 There is an interesting argument to be made that non-revenue-producing facilities need not be covered by business interruption insurance because the loss of the facility would not affect the tenant’s profitability. If the landlord agrees to omit the requirement that the tenant carry business interruption insurance, the tenant’s waiver of subrogation should be expanded to include a waiver of any claim the tenant might have that may have been covered by the foregone business interruption insurance (i.e., it’s as if the tenant carried the insurance).

269 Note the requirement that the insurance certificate state that the insurance “may not be” canceled or amended without notice to the landlord. Some insurers try to issue certificates stating only that they “will endeavor to” give notice to the landlord.

prevent Tenant's use of the Premises for the Permitted Use.²⁷⁰ If, as a result of any act or omission by or on the part of Tenant or violation of this Lease by Tenant, whether or not Landlord has consented to the same, the rate of "All Risk" or other type of insurance maintained by Landlord on the Property shall be increased to an amount higher than it otherwise would be, Tenant shall reimburse Landlord for all increases of Landlord's insurance premiums so caused; such reimbursement to be additional rent payable within five (5) days after demand therefor by Landlord. If, due to abandonment of or failure to occupy the Premises by Tenant, any insurance shall be canceled by the insurance carrier, then Tenant hereby indemnifies Landlord against liability which would have been covered by such insurance. In any action or proceeding wherein Landlord and Tenant are parties, a schedule or "make-up" of rates for the Property or Premises issued by the body making fire insurance rates or established by the insurance carrier providing coverage for the Property or Premises shall be presumptive evidence of the facts stated therein, including the items and charges taken into consideration in fixing the "All Risk" insurance rate then applicable to the Property or Premises.

SECTION 14.3—Notice of Accidents

Tenant shall give Landlord notice in case of crimes, solicitations, fire, accidents or other adverse incidents in the Premises or the Building promptly after Tenant is aware of such event.²⁷¹

SECTION 14.4—Waiver of Subrogation

Notwithstanding anything to the contrary contained in this Lease, Tenant agrees that it will, at its sole cost and expense, include in its property insurance policies appropriate clauses pursuant to which the insurance companies (a) waive all right of subrogation against Landlord and any tenant of space in the Building with respect to losses payable under such policies, and (b) agree that such policies shall not be invalidated should the insured waive in writing prior to a loss any or all right of recovery against any party for losses covered by such policies. Tenant shall furnish Landlord evidence satisfactory to Landlord evidencing the inclusion of said clauses in Tenant's property insurance policies. Provided that Landlord's right of full recovery under its property insurance policies is not adversely affected or prejudiced thereby, Landlord hereby waives any and all right of recovery which it might otherwise have against Tenant, its servants, agents and employees, for loss or damage occurring to the Building and fixtures, appurtenances and equipment therein to the extent the same is covered by Landlord's insurance, notwithstanding that such loss or damage may result from the negligence or fault of Tenant, its servants, employees or agents. Tenant hereby waives²⁷² any and all claims, rights of recovery, actions and causes of action which it might otherwise have against Landlord, its agents, servants and employees, and against every other tenant in the Building which shall have executed a similar waiver as set forth in this Section, for damage to the Premises, any Alterations, or for loss or damage to Tenant's furniture, furnishings, fixtures and other property, by reason of any cause required to be insured against under this Lease, regardless of cause or origin, including the negligence or fault of Landlord, its servants, agents or employees, or such other tenant or the servants, agents or employees thereof.

270 Without the preceding "but nothing..." clause, this Section 14.2 could allow the landlord to prohibit, via agreements between the landlord and its insurer over which the tenant has no control, tenant uses that are otherwise permitted by this lease.

271 Many leases simply require that the tenant give the landlord notice of all fire and accidents, regardless of tenant knowledge. Read literally, this would put the tenant in default for failing to notify the landlord of something the tenant may itself not be aware of, and even if the landlord had prior knowledge. (Of course, if the landlord is required to give the tenant notice and an opportunity to cure defaults, then the landlord would have knowledge of the problem and notify the tenant of the tenant's failure to give notice, which would give the tenant the opportunity to cure by in turn notifying the landlord of the issue that the landlord just notified the tenant.) If a lease requires tenant to give landlord notice of such incidents, such notice should not be a condition precedent to any landlord obligation to repair or restore.

272 This section contains a waiver of subrogation only by the tenant's insurer against the landlord. But each party waives the right to pursue the other party for claims that are insured or, in the case of the tenant, claims that are supposed to be insured. (Note that the waivers are not reciprocal.) Thus insurance, not contractual indemnification (Section 20.3), is really the manner in which the parties lay off risk.

ARTICLE 15: SERVICES AND UTILITIES²⁷³

SECTION 15.1 Services and Utilities

- (a) The normal hours of operation of the Building will be _____ a.m. to _____ p.m. on Monday through Friday (except legal holidays²⁷⁴). Building services shall also be available on Saturdays (except legal holidays) at no additional charge between the hours of _____ a.m. and _____ p.m. upon 24 hours advance notice (which may be telephonic or electronic) from Tenant.²⁷⁵ There will be no normal hours of operation of the Building on Sunday or legal holidays, and Landlord shall not be obligated to maintain or operate the Building at such times unless special arrangements are made by Tenant. Tenant shall have access to the Building and the Premises twenty-four (24) hours per day, every day of the year, subject to exclusion during emergencies or repairs if, in Landlord's sole judgment, such exclusion is necessary. Landlord will furnish all services and utilities required by this Lease only during the normal hours of operation of the Building unless otherwise specified herein.
- (b) Landlord shall provide janitorial service five days a week (excluding legal holidays).²⁷⁶ [IF PUSHED BY TENANT] The janitorial service shall use environmentally preferable janitorial paper products and trash bags when price, quality and availability are comparable to conventional products.

[ALTERNATE (b) FOR BUILDINGS WITH CLEANING SERVICE DURING NORMAL BUSINESS HOURS]

- [(b) Janitorial service may be conducted during normal business hours in accordance with Landlord's sustainability practices and will be done in such a way as to minimize unreasonable disruption with Tenant's use of the Premises.²⁷⁷ [IF PUSHED BY TENANT] The janitorial service shall use environmentally preferable janitorial paper products and trash bags when price, quality and availability are comparable to conventional products.]

273 A tenant admittedly has few remedies for a landlord's failure to provide services, particularly if the tenant has agreed that rent is payable without offset, as is customary. A right of termination is apocalyptic and, while therefore is unlikely to be exercised, must be strongly resisted by a landlord. Only large tenants with bargaining power should be granted termination rights as a remedy for default, and even then the remedy should only be exercisable after explicit default notice (or notices) are given, only if the problem is within the landlord's control and is not remedied, and probably only if the premises are not suitable for the conduct of the tenant's business. (The preceding statements do not apply to casualty or condemnation events, which are addressed elsewhere.)

274 "Legal holidays" is vague and gives the landlord significant discretion. Many tenants will want a more definitive listing of what constitutes a "legal holiday" so they will know which days they are going to be charged for overtime rates.

275 In the interest of energy efficiency and lower operating costs, LEED-EB asks that the parties consider the hours tenants actually work and reduce unneeded operating hours, as well as weekend operating hours if possible. In lieu of normally operating the Building on Saturdays, this lease takes the approach that Saturday operations are available (at no additional charge), but only upon request.

276 Prospective tenants should notice that nothing in this lease requires the landlord to provide "green cleaning" services. If a tenant desires the landlord to use green cleaning products, the tenant must negotiate for that in this lease (see Section 15.2(e) below for some examples of what might be required of a landlord in this regard). Also, a tenant trying to minimize its electric bill by minimizing the number of hours the lights are on may want janitorial services provided during the normal work day, instead of after-hours, and should consider the "Alternate" version of Section 15.1(b) provided here (perhaps making it mandatory rather than at the landlord's option).

277 Another option the landlord may want to consider is to encourage janitorial services during business hours by charging a premium for after-hour janitorial service or offering during-business-hour service at a discount. As a practical matter, there may be little or no price differential.

- (c) Landlord shall furnish to the Premises during normal hours of operation of the Building air-conditioning and heat during the seasons when they are required, as and to the extent determined in Landlord's reasonable judgment taking into account standards prevalent in comparable buildings in the market in which the Building is located.²⁷⁸ It is also agreed that if Tenant requires air-conditioning or heat beyond the normal hours of operation set forth herein, Landlord will furnish such air-conditioning or heat provided Tenant gives Landlord sufficient advance notice of such requirement,²⁷⁹ and Tenant hereby agrees to pay for such extra service in accordance with Landlord's then-current schedule of costs and assessments for such extra service.²⁸⁰ To maintain proper air balancing and pressurization, Tenant shall keep all of its suite entry doors closed except as actually used for ingress or egress.
- (d) Landlord shall provide water²⁸¹ and electricity to the Premises, twenty-four (24) hours per day,²⁸² for standard office equipment, as and to the extent determined by Landlord.²⁸³ Tenant shall use proven energy efficiency and carbon reduction measures in the Premises in compliance with ASHRAE 189.1 standards or other, more stringent, standards as may be imposed by law, including but not limited to using energy efficient light bulbs in task lighting, using daylighting measures to avoid over lighting interior spaces, closing window shades that face the sun, turning off such lights and equipment as is feasible at the end of the work day, and purchasing ENERGY STAR -qualified equipment and water-conserving plumbing fixtures when such equipment and/or fixtures are commercially available.
- (e) Landlord shall contract for the Building's electrical energy, which shall be redistributed to Tenant, and Tenant shall not be entitled to contract directly with any utility company for electrical energy to be supplied to the Premises.²⁸⁴ Landlord reserves the right to change electricity providers at any time, even if such change results in higher costs to Tenant. Landlord reserves the right to purchase green or renewable energy, even if such change results in higher costs to Tenant.

278 Many leases prefer to use more definitive seasonal temperature requirements. Instead of arguing about idiosyncratic temperature ranges, for a neutral stance the parties could simply cross-reference ANSI/ASHRAE Standard 55-2010, Thermal Environmental Conditions for Human Occupancy, and ANSI/ASHRAE Standard 62.1-2010, Ventilation for Acceptable Indoor Air Quality, as they may be amended, supplemented or replaced from time to time. In addition, a tenant may want promises that the building can be divided into different thermal zones and that zones can be adjusted or turned off when the facility is only partially occupied (which could mean during normal working hours as well as off-hours service). But some buildings cannot meet those standards and, in any event, this may be more specificity than most landlords (and tenants) care to address and landlords care to promise in most cases.

279 This lease uses only the vague phrase "sufficient advance notice." Many leases that more specifically address the issue use obsolete notice requirements, such as when a day or more of notice was required because buildings had to be operated manually, or such as requiring different notice for service over a weekend than over a holiday. If more precision than "sufficient advance notice" is desired or requested, the parties should read the requirements to make sure that they make sense.

280 This lease uses a vague concept of cost. There is no limitation of "at market" or "at cost" or whether "cost" includes depreciation (theoretically arising from the increased usage of the machinery). Some states prohibit landlords from marking up or profiting on these services.

281 If the landlord is to abide by any water efficiency guidelines, that should be written into the lease. Customary guidelines are those found in the U.S. Energy Policy Act of 1992, and many states, counties and municipalities have adopted their own code requirements.

282 This lease distinguishes between air-conditioning and heat, which are provided only during "normal hours of operation" under the preceding subsection, and water and electricity, which are provided 24/7/365. Many leases do not make this distinction, and include water and electricity as among the services provided only during normal hours of operation. Usually this is simply the result of poor drafting. However, an unscrupulous landlord could use such a clause to try to bill the tenant extra for water and electricity. Tenants should be alert to this distinction.

283 Again, note that this lease is somewhat vague on what equipment is considered to be standard and thus approved.

284 The landlord's argument for forbidding a tenant to obtain its own electricity is that the landlord does not want to lose any volume discount it obtains for its electricity by having tenants obtain their own electricity.

[ALTERNATE PROVISION IF TENANT IS ALLOWED TO BUY ITS OWN ELECTRICITY²⁸⁵].

- (e) Tenant shall be entitled to contract for its Premises' electricity supply directly with a utility company. The utility company must be a building-approved utility provider as determined by Landlord from time to time. Tenant may obtain the list of building-approved utility providers from the Building Manager and may suggest names for inclusion on the list. The terms and conditions of attached Exhibit I shall apply to any electric service obtained by Tenant for the Premises.
- (f) Landlord shall provide snow removal services for walkways and any outdoor driveways and parking areas located on the Property of the type customary for comparable buildings in the market in which the Building is located.
- (g) Landlord shall have the right to remove elevators from service as may be required for moving freight or for servicing or maintaining the elevators and/or the Building; provided, however, that Landlord will also provide at least one elevator²⁸⁶ subject to call for all tenants in general.
- (h) Tenant shall also be responsible for and agrees to pay the cost of all above-standard or non-standard uses of the utilities and services provided to the Premises.
- (i) Tenant shall be required to submit to Landlord energy and water consumption data and waste removal data, including total usage and total charges as they appear on Tenant's electric, gas, water and other utility bills, in a format deemed reasonably acceptable by Landlord, or original copies as may be required by local benchmarking/disclosure regulations or authorize owner to retrieve the data directly from the utility.²⁸⁷
- (j) Landlord shall provide the Building with an electronic perimeter access security system that includes 24-hour monitoring by a manned central station.

²⁸⁵ This provision and the accompanying Exhibit can be modified to address a tenant's direct procurement of other utilities, such as natural gas, and services such as waste haulage.

²⁸⁶ This clause is routine in modern leases, but a tenant should consider whether a single elevator can service the entire building before including it.

²⁸⁷ This seemingly simple, throw-away, requirement is likely to be enormously important as LEED and regulatory standards evolve to require more energy efficiency and, specifically, more energy benchmarking and reporting. Before objecting to this clause as onerous, a tenant should note that it starts with the assumption that information provided by the utility company to the tenant will be sufficient if forwarded to the landlord, so there isn't any additional monitoring by the tenant anticipated.

SECTION 15.2 Sustainability²⁸⁸

- (a) Landlord²⁸⁹ may be required to comply with code and/or,²⁹⁰ from time to time, decide to develop, maintain and/or operate the Building in accordance with third-party accreditations, ratings or certifications that relate to sustainability issues, energy efficiency or other comparable goals, including (without limitation) Third Party Sustainability Standards. Should Landlord make such a decision or applicable code require Landlord to develop, maintain and/or operate the Building accordingly, Tenant shall cooperate with Landlord's efforts in that regard.²⁹¹ Such cooperation shall include, without limitation, providing Landlord with information²⁹² within fourteen (14) days after a request is made about Tenant's occupancy as may be required by any such third-party agency, such as staffing levels, hours of operation, utility usage, commuting patterns (to the extent reasonably determinable), cleaning methods, build-out materials and techniques, furniture, fixtures and equipment inventories, and other purchasing information. The foregoing provisions shall apply whether

288 This green lease, unlike some others, does not include a preamble or environmental performance objective clause explaining the parties' general goals with respect to sustainability. Why, or why not? Such clauses are not found in any other provision of this or any other lease, so why should one be included here? Such clauses seem to respond to the ongoing social activism of the green movement, a need or desire to explain why it is better to be green than not to be green. However, a lease is not a "movement" manifesto, it is a legally binding contract between the landlord and the tenant. To the extent such preambles are vague or sweeping and attempt to establish noble concepts, and they usually are all of those, they run the risk of being deemed merely "aspirational," which calls their legal enforceability into question. To the extent such preambles do create legal obligations, the vague, broad and noble obligations so created are often internally inconsistent with each other or with other specific provisions already in the lease. Further, such preambles may create obligations that a party might not sign on to in the harsh light of a specific lease covenant. Thus, no identifiable legal "good" seems to arise from such statements of intent, and they can lead to more legal disputes than they can possibly solve.

289 The question is often asked by sustainability activists who are unfamiliar with leases whether successor landlords are bound by the sustainability provisions of the lease. The answer is an unqualified "yes" -- unless, of course, the lease contains a specific provision to the contrary for any one or more specific provisions. Unless otherwise specified, anything that is written in the lease document benefits and binds the original landlord, the original tenant, and all of their successors. This is as true of sustainability provisions as it is of all other lease provisions. However, it is critical for non-lawyers to understand that the parties are effectively bound only by what is written in the lease; unless expressly provided otherwise, the parties are not bound by oral agreements, pre-existing side letters, letters of intent, or any other handshake or implicit agreements. So all sustainability issues should be addressed in the lease, not left to be implemented as a matter of good faith or good will.

290 Note that this subsection is triggered by landlord's discretionary decision or code requirements that are ever-changing. In either case, compliance by the tenant is mandatory. As it relates to landlord's discretionary decision (and not to a legal requirement), a tenant should consider whether that is acceptable. For example, under this subsection and absent a legal requirement, the landlord has the option of seeking a third-party green certification, operating in accord with third-party standards but without seeking a formal certification, or neither. But if the landlord exercises its options, the tenant must cooperate. Should a landlord agree to obtain a third-party certification? Probably not, because the third-party is outside the landlord's control and the consequences of failure are entirely unclear (as are the direct benefits to the tenant of success). However, a tenant may be insistent and a more affirmative obligation may be created. In that regard, consider other possibilities, such as "using reasonable efforts" to obtain certification, or operating in substantial accord with the third-party standard even if formal certification isn't applied for. More broadly, note that nothing in this subsection requires the landlord to abide by sustainability standards in its own operation of the building or to impose or enforce sustainability requirements on other tenants, although there are some suggested clauses provided later in this section. Because the acts of the landlord or one tenant can affect other tenants environmentally, a tenant may want more assurance than this. However, a tenant should also consider that a landlord may have other tenants in place with non-green leases and there may be practical limits to this obligation.

291 Tenant's cooperation is required because it is otherwise unlikely that the building can successfully comply. For example, LEED-EB currently requires that the U.S. Green Building Council given access for five years after certification to water and energy usage data.

292 This information is required, or is expected to be required, by governments and third-party accreditation agencies. Landlords must therefore require tenants to cooperate. The question for a tenant is to what extent and at what cost must it cooperate.

Landlord affirmatively seeks an accreditation, rating or certification under a Third Party Sustainability Standard and to thereafter maintain the accreditation, rating or certification, or to operate voluntarily in accordance with some or all of such Third Party Sustainability Standards but without formally obtaining the accreditation, rating or certification.²⁹³

- (b) The parties hereto agree to comply with all mandatory²⁹⁴ and voluntary²⁹⁵ energy, water, recycling or other conservation controls or requirements applicable to office buildings issued by the federal, state, county, municipal or other applicable governments, or any public utility or insurance carrier²⁹⁶ including, without limitation, controls on the permitted range of temperature settings in office buildings or requirements necessitating curtailment of the volume of energy consumption or the hours of operation of the Building. Any terms or conditions of this Lease that conflict or interfere with compliance by Landlord with such controls or requirements shall be suspended for the duration of such controls or requirements. It is further agreed that compliance with such controls or requirements shall not be considered an eviction, actual or constructive, of Tenant from the Premises and shall not entitle Tenant to terminate this Lease or to an abatement or reduction of any rent payable hereunder.
- (c) Landlord may, at any time, install separate metering for the Premises or for any specific use within the Premises (including, without limitation, Tenant's datacenter, server rooms, or other information technology equipment²⁹⁷) for electricity, water, gas, steam, or other utility usage.²⁹⁸ Landlord shall have access to the

293 It is plausible that a landlord may choose to operate a building pursuant to a third-party sustainability program but choose to forego obtaining formal certification in order to save the often-considerable cost of obtaining the formal certification.

294 The parties would have to comply with all "mandatory" controls, so this phrase is included only to supersede any earlier specific agreement on temperature ranges or hours of operation. This clause firmly establishes that mandatory energy controls are a superseding event, even if the lease says otherwise.

295 Compliance with "voluntary" energy conservation measures may be more arguable. See Footnote 296.

296 The question arises whether the parties should also obligate themselves to abide by any voluntary energy, water, temperature, or other conservation controls issued by third-party rating organizations defined in this lease as Third Party Rating Standards. Such an obligation is, of course, a two-edged sword. From the landlord's point of view, this could obligate it contractually to do, perhaps building-wide, what it only aspired to do or maybe even what it cannot in reality do, particularly if such covenants do not exist in other leases in the building and other tenants have claims to other standards. This lease therefore avoids such sweeping entanglements. If a specific operating standard is desired, it might be best to include it here or in Section 15.2.

297 Both LEED and ENERGY STAR have certifications addressing the specific issues relating to data centers. The ENERGY STAR for Data Centers program was the first, and LEED followed later. ENERGY STAR for Data Centers is part of a joint initiative of the EPA and Department of Energy known as the National Data Center Energy Efficiency Information Program.

298 Separate metering, whether by direct meter, submeter or check meter, is probably the single most effective step to incentivize tenants to use electricity effectively. Yet it is not consistent with the pure "gross" lease concept advocated by some green leasing adherents. Separate metering isn't consistent with pure gross leases because gross leases assume that the base rent includes a component for the tenant's utilities while separate metering assumes the tenant pays utility costs in addition to base rent (what is common in residential leasing and referred to in some commercial leasing markets as "rent plus electric"). But leases, gross or net, without separate metering somewhat perversely incentivize tenant wastefulness in its own premises. And by not charging the tenant for its own energy usage, gross leases risk losing the tenant points toward LEED-CI certification. So the green adherents of gross leasing should applaud separate metering for incentivizing the tenant to control its own utility usage.

Premises as is reasonably necessary to accomplish the installation set forth in this paragraph. Such separate metering may be a direct meter, a submeter, a check meter. Any meter so installed may, at Landlord's option, be a "smart meter". The cost of installation shall be a capital expense that is included in Operating Charges on an amortized basis over the expected useful life of the meter.²⁹⁹ If such a meter is installed, Tenant shall pay for the consumption shown on the meter plus any fee applicable to reading the meter, either directly to the third-party utility provider in the case of a direct meter or to Landlord in the case of a submeter or check meter, and Tenant shall report to Landlord Tenant's usage as measured by the meter. If such a meter is installed, Tenant shall thereafter not be charged as an Operating Charge for any other tenant's use of that utility in the other tenant's own premises, but shall still be charged its pro rata share for the consumption of that utility in any part of the Building that is not leased to another tenant.

- (d) Tenant shall install automatic dimmer switches and occupancy sensors on all light fixtures so that they automatically switch off or dim when an area is unoccupied. Such sensors may be installed with manual overrides for areas that are normally occupied, such as individual offices and conference rooms.
- (e) Should Tenant be permitted to undertake its own cleaning of the Premises, Tenant shall adopt a low environmental impact cleaning policy and shall use only cleaning equipment that reduces impacts on indoor air quality. Without limiting the foregoing, Tenant shall use sustainable cleaning chemicals that meet the Green Seal GS-37 or the U.S. Environmental Protection Agency's Design for the Environment standards. For cleaning purposes, Tenant shall use micro-fiber wipes, dust cloths and dust mops in place of paper wipes (and where paper products are used, Tenant shall use products that contain at least 30 percent recycled content and which are recyclable). When chemicals for which the GS-37 or a U.S. Environmental Protection Agency's Design for the Environment rating are not applicable, the chemicals shall be durable, slip resistant and free of zinc (metal-free) and compliant with the Green Seal GS-40 Standard and/or CCD-147. Carpet care products shall meet the requirements of the Green Seal GS-37 Standard and/or CCD-148. Use of hand soaps that do not contain antimicrobial agents, except where required by health codes, and that meet Green Seal GS-41 Standard, is required. Proper training of maintenance personnel in the hazards, use, maintenance and disposal of cleaning chemicals, dispensing equipment and packaging is required. Tenant shall provide documentation that this policy has been followed, showing specifications for chemicals used, dates and activities associated with cleaning maintenance, and dates and outline of cleaning worker training. Tenant shall ensure that any cleaning contracts entered into by it require the cleaning contractor to comply with elements of any environmental management plan adopted by Landlord. Tenant shall ensure the cleaning contractor properly understands and is trained in the maintenance of specialized green facilities. Landlord reserves the right to approve, acting reasonably, any Tenant cleaning contractor or cleaning contract, but without liability on the part of Landlord.

²⁹⁹ Landlords and tenants seem to enjoy engaging in lengthy negotiations over which of them should pay the costs of installing a meter, a cost that is usually less than the legal fees spent debating it. (Assuming that the tenant's premises are already separately wired—a large "if"—the cost of the metering itself isn't significant. The significant cost is the cost of separating out various premises in the building so that each has separate wiring that can be separately metered. Some buildings simply are not configured to allow this. Even in buildings with more flexibility, this can be a formidable obstacle as spaces are consolidated, divided and otherwise changed over time. Further, consider that the landlord essentially has to keep separate operating cost books and bill tenants differently in a building in which some spaces are separately metered and other spaces are charged for their electric usage on a pro rata square footage basis.) This lease compromises by charging the tenant but amortizing the cost. The parties should confirm that any operating expense pass through in this section is consistent with the operating expense exclusion language.

- (f) Landlord shall be entitled at any time or from time to time to acquire all or part of the electrical power for the Building from sources with low greenhouse gas emissions.³⁰⁰ Any incremental cost in so doing above the cost of obtaining conventionally-generated electricity shall be included in Operating Charges.³⁰¹
- (g) Landlord may, at any time and from time to time, install and maintain a vegetated green roof on the Building. The cost of installation shall be borne by Landlord but the amortized cost may be included in Operating Costs to the extent that the green roof reduces the Building's energy costs, and the cost of maintaining such a green roof shall be an Operating Cost.³⁰²
- (h) Tenant acknowledges the use of treated recycled or treated natural water in washrooms and in other applications where potable water usage is not required. Tenant acknowledges that the Property may implement rainwater collection, treatment and reuse methods, natural plantings and other methods of reducing water usage, including the use of water-saving appliances, such as waterless urinals.
- (i) The pressure maintained in any food or other product preparation areas operated by Tenant shall be maintained at a negative pressure to control the migration of fumes or odors into the Building.³⁰³
- (j) Any carbon offset credits, renewable energy credits, tradable renewable credits, energy saving certificates, rebates, incentives, offsets, allowances and other similar entitlements, now or hereafter existing ("**Renewable Credits**") received by the Property or by Landlord and applicable to the Property shall belong to Landlord except to the extent, if any, to which (i) Tenant may be entitled to them under applicable law, in which event Tenant shall be entitled to the Renewable Credits to the extent required by law, (ii) the same arise directly from any action or activity undertaken by Tenant itself in the Premises that result in decreased consumption of natural resources by the Building or the avoidance of environmental impacts on air, soil or water, or (iii) Tenant may have paid as an Operating Charge or contributed to a cost or program that obtained the Renewable Credits and Tenant is not compensated under preceding clause (i) of this subsection (i), in which event Tenant shall be entitled to an equitable share, as determined by Landlord in its reasonable discretion, after first netting out the costs of participating in the carbon reduction program and/or of obtaining the credit.³⁰⁴

300 Such alternative power could be generated by means of solar, wind, tidal, biomass, etc. But tenants should keep in mind that low-emissions electric generation could also include nuclear and hydroelectric, two methods of generating power that may not find favor with environmentalists. A tenant desiring to negate nuclear or hydro power should expressly say so in the lease.

301 Alternative energy often costs more per kilowatt-hour than electricity generated through the traditional burning of fossil fuels. This subsection establishes that the tenant understands this and is agreeable to paying the additional costs.

302 If the building already has a green roof, a tenant might want to consider implications of removal of the green roof: What if the building's electric costs increase as a result of the green roof removal because of the loss of the green roof's beneficial effect on the building's temperature? Does the increase in electrical usage get passed through to the tenant? Is that increase at all set off by any savings arising from no longer paying to maintain a green roof? It's also important to keep in mind that the green roof is likely part of the building's compliance with stormwater management requirements or other development approvals, and as a result, the landlord will not take lightly any decision to remove the green roof.

303 Obviously, before agreeing to this, the landlord must confirm that the building performs accordingly.

304 Renewable Credits, carbon credit trading, and related concepts continue to evolve. This clause attempts to raise the issue and address some allocation of entitlement. Be aware that other green lease commentators advocate slightly different allocations, such as (i) full allocation to the tenant except to the extent the landlord has a legal entitlement, which is the reverse of what is proposed here, and (ii) leaving it to the landlord's discretion whether to give the tenant any share of the credit if the tenant paid some or all of the cost but the law does not mandate that the tenant be recompensed. Keep in mind that tenants traditionally don't benefit from any other rebate, credit or other incentive received by landlords, except, in some cases, those that offset real estate taxes, simply because so many of those rebates, credits or other incentives offset income taxes or other taxes the tenants don't directly pay anyway.

- (k) Each party shall provide the other party, upon request made from time to time, with such information about the base building (in the case of a request made to Landlord) or of the Premises (in the case of a request made to Tenant) as may be in the possession of the party of whom the request is made or of its architects, engineers or other consultants as may be applicable to determining or maintaining the sustainability of the Building and/or the Premises.³⁰⁵ This information may include, but shall not be limited to, information provided to the U.S. Green Building Council or the Green Building Initiative, or their affiliates or subsidiaries, or any comparable third-party certification agencies now or hereafter in existence, to substantiate any third-party rating. Each party shall hold the information so received from the other party as confidential except for its limited use to evidence compliance with any sustainability standard. A party shall not use, nor allow any of its parent, subsidiary or affiliated entities or architects, engineers, other consultants or advisors, subtenants, assignees or others claiming by or through that party to use, any of such information to challenge any sustainability score, rating, certification or other approval granted by any third party.
- (l) [IF THE BUILDING IS TRYING TO COMPLY WITH THE LEED-EB RATING SYSTEM, ADD:] Tenant shall adopt and implement an environmentally preferable purchasing policy in accordance with then-current version of LEED for Existing Buildings: Operations & Maintenance (“LEED-EB”) standards. In addition to complying with the purchasing policy established by LEED-EB for construction and operating materials acquired for the Premises, Tenant shall also maintain records sufficient to substantiate compliance and provide such records to Landlord upon request.
- (m) [IF PUSHED BY TENANT]³⁰⁶ Landlord shall cause the Building to comply with indoor air quality standards³⁰⁷ ASHRAE 55-2010 (Thermal Conditions for Human Occupancy) and 62.1-2010 (Ventilation for Acceptable Indoor Air Quality) and to be retrocommissioned³⁰⁸ not less frequently than every [six (6)]³⁰⁹

305 Each party’s sustainability effort may be dependent upon information known to the other, so a sharing of information is required. To quell fears that one party will use the information as a sword against the other, the last sentence of this section attempts to quash that hostile usage.

306 Nothing in this lease requires the landlord to operate in accordance with LEED-EB standards or to be formally certified as LEED-EB (or any comparable rating, such as Green Globes). If any of that is desired by a tenant and acceptable to a landlord, then such a covenant should be included in the lease. However, a landlord may refuse to make such a commitment, or dilute the commitment to a “reasonable efforts” standard, or otherwise specify that its failure to do so has no consequence. See Footnote 290. The issue of consequences—or, more likely, the absence of consequences—for not achieving green standards is an interesting one, as discussed elsewhere in this document. In a nutshell, the problem is simply that no one has yet figured out what consequences are appropriate to breaches of green covenants. Also, the American legal system, which focuses on granting monetary damages whenever possible, isn’t responsive to breaches of sustainability covenants because they are difficult, often impossible, to monetize.

307 Somewhat paradoxically, LEED’s increasing emphasis on energy efficiency leads to more tightly sealed building envelopes, which leads to the encapsulation of more air contaminants (e.g., particulate matter and volatile organic compounds emanating from building materials), which leads to complaints that LEED standards don’t give enough thought to indoor air quality and the health of occupants. Detractors claim that relatively few points are earned in LEED certification for “indoor environmental quality” and that most of those points are earned for lighting and thermal comfort, not for indoor air quality or health-related issues.

308 “Retrocommissioning” is a formal building inspection and evaluation in which operating systems are reviewed to see if they are performing in accordance with their design specifications. It is somewhat broader in scope than an energy audit.

309 A tenant might prefer retrocommissioning more frequently. It depends on the circumstances. Five years will satisfy 2009LEED-EB and BOMA 360 Performance Program standards in effect as this is written, which require requalifying the building every five years. But, for example, the United States General Services Administration, the chief civilian property-administering agency within the federal government, recommissions its owned (not leased) building stock every four years. ASHRAE is satisfied with recommissioning every six (6) years..

years in accordance with then-applicable ASHRAE standards. Landlord shall make such repairs and implement such changes in Building operations as are reasonably recommended by such a retrocommissioning exercise.³¹⁰

- (n) [IF PUSHED BY TENANT] Landlord shall install a direct digital control system to provide building system operational monitoring, energy management, and work space environmental management.³¹¹ Landlord shall make an electronic link to the system using available to Tenant in such a way that allows Tenant to monitor, but not otherwise direct or interface with, the information produced. If the electronic link uses proprietary software, it shall be Landlord's responsibility, at its own cost, to provide Tenant with hardware and software suitable for accessing the link; otherwise, it shall be Tenant's responsibility to obtain for itself hardware and software that is compatible with the link.
- (o) [IF PUSHED BY TENANT] Landlord shall provide an environmental performance report annually to Tenant.³¹² To the extent other tenants of the Building have reported their own consumption data to Landlord, such report shall address: the Building's ENERGY STAR rating; the Building's gross consumption, consumption per square foot, and consumption per occupant of electricity (and noting any alternative sources of electricity consumed), gas, other fuels, and water; and total gross waste (by ton) generated, sent to landfills or for incineration, or diverted from landfills and incineration.³¹³
- (p) [IF PUSHED BY TENANT] Landlord shall conduct a waste stream audit for the Building, including gathering information about paper, glass, plastics, cardboard and metals in the Building's waste stream. Landlord shall develop a reasonable reduction, recycling and disposal program for waste materials. Landlord shall also provide a recycling program for toner cartridges, fluorescent light bulbs, batteries, mobile phones, and other electronic devices. Specific areas shall be set aside for separation and storage of each type of waste. Landlord

310 A more aggressively pro-tenant version of this obligation would be to obligate the landlord to implement all retrofits suggested by a reputable third-party consultant, such as the utility company, perhaps within certain cost and payback parameters, which themselves would be extremely difficult to set unless they were very low and very short. A separate and significant issue is whether a landlord would be required to make capital improvements as a result of any retrocommissioning exercise, and, if so, whether a tenant would then be responsible for bearing some of the cost of the capital improvement, whether as an operating expense pass-through or otherwise, even if the capital improvement doesn't actually save operating expenses. This language should be consistent with the operating expense pass through language and exclusions.

311 Obviously, this subsection is only feasible for buildings which have the capability of installing such a system.

312 Landlords rarely volunteer to prepare these annual reports because of unfamiliarity with them, dependence on third parties (including tenants) for much of the information, and the uncertain consequences of default if the landlord fails to deliver a report. On the other hand, some governments are beginning to mandate disclosure of some of this information, particularly ENERGY STAR ratings. This is proving extremely problematic in cases where the landlord does not own the data, thus making it important for landlord to require tenant's cooperation to the extent possible in the lease. The ENERGY STAR Statement of Energy Performance provides a format to share ENERGY STAR and energy performance information with tenants.

313 If the landlord promises to abide by any sustainability covenants and/or provides statements to the tenant about the building's sustainability practices, should the tenant have the right to audit the landlord's practices and/or those statements like the tenant has the right to audit operating expenses under Section 4.7? (The same issue could arise if the landlord provided the tenant with building operating statements during the "wooing" period before the lease was signed and in any way implied that the building would continue to be operated in accordance with those statements and that operating costs would continue to be in line with what was shown there. For the sake of discussion, this ignores the legal issue that any such implied covenants or representations aren't binding because of express and standard lease provisions and, in the absence of "fraud in the inducement," i.e., fraudulent representations that induced the tenant to enter into the lease transaction, legal principles declaring ineffective anything and everything that happened before the lease was signed if it is not incorporated in the lease.) What would such an audit entail? Would it be the equivalent of a tenant-engaged retrocommissioning? Who would pay for the audit? What would happen as the outcome of the audit? Presumably, the landlord would be required to abide by any sustainability covenants the tenant can identify aren't being followed. But, more broadly, would a tenant be able to claim that certain operating standards aren't being followed and that its operating expense pass-throughs are therefore higher than justified? (That requires several sweeping assumptions, such as whether there is a direct effect of sustainability initiatives on operating costs, whether those effects are measurable, and whether those effects all tend to lower operating costs.)

shall also develop a waste disposal program that tracks types of waste loads, weights, hauling service, landfill or other repository name, and date accepted by the landfill or other repository. Landlord shall provide occupant education for Tenant's employees to encourage participation in these programs. Tenant shall cooperate in any such programs for its own equipment and practices and in any such education effort.

- (q) [IF PUSHED BY TENANT] Landlord shall retain and protect as much existing on-site vegetation as possible and restore degraded areas in accordance with ASHRAE 189.1 and applicable laws. New plantings shall use native and naturalized shrubs, ground covers and grasses with water requirements appropriate to local conditions. Trees should shade at least 60% of the impermeable surfaces of any area within the Property but outside the Building.
- (r) [IF PUSHED BY TENANT] Irrigation systems shall be fed only with captured rainwater, grey water,³¹⁴ or on-site treated water. Irrigation systems shall be controlled by rain gauges or soil moisture sensors to eliminate unnecessary irrigation during or after rain events.³¹⁵
- (s) [IF PUSHED BY TENANT]³¹⁶ Integrated pest management techniques, which emphasize minimizing the use of toxic pesticides and other harmful chemicals, shall be used.³¹⁷

SECTION 15.3 Interruption of Services and Utilities

It is understood and agreed that Landlord shall not have any liability whatsoever to Tenant as a result of Landlord's failure or inability to furnish any of the utilities or services³¹⁸ required to be furnished by Landlord hereunder, whether resulting from breakdown, removal from service for maintenance or repairs, strikes, scarcity of labor, Hazardous Materials, acts of God, governmental requirements or from any other cause whatsoever. It is further agreed that any such failure or inability to furnish the utilities or services required hereunder shall not be considered an eviction, actual or constructive, of Tenant from the Premises and shall not entitle Tenant to terminate this Lease or to an abatement or reduction of any rent payable hereunder.

314 Gray water is wastewater that has been somewhat treated but is not suitable for human consumption.

315 A standard such as "Irrigation technologies are to be applied at the lowest rate required to keep plants healthy" is not recommended simply because it is somewhat vague.

316 Leases rarely address pest control in any manner. That may be more a reflection that neither party wishes to acknowledge such a distasteful subject than any disagreement on substance. Most landlord leases will simply omit this subsection.

317 Only chemicals that meet San Francisco's "Reduced Risk Pesticide List, Tier 3" are permitted to be used freely by LEED-EB at this time. The use of other chemicals requires notification to building occupants.

318 This lease deliberately blends the terms "utilities and services" into a single phrase here and in the succeeding sentence. Even if the tenant agrees that the landlord has no responsibility for the failure of outside "utilities," should the landlord also have no responsibility for its own failure to provide "services"? And then the question is what remedy is appropriate for the tenant. A "rent offset" is the usual suggestion but the landlords almost universally reject that suggestion, particularly if it is applicable under vague circumstances and poorly-defined or unquantified damages. Similarly, tenant advocates routinely advocate that tenants should have "self-help" rights to perform the landlord's obligations, chiefly relating to repair and maintenance. This issue is more forcefully pushed among advocates of green buildings, who are worried that a landlord's failures will affect the sustainability of their own premises or of the building generally. The willingness of landlords to grant self-help rights to tenants is very limited, particularly in multi-tenant buildings. (There may be more willingness in single-tenant buildings, particularly in warehouse and retail situations where the building may be simpler structurally and mechanically and may even be a build-to-suit for the tenant.) A landlord may be more inclined to grant a right of self-help to the tenant in connection with a service if the task does not directly affect the building, e.g. if the tenant operates its own recycling program in reaction to a landlord's failure. But allowing tenants to tinker with building systems and building structural systems is something most landlords forbid. (A right of self-help often segues into a request for a rent offset so that the tenant can then reimburse itself for the costs expended. A landlord is likely to be resistant, particularly since there are usually no bounds on what the tenant may have expended and whether the expenditure was worthwhile.) And a tenant should also consider whether, in a practical sense, it has the capability of implementing a self-help remedy and whether it is prepared to face the consequences.

ARTICLE 16: LIABILITY OF LANDLORD

SECTION 16.1 No Liability of Landlord

Landlord shall not be liable to Tenant, its employees, agents, invitees, licensees, customers, clients, family members or guests for any damage, injury (including death), loss, compensation or claim, including, but not limited to, claims for the interruption or loss of Tenant's business, based on, arising out of, or resulting from any cause whatsoever, including, but not limited to, the following: repairs to any portion of the Premises or the Property; the negligence of Landlord or any of its servants, agents, contractors or employees; interruption in the use of the Premises; any accident or damage resulting from the use or operation (by Landlord, Tenant, or any other person or persons) of elevators, or of the heating, air-conditioning, electrical, or plumbing equipment or apparatus; the termination of this Lease by reason of the destruction of the Premises; any fire, explosion, falling plaster, steam, gas, robbery, theft, mysterious disappearance, and/or any other casualty; the actions of any other tenants of the Property or of any other person or persons; any failure or inability to furnish any of the utilities or services required to be furnished by Landlord hereunder; any leakage in any part or portion of the Premises or the Property, or from water, rain or snow that may leak into, or flow from, any part of the Premises or the Property, or from drains, pipes, appliances or plumbing work in the Property or from the roof, street or subsurface, or resulting from dampness or from any other cause of whatsoever nature. The occurrence of any of the foregoing items described in this Section shall not be considered an eviction, actual or constructive, of Tenant from the Premises and shall not entitle Tenant to terminate this Lease or to an abatement, set-off, counterclaim against, or reduction of, any rent payable hereunder. Any goods, property or personal effects stored or placed by Tenant or its employees in or about the Premises or Property shall be at the sole risk of Tenant, and Landlord shall not in any manner be held responsible therefor. It is understood that the employees of Landlord are prohibited from receiving any packages or other articles delivered to the Building for Tenant, and if any such employee receives any such package or articles, such employee shall be acting as the agent of Tenant for such purposes and not as the employee or agent of Landlord. Notwithstanding the foregoing provisions of this Section, Landlord shall not be released from liability to Tenant for any damage or injury caused by the willful misconduct³¹⁹ of Landlord or its employees. The provisions of this Section shall be subject and subordinate to any provision of this Lease expressly imposing a contractual obligation on Landlord.³²⁰ In no event shall Tenant make any claim against Landlord for consequential, indirect or punitive damages.

SECTION 16.2 Transfer by Landlord

In the event that at any time Landlord shall sell or transfer the Building, the transferor Landlord shall not be liable to Tenant for any obligations or liabilities based on or arising out of events or conditions occurring on or after the date of such sale or transfer.³²¹ Upon the closing date of such sale or transfer, Tenant is deemed to automatically attorn to the purchaser or transferee.³²²

319 Note that this lease exempts only the landlord's "willful misconduct" as a reason why the landlord may be held liable. Most leases will also exempt the landlord's "gross negligence." Then again, insurance is intended to provide the practical remedy.

320 This sentence is fairly unusual but is included to address laymen's concern that this section somehow overrides all of the landlord's contractual obligations in the rest of the lease when, in fact, the reverse is clearly intended and true.

321 Note that a transferor Landlord is not responsible for post-sale problems whereas an assignor tenant remains responsible for post-assignment problems. This is routine even if not symmetrical.

322 "Attorn" means recognize as the valid successor. Note that this clause makes the tenant's "attornment" to the new landlord automatic. For unclear reasons, many leases require that the tenant execute and deliver a document evidencing its attornment. That practice raises the question of what happens if either the new landlord forgets to ask the tenant to attorn or the new landlord asks but the tenant neglects or affirmatively refuses to respond. The lease could be written to make it clear that the landlord may, "at its option," ask the tenant to affirmatively attorn and that the tenant "shall execute and deliver" the attornment document, but that the tenant's failure to do so does not affect the effectiveness of the automatic attornment. Note that a successor landlord who acquires the property via a traditional arm's-length voluntary purchase succeeds to all of the benefits and burdens of the landlord, without benefit of the advantages given in Section 21.2(b) to mortgagees and ground lessors who foreclose or take title by deed-in-lieu of foreclosure.

SECTION 16.3 Disputed Payments

In the event that at any time during the Lease Term Tenant shall have a claim against Landlord, Tenant shall not have the right to deduct the amount allegedly owed to Tenant from any rent payable to Landlord hereunder, it being understood that Tenant's sole method for recovering upon such claim shall be to institute an independent action against Landlord.³²³

SECTION 16.4 Extent of Landlord's Liability³²⁴

Notwithstanding any other provision of this Lease whatsoever, no recourse shall be had on any of Landlord's obligations hereunder or for any claim based thereon or otherwise in respect thereof against any incorporator, subscriber to the capital stock, shareholder, officer or director of any corporation, or any partner or joint venturer of any partnership or joint venture, or any member or manager of any limited liability company, which shall be Landlord hereunder or included in the term "Landlord" or of any successor of any such corporation, limited liability company, partnership or joint venture, or against any principal, disclosed or undisclosed, or any affiliate of any party which shall be Landlord or included in the term "Landlord." All such liability is expressly waived and released by Tenant. Tenant shall look solely to Landlord's estate and interest in the Property³²⁵ for the satisfaction of any right or remedy of Tenant for the collection of a judgment or other judicial process or arbitration award requiring the payment of money by Landlord. No other property or assets of Landlord, Landlord's agents, incorporators, shareholders, officers, directors, partners, members, managers, principals (disclosed or undisclosed) or affiliates shall be subject to levy, lien, execution, attachment or other enforcement procedure for the satisfaction of Tenant's rights and remedies under or with respect to this Lease, the relationship of Landlord and Tenant hereunder or under law, or Tenant's use and occupancy of the Premises, or any other liability of Landlord to Tenant.

ARTICLE 17: RULES AND REGULATIONS

SECTION 17.1 Abide by Rules and Regulations³²⁶

Tenant and its agents, employees, invitees, licensees, customers, clients, family members, guests and subtenants shall at all times abide by and observe the rules and regulations promulgated by Landlord and attached hereto as Exhibit C and all other rules or regulations that Landlord may promulgate from time to time for the operation and maintenance of the Property, provided that notice thereof is given to Tenant and such other rules and regulations are not inconsistent with the provisions of this Lease.³²⁷

³²³ The concept of no offsets is repeated throughout this lease, perhaps unnecessarily, and is widespread in leasing.

³²⁴ Some variation of this clause is standard: a landlord's liability is limited to its interest in the property, and the landlord does not expose its other assets to liability.

³²⁵ "Estate and interest in the Property" is vague. There is a good pro-landlord argument to be made that it does not permit a tenant to try to seize the proceeds or rent stream or income from the property, but only the landlord's equity interest. If a tenant cannot chase "proceeds", the tenant has little practical recourse for recovery.

³²⁶ This is a good place for landlord to cross-reference any specific state or local laws that apply. Namely, if utility information will need to be collected for benchmarking purposes, that should be addressed, with quarterly or monthly collection required, as applicable.

³²⁷ Most leases omit the caveat that future rules and regulations can't be inconsistent with the lease itself. Some leases take a different approach and require that new rules and regulations be vaguely "reasonable."

SECTION 17.2 Other Tenants

Nothing contained in this Lease shall be construed as imposing upon Landlord any duty or obligation to enforce such rules and regulations or the terms, conditions or covenants contained in any other lease as against any other tenant, and Landlord shall not be liable to Tenant for the violation of such rules or regulations or lease by any other tenant or its employees, agents, invitees, licensees, customers, clients, family members, guests or subtenants.³²⁸

ARTICLE 18: DAMAGE OR DESTRUCTION

SECTION 18.1 Casualty

Subject to Sections 18.2 and 18.3 below, if during the Lease Term the Premises or the Property are totally or partially damaged or destroyed by a casualty,³²⁹ thereby rendering the Premises totally or partially inaccessible or unusable, Landlord shall diligently (taking into account the time necessary to effectuate a satisfactory settlement with any insurance company involved) restore and repair the Premises and the Property to substantially the same (or, at Landlord's option, better) condition they were in prior to such damage.³³⁰ Provided that such damage was not caused by the act or omission of Tenant or any of its employees, agents, licensees, subtenants, customers, clients, family members or guests,³³¹ until the repair and restoration of the Premises is completed Tenant shall be required to pay rent only for that part of the Premises that Tenant is able to use while repairs are being made, based on the ratio that the amount of usable rentable area bears to the total rentable area in the Premises.³³² Landlord shall bear the costs and expenses of repairing and restoring the Premises (with the exception of the Tenant Improvement Work or other Alterations), except that if such damage or destruction was caused by the act or omission of Tenant or any of its employees, agents, licensees, subtenants, customers, clients, family members or guests, upon written demand from Landlord, Tenant shall pay to Landlord the amount by which such costs and expenses exceed the insurance proceeds, if any, received by Landlord on account of such damage or destruction.³³³

328 Tenants occasionally ask but landlords rarely agree with one tenant to enforce their rules and regulations against other tenants. Doing so exposes the landlord to the problem of having no practical remedy against the third-party-tenant violator yet being exposed to some unstated liability to the first tenant. Also, of course, a landlord may not, in reality, treat every tenant the same in all circumstances.

329 Who makes this decision? Although it is not stated, it would seem that the landlord makes the decision because the action following the decision is solely up to the landlord.

330 The parties should consider whether they want any repair or rebuilding to exceed the building's "prior condition" and use then-current green building standards.

331 The phrase "and provided that such damage was not caused by the act or omission of Tenant or any of its employees, agents, licensees, subtenants, customers, clients, family members or guests" is not consistent with the earlier idea that the parties should really look to insurance, not to each other, to cover their losses. It also makes the tenant responsible for actions by third parties who may not be under the tenant's control. Notwithstanding the unfairness to tenants of this clause, it is commonplace in leases, perhaps out of some sense that "fault" still plays a role notwithstanding modern risk allocation via insurance.

332 This pro rata formula is commonly used but may not reflect the actual functionality of partially useful space. On the other hand, nothing else may be more practical or neutral.

333 The parties can negotiate which party should be responsible to cover any shortfall in insurance proceeds if damage arises from the tenant's actions. It seems fair that the party causing the damage should bear the cost. However, this clause is carefully written to impose the obligation on the tenant, arguably even if the casualty is not the tenant's fault or not primarily the tenant's fault. Also, should the tenant be responsible if the landlord underinsures?

SECTION 18.2 Limitations on Landlord's Obligations

Notwithstanding anything in [Section 18.1](#) or any other part of this Lease, (a) Landlord shall not be obligated to spend more than the net proceeds of insurance proceeds made available for such repair and restoration,³³⁴ and (b) if Landlord is obligated to repair and restore the Premises as provided in [Section 18.1](#), Landlord shall not be required to repair or restore any Tenant Improvement Work or other Alterations to the Premises (regardless of by whom they were made) or any trade fixtures, furnishings, equipment or personal property belonging to Tenant. It shall be Tenant's sole responsibility to repair and restore all such items. However, if requested by Tenant, Landlord shall repair any damage to the Tenant Improvement Work or other Alterations to the extent Tenant's insurance proceeds are sufficient and are made available to Landlord for that purpose.

SECTION 18.3 Right to Terminate

Notwithstanding anything to the contrary contained herein, (a) if there is a destruction of the Property that exceeds twenty-five percent (25%) of the replacement value of the Property from any risk, whether or not the Premises are damaged or destroyed,³³⁵ or (b) if Landlord reasonably believes that the repairs and restoration cannot be completed despite reasonable efforts within ninety (90)³³⁶ days after the occurrence of such damage,³³⁷ or (c) if Landlord reasonably believes that there will be less than two (2) years remaining in the Lease Term upon the substantial completion of such repairs and restoration,³³⁸ or (d) if a Mortgagee fails or refuses to make sufficient insurance proceeds available for repairs and restoration, or (e) if zoning or other applicable laws or regulations do not permit such repairs and restoration, Landlord³³⁹ shall have the right, at its sole option, to terminate this Lease by giving written notice of termination to Tenant within sixty (60) days after the occurrence of such damage. If this Lease is terminated pursuant to the preceding sentence, all rent payable hereunder shall be apportioned and paid to the date of the occurrence of such damage.

334 This sentence assumes, but is not expressly conditioned upon, the landlord maintaining commercially reasonable insurance.

335 Note that this right to terminate applies regardless of which party was (arguably) at fault for the damage in the first place. This provision tries to deal with the reality of restoring the building or premises.

336 A 90-day restoration period may be insufficient per the situation. It might not be long enough to even resolve an insurance claim. A tenant might want the landlord to incur a casualty requiring a longer restoration period before allowing the ultimate act of lease termination. A tenant might also want to allow a landlord to terminate this lease only if the landlord decides to cease operating the entire building, or otherwise require the landlord to exercise its rights in a nondiscriminatory fashion, or otherwise try to protect itself against the landlord using this clause "offensively" to terminate one tenant's lease so it can lease the same space to another expanding tenant. If the outcome of a negotiation of this clause is that the tenant gets a termination right of its own, then the restoration period is often lengthened so the termination option is less of a threat to the landlord (and to the tenant), and the tenant might also have to wait longer to terminate even if unable to use the premises in the interim.

337 Note that this clause addresses only an anticipated date of completion and does not impose any consequence on the landlord or give the tenant any remedy if the lease remains in effect but the landlord fails to meet the anticipated date of completion.

338 Most leases do not include this right given to the landlord to terminate if the lease term would be near expiration after the work is completed. However, as a practical matter a tenant in such circumstances may not object to this. At least it will avoid the impracticality to the tenant of having to move out in the interim while restoration is underway, only to then reoccupy the premises for a relatively short time before permanent move out.

339 Note that this paragraph gives only the landlord and not the tenant the right of decision. A tenant may want a comparable right of termination, although it is overly simplistic to think that the tenant's right would be identical to the landlord's right. A tenant's right to terminate should be customized to reflect the tenant's situation.

ARTICLE 19: CONDEMNATION

SECTION 19.1 Termination for Condemnation³⁴⁰

If the whole or a substantial part (as hereinafter defined) of the Premises and/or the Property or the use or occupancy of the Premises shall be taken or condemned by any governmental or quasi-governmental authority for any public or quasi-public use or purpose (including a sale thereof under threat of such taking), then this Lease shall terminate on the date title thereto vests in such governmental or quasi-governmental authority, and all rent payable hereunder shall be apportioned as of such date. If less than a substantial part of the Premises (or the use and occupancy thereof) is taken or condemned by any governmental or quasi-governmental authority for any public or quasi public use or purpose (including a sale thereof under threat of such a taking), this Lease shall continue in full force and effect, but the rent thereafter payable hereunder shall be equitably adjusted (on the basis of the ratio of the number of square feet of rentable area taken to the total rentable area in the Premises prior to such taking) as of the date title vests in the governmental or quasi-governmental authority. For purposes of this Section, a substantial part of the Premises or the Property shall be considered to have been taken if more than twenty-five percent (25%) of the Premises or Property is rendered unusable as a result of such taking.

SECTION 19.2 Award

All awards, damages and other compensation paid by the condemning authority on account of the taking or condemnation (or sale under threat of such a taking) shall belong to Landlord, and Tenant hereby assigns to Landlord all rights to such awards, damages and compensation. Tenant agrees not to make any claim against Landlord or the condemning authority for any portion of such award or compensation attributable to damages to the Premises, the value of the unexpired term of this Lease, the loss of profits or goodwill, Alterations or severance damages. Nothing contained herein, however, shall prevent Tenant from pursuing a separate claim against the condemning authority for the value of furnishings, equipment and trade fixtures installed in the Premises at Tenant's expense and for relocation expenses,³⁴¹ provided that such claim shall in no way diminish the award or compensation payable to or recoverable by Landlord in connection with such taking or condemnation.

340 See the footnotes to Article 18 above for commentary about similar provisions that are effective in a casualty loss situation and how they can be modified.

341 This type of formulation is typical in leases. The tenant may negotiate the right to pursue its own separate claims for any compensation allowed by the applicable eminent domain statute as long as "such claim shall in no way diminish the award or compensation payable to or recoverable by Landlord in connection with such taking or condemnation."

ARTICLE 20: DEFAULT BY TENANT

SECTION 20.1 Events of Default

The occurrence of any of the following shall constitute an “**Event of Default**” by Tenant under this Lease:

- (a) If Tenant fails to make any payment of rent when due³⁴² or, if no due date is specified in this Lease, within ten (10) days after notice is given.
- (b) If Tenant violates or fails to perform any obligation set forth in [Article 8](#), [Section 10.2](#), [Section 14.1](#), [Section 21.1](#), [Section 23.2](#), or [Section 24.2](#) of this Lease beyond the expiration of any period for performance or request, notice or cure period set forth or referred to therein.³⁴³
- (c) If (i) Tenant violates or fails to perform any other term, condition, covenant or agreement to be performed or observed by Tenant under this Lease (other than as specified in this Section)³⁴⁴ and (ii) Tenant has not been given notice of the same or a substantially similar³⁴⁵ violation or failure on three or more other occasions³⁴⁶ within the twelve (12) month period³⁴⁷ preceding the most recent violation or failure, regardless of whether such earlier violations or failures were cured within the allowed cure period,³⁴⁸ and (iii) such violation or failure shall continue for thirty (30) days after notice from Landlord to Tenant of such violation or failure;

342 Note that this lease gives the tenant no notice or cure period for most payment defaults. Notice and cure rights are negotiable. Forfeiture of a leasehold is a significant penalty for what may be an inadvertent default or a minor default. Conversely, a landlord does not want to get into playing a game of “chicken” with the tenant where the tenant delays payment of the rent until it receives a default notice. This game literally costs the landlord administrative cost and lost opportunity cost, and mocks the provision of the lease that rent is payable without notice or demand. As a compromise, a tenant may suggest a clause under which repeat offenders forfeit notice and cure rights while still protecting the tenant from a landlord who wields an inadvertent default as a sword. For example, clause (a) could be rewritten in its entirety as follows: “If Tenant fails to make any payment of rent when due, and (i) if a due date is specified in this Lease, either (a) Tenant has been sent more than two (2) notices of monetary default under this Lease in the preceding twelve (12) months, in which case an Event of Default shall exist without any further notice and cure period being afforded, or (b) if Tenant has not been sent more than two (2) notices of monetary default under this Lease in the preceding twelve (12) months, if such payment isn’t made within [seven (7)] days after Landlord gives Tenant notice of such default, or (ii) if no due date is specified in this Lease, within [ten (10)] days after notice is given.”

343 The viewpoint of this lease is that certain provisions already have predetermined compliance time periods and that granting additional notice and cure periods in this section would create a double performance period. However, note that their predetermined compliance time periods may well be shorter than the generic non-monetary cure period and there may be no notice of default required under those other provisions. A tenant may or may not accept this outcome.

344 There is debate whether violation of “green” covenants should be a default. The rationale for exempting violations of green covenants seems to be an outgrowth of green as a social movement promoting harmony, not from any particular legal issue. If a violation of a green covenant is not a default, then the covenant itself becomes only aspirational, and green covenants would then be treated differently than all other covenants in the lease. This lease takes the approach that a violation of a green covenant is as much a default as the violation of any other covenant. (If a different approach is desired, the parties must expressly and affirmatively provide for it, and must identify which covenants are green covenants for that purpose.) Of course, even if violations of green covenants are defaults the practical problem remains of finding remedies that are practical for green defaults, but that problem applies broadly to not only green defaults but to most non-monetary defaults.

345 “Substantially similar” is intended to avoid defeating use of this “repeat default” clause on technical excuses.

346 This legal phrasing gives the tenant two opportunities of occurrence. The third occurrence precludes any further notice or cure opportunity. Some leases that use this concept only give the tenant one prior occurrence.

347 This clause uses a rolling 12-month period. Another method is to use calendar years or Lease Years, so the tenant periodically starts with a clean slate. At the other extreme, some leases that use the repeat default concept just omit “within the... violation or failure” phrase entirely so that the third similar default at any time during the entire lease term is fatal.

348 Curing prior defaults does not negate the application of a “repeat default” clause. The purpose of the “repeat default” clause is to protect the landlord against a recidivist tenant. If the clause “regardless whether ... allowed cure period” is omitted, then there is no point to a “repeat default” clause. Each default then stands on its own.

shall continue for thirty (30) days after notice from Landlord to Tenant of such violation or failure; provided, however, that if such violation or failure is capable of being cured but is not capable of being cured within such thirty (30) day period despite reasonable diligence,³⁴⁹ then such thirty (30) day period shall be extended for such reasonable period, not to exceed an additional sixty (60) days,³⁵⁰ in which Tenant may cure the violation or failure if Tenant commences its cure within the initial thirty (30) day period and prosecutes the cure diligently to completion thereafter. If Tenant has been given notice of the same or a substantially similar violation or failure on two (2) or more other occasions within the twelve (12) month period preceding the most recent violation or failure, regardless whether such earlier violations or failures were cured within the allowed cure period, then the current violation shall be an Event of Default without any further notice or cure period being afforded.³⁵¹

- (d) If Tenant abandons³⁵² the Premises.
- (e) If Tenant or any guarantor (i) is voluntarily adjudicated bankrupt or insolvent, (ii) seeks or consents to the appointment of a receiver or trustee for itself or for all or a part of its property, (iii) files a petition seeking relief under the bankruptcy or similar laws of the United States or any state or any other jurisdiction, (iv) makes a general assignment for the benefit of creditors, or (v) admits in writing its inability to pay its debts as they mature.
- (f) If a petition is filed against Tenant or any guarantor seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future Federal or State law or other statute, law or regulation and shall remain undismissed or unstayed for sixty (60) days,³⁵³ or if any trustee, receiver or liquidator of Tenant or any guarantor, or of all or any substantial part of its properties, shall be appointed without the consent or acquiescence of Tenant or any guarantor and such appointment shall remain unvacated or unstayed for sixty (60) days.
- (g) If any attachment or execution of any type, including but not limited to federal, state, or municipal tax liens, is issued against Tenant or any guarantor, or Tenant's property located on the Premises, or Tenant's rights or interest in the Lease, or guarantor's or Tenant's assets of any type or nature whatsoever, and such is not dismissed or released within ten (10) days thereafter or such lesser time as may be necessary to avoid loss of such property, rights or assets.

349 There is little point to granting an extension if a cure cannot be accomplished at all.

350 The cure period is extended only for a "reasonable period," which could be less than 60 days. The cap of an additional 60 days is intended to create some finality to this process. It gives the tenant a total of 90 days.

351 This sentence reiterates the earlier provisions that the third occurrence is final and makes the important clarification that the third occurrence is not curable and does not require notice.

352 "Abandoning" often requires that a tenant make clear that there is no intention of returning to the premises and may require that the tenant stop paying rent and/or maintaining the premises as proof of abandonment, in which case other default clauses will presumably be sufficient to establish the existence of a default. Because "abandoning" can have a legal meaning and various interpretations, it is important to define its intended meaning in the lease. Some leases attempt to clarify "abandonment" by incorporating other defaults into the definition. Is the abandonment default not then redundant? Conversely, many leases make it a default if the tenant "vacates or abandons" the premises. "Vacating" may be a much more benign act than "abandonment" (maybe the tenant has moved out in anticipation of subleasing the premises, or in connection with alterations, or because the tenant closes its business for a week or a month during a traditional slack time), and there is some question whether a tenant ought to be in default for "vacating" if it is still paying the rent and otherwise performing under the lease. In a retail lease, circumstances may be different, particularly if percentage rent is involved or other retailers are dependent on each other for generating traffic or the building's appearance will suffer if a storefront is vacant. In a retail lease, there may also be a "covenant of continuous use," discussed in Section 6.1 of this lease.

353 The 60-day periods in this paragraph are fairly brief. Ninety (90) days may be appropriate.

SECTION 20.2 Landlord's Rights To Terminate, Evict, Collect Rent, Liquidated Damages³⁵⁴

If an Event of Default occurs under this Lease, Landlord shall have the following rights:³⁵⁵

- (a) The right, at its sole option, to terminate this Lease. If Landlord elects to terminate this Lease, everything contained in this Lease on the part of the Landlord to be done and performed shall cease without prejudice, subject, however, to the right of Landlord to recover from Tenant all rent accrued up to the time of termination or recovery of possession by Landlord, whichever is later.
- (b) With or without terminating this Lease,³⁵⁶ Landlord may re-enter and take possession of the Premises, and the provisions of this Article shall operate as a notice to quit; any other notice to quit or notice of Landlord's intention to re-enter the Premises is hereby expressly waived. If necessary, Landlord may proceed to recover possession of the Premises under and by virtue of the laws of the jurisdiction in which the Building is located, or by such other proceedings, including re-entry and possession, as may be applicable.³⁵⁷
- (c) Any abated rent provided in this Lease and the leasing commissions paid by Landlord in connection with this Lease shall immediately become due and payable by Tenant to Landlord.³⁵⁸
- (d) Whether or not this Lease is terminated by reason of Tenant's default, the Premises may be re-let by Landlord for such rent and upon such terms as Landlord deems reasonable under the circumstances and Tenant shall be liable for all damages sustained by Landlord, including, without limitation, deficiency in fixed and additional rent, return of any and all abated rent and brokerage commissions paid by Landlord hereunder,³⁵⁹ reasonable attorneys' fees, brokerage fees and the expenses of placing the Premises in first-class rentable condition.³⁶⁰ Any damages or loss of rent sustained by Landlord may be recovered by Landlord at the time of the re-letting or in separate actions from time to time, as said damage shall have been made more easily ascertainable by successive re-letting, or, at Landlord's option, may be deferred until the expiration of the Lease Term, in which event Tenant hereby agrees that the cause of action shall not be deemed to have accrued until the date of expi-

³⁵⁴ Remedies should be adapted to local landlord-tenant law and to local practice. There are states where, regardless of the lease language, judicial processes must be followed in order to evict a tenant or exercise other remedies.

³⁵⁵ This lease does not provide for mediation or arbitration of "green" defaults, as some suggest. As is always the case with mediation, it is never clear what happens as a result. Arbitration is not made a remedy for a green default not because of any hostility to arbitration but because this lease treats green defaults the same as all other defaults and does not provide for any arbitration of any defaults. If a lease provides for arbitration of other defaults, then green defaults could be easily arbitrated as well.

³⁵⁶ There is often a substantive difference between terminating the lease and evicting the tenant without terminating the lease. If the lease is terminated, the tenant has no prospective liability. However, this is not palatable to most landlords because they want the right to hold the defaulting tenant liable for the rent for the remainder of the originally anticipated lease term. As is often the case, this lease blends the remedies so that the defaulting tenant is always, by contract, liable for the balance of the original lease term, whether the lease is terminated or the tenant is evicted.

³⁵⁷ A tenant in a jurisdiction that allows a landlord to unilaterally evict a tenant, sometimes referred to as a "self-help eviction," without any judicial process, may want to negotiate this clause to provide additional notice, waiting periods, cure periods, limitations on exercise (e.g., if the tenant has contested the existence of the default in writing), etc. Otherwise, the tenant is at the landlord's mercy. And, even if the landlord turns out to have been wrong, the tenant is out of the premises and fighting somewhat of an uphill battle.

³⁵⁸ This sentence allows the landlord to recover any abated rent, as if the abatement was expressly granted only on condition of the tenant's compliance. In most circumstances, no such condition is understood at the time of lease inception, and the landlord wrote off the abated rent as part of "the deal." This sentence would therefore allow the landlord to collect more in a default situation than it would if the lease was fully performed. Also, under this sentence the landlord can recover the leasing commission paid for this lease. But, per subsections (d) and (e), the landlord can also recover the rent for the remainder of what would have been the lease term. That rent stream presumably included a component for the recovery of the leasing commission. Tenants should protect against any implication of double recovery.

³⁵⁹ See the preceding footnote for a discussion of collection of abated rent and leasing commissions.

³⁶⁰ Aren't the brokerage fees, attorneys' fees and build-out costs for the new lease baked in to the successor tenant's own rent? If so, why is the defaulting tenant also paying those costs? Tenants should protect against any implication of double recovery.

ration of the Lease Term.³⁶¹ Tenant shall not be entitled to receive any excess of any such rents collected from a third party over the rent reserved herein.³⁶²

- (e) Landlord shall become entitled to recover from Tenant as and for liquidated damages³⁶³ for Tenant's default hereunder, the difference, discounted to present value by applying a discount rate equal to [five percent (5%)], between (i) the Fixed Annual Rent reserved hereunder for what, but for any such termination, would have been the unexpired portion of the Lease Term, and (ii) the cash rental value of the Premises for such unexpired portion of the Lease Term (unless the statute that governs or shall govern the proceedings in which such damages are to be proved limits the amount of such claim capable of being so proved, in which case Landlord shall be entitled to prove as and for liquidated damages an amount equal to that allowed by or under any such statute). In calculating such liquidated damages, the then cash rental value of the Premises shall be deemed prima facie to be the actual rent received by Landlord for the Premises upon a re-letting or, if not received, the estimated cash rental value of the Premises upon any re-letting, as determined by a broker or an appraiser selected by Landlord.³⁶⁴ The provisions of this subsection shall be without prejudice to Landlord's right to prove and collect, in full, damages for all rent accrued prior to the termination of this Lease but not paid.³⁶⁵
- (f) Enforce any claim Landlord may have against Tenant for anticipatory breach of this Lease

SECTION 20.3 Indemnity by Tenant³⁶⁶

Tenant shall indemnify Landlord and defend Landlord and save it harmless from and against any and all claims, suits, actions, proceedings, liabilities, damages, costs or expenses, including [reasonable] attorneys' fees,³⁶⁷ arising (i) from any act, omission or negligence of Tenant or its officers, contractors, licensees, agents, employees, guests, invitees or visitors³⁶⁸ in or about the Property, (ii) from Tenant's use or occupancy of the Premises or the

³⁶¹ This clause attempts to save the landlord from the hassle of having to sue every month for the lost rent or risk having the statute of limitations start running.

³⁶² The tenant always bears the risk of the landlord losing money on the successor tenant, but the tenant never gets the reciprocal benefit if the landlord makes money on the successor tenant.

³⁶³ This subsection creates a right on the landlord's part to accelerate the rent for the remainder of the term, but only if and only to the extent that the tenant's rent is above fair market rent, and even then with a five percent present value discount. Clauses that allow landlords to accelerate all of the rent, while also allowing the landlord to retain all of the rent from a replacement tenant, or that do not apply at least some present value discount, run the risk of being voided as "penalties." As a practical matter, of course, there is some question whether a defaulted tenant could actually pay such accelerated rent, but at least the landlord may have claim for the full amount and be able to seek a judgment lien for the full accelerated amount and establish its priority against subsequent creditors.

³⁶⁴ Many "accelerated rent" remedies refer to the fair market rent but do not say how it is determined. In that vacuum, the defaulted tenant may then challenge the determination, which effectively moots the landlord's ability to quickly and unilaterally implement this clause.

³⁶⁵ The final sentence of this Section is intended to clarify that the only rent being accelerated is the future rent. The past due rent is due in full, whether more than or less than then-market value and without any present value discount.

³⁶⁶ Thanks to the introduction of sustainability concepts in this lease and the introduction of sustainability-based incentives under government programs and in the marketplace, the scope of the tenant's potential indemnification liability has broadened. This could arguably include loss of financing, loss of favorable zoning or other land use entitlement, forfeiture of a tax incentive or a grant, forfeiture of an ENERGY STAR label, loss of a potential tenant who is very sustainability conscious, forfeiture of a LEED certification (if the landlord fails to provide the U.S. Green Building Council with the required operating data, some of which probably needs to be provided by the tenant) or, of course, in jurisdictions with green building codes, inability to obtain a certificate of occupancy. These indirect consequences may be more than a tenant is willing to accept, which may also be true of the application of this section to traditional non-green issues. The benefit to the landlord of applying an indemnification clause to green or any other nonmonetary covenants is that it may give the landlord its only effective remedy because the field is too new to understand the applicability of traditional damages and remedies.

³⁶⁷ Some states require that indemnities that cover attorneys' fees be limited to "reasonable attorneys' fees."

³⁶⁸ Some tenants may argue that they cannot control "guests, invitees or visitors" and therefore should not be liable for their actions. Some landlords find this acceptable (particularly because both parties are primarily looking to insurance for coverage anyway). Other landlords will argue that may be so, but that a tenant is more capable than a landlord in controlling the tenant's "guests, invitees or visitors."

business conducted by Tenant therein, (iii) from any breach or default under this Lease by Tenant,³⁶⁹ (iv) from, or relating to, the enforcement by Landlord of the provisions of this Lease as against Tenant, or (v) from any accident, injury or damage, howsoever and by whomsoever caused, to any person or property, occurring in or about the Premises or, when relating to or arising from the tenancy, the Building or the Property. This provision shall not be construed to make Tenant responsible for loss, damage, liability or expense resulting from injuries (or death) to third parties to the extent caused solely³⁷⁰ and directly by the gross negligence or willful misconduct of Landlord or its officers, contractors, licensees, agents, employees or invitees. The provisions of this Section shall survive the expiration or termination of this Lease.

SECTION 20.4 Landlord's Right to Cure

If Tenant defaults in the making of any payment or in the doing of any act herein required to be made or done by Tenant, then Landlord may, but shall not be required to, make such payment³⁷¹ or do such act.³⁷² If Landlord elects to make such payment or do such act, all costs and expenses incurred by Landlord, plus interest thereon at the rate of eighteen percent (18%) per annum³⁷³ (or such lesser rate as is then allowed by applicable law) from the date paid by Landlord to the date of payment thereof by Tenant, shall be immediately paid by Tenant to Landlord as additional rent upon demand. The making of any payment or the taking of such action by Landlord shall not be considered as a cure of such default by Tenant or prevent Landlord from pursuing any remedy it is otherwise entitled to pursue in connection with such default.

SECTION 20.5 Landlord's Lien

In addition to any statutory lien granted by applicable law, Landlord shall have a lien upon, and Tenant hereby grants to Landlord a security interest in, all personal property of Tenant now or hereafter located in the Premises as security for the payment of all rent and the performance of all other obligations of Tenant required by this Lease.³⁷⁵ In order to perfect and enforce said lien and security interest, Tenant agrees to execute all required

369 Clause (iii) casually expands the landlord's remedies well beyond those found in Section 20.2, which is the provision that purports to cover remedies. The tenant's contractual liability insurance, required under Section 14.1, should cover this.

370 This lease uses a one-sided old-school "contributory negligence" concept to limit the landlord's liability: only if the landlord is solely responsible is the tenant released. Thus, if this tenant, or any other person, is even minimally responsible for the problem, this tenant is indemnifying the landlord. Most modern agreements will use a balance based more on "comparative negligence," i.e., to what extent each party is responsible. The waiver of subrogation regarding insurance proceeds should, as a practical matter, make this debate mostly academic.

371 Read literally, in addition to empowering the landlord to act for defaulting tenant, this section allows the landlord to pay itself the defaulted rent and then charge the tenant up to 18 percent annual interest. Would a landlord really do that? Eighteen percent (18%) per annum interest is an attractive rate of return, but consider the likelihood of recovering it from a defaulted tenant. A landlord may be willing to clarify that this section does not apply to payment defaults of base rent and operating expense and real estate tax pass-throughs.

372 Landlord's right to do other acts may include the authority of landlord to get data directly from a utility company as necessary.

373 A common alternative interest rate is 5 percent over the prime rate as published in The Wall Street Journal as of the date the cost was paid by the landlord.

374 Local law (particularly the Uniform Commercial Code) should be checked before utilizing this clause. Obviously, a retailer would be crippled by giving a landlord a lien on inventory. Even a service-sector tenant or other non-retailer should consider whether to agree to this remedy. Going further, a tenant in a jurisdiction that has a statutory landlord's lien may want the landlord to affirmatively waive the statutory landlord's lien. If the statutory landlord's lien is of no practical value to the landlord anyway, the landlord may be amenable.

375 A tenant who does agree to this section should consider whether this lien should be automatically subordinated to any and all other liens the tenant might grant. The theory is that the granting of this lien is a significant burden on the tenant and has limited value to the landlord anyway, so subordinating this landlord's lien is of great value to a tenant and not materially detrimental to a landlord.

financing statements. At any time after an Event of Default by Tenant, Tenant may not remove and, without further notice to Tenant, Landlord may enter the Premises and seize and take possession of any and all personal property belonging to Tenant which may be found in and upon the Premises. If Tenant fails to redeem the personal property so seized by payment of all sums due Landlord under and by virtue of this Lease, Landlord shall have the right, after ten (10) days' written notice to Tenant, to sell such personal property so seized at public or private sale and upon such terms and conditions as may appear advantageous to Landlord. Landlord may be the purchaser at any such sale. After the payment of all proper charges incident to such sale, the proceeds thereof shall be applied to the payment of any and all sums due to Landlord pursuant to this Lease. In the event there shall be any surplus remaining after the payment of any sums due to Landlord, such surplus shall be paid over to Tenant.

SECTION 20.6 Attorney's Fees

If, as a result of any alleged breach or default in the performance of any of the provisions of this Lease, Landlord uses the services of an attorney in order to secure compliance with such provisions or recover damages therefor or possession of the Premises, or if Landlord is made a party to any action as a result of any alleged act or failure to act of Tenant, then Tenant shall reimburse Landlord upon demand for any and all reasonable attorneys' fees and expenses so incurred by Landlord as additional rent within [five (5)] days after Landlord's demand therefor.³⁷⁶

SECTION 20.7 Landlord's Rights Cumulative

All rights and remedies of Landlord set forth herein are in addition to all other rights and remedies available to Landlord at law or in equity. All rights and remedies available to Landlord hereunder or at law or in equity (including, without limitation, injunction, temporary restraining order and specific performance) are expressly reserved and declared to be cumulative. The exercise by Landlord of any such right or remedy shall not prevent the concurrent or subsequent exercise of any other right or remedy.³⁷⁷

SECTION 20.8 No Waiver By Landlord

No delay in the enforcement or exercise of any right or remedy shall constitute a waiver of any default by Tenant hereunder or of any of Landlord's rights or remedies in connection therewith. Landlord shall not be deemed to have waived any default by Tenant hereunder unless such waiver is set forth in a written instrument signed by Landlord. If Landlord waives in writing any default by Tenant, such waiver shall not be construed as a waiver of any covenant, condition or agreement set forth in this Lease except as to the specific circumstances described in such written waiver. If Landlord institutes proceedings against Tenant and a compromise or settlement thereof is made, the same shall not constitute a waiver of the same or any other covenant, condition or agreement set forth herein or of any of Landlord's rights hereunder. Neither the payment by Tenant of a lesser amount than the rent due hereunder nor any endorsement or statement on any check or letter accompanying a check for payment of rent shall 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 to pursue any other remedy available to Landlord. No reentry by Landlord, and no acceptance by Landlord of keys from Tenant, shall be considered an acceptance of a surrender of this Lease.

³⁷⁶ Note that this provision does not reciprocally grant the tenant a right to charge the landlord attorneys' fees in the event the tenant sues the landlord for breach. This lease, like most leases, does not really even acknowledge the concept that the landlord could default, which enables this lease, like most leases, to avoid having to deal with the consequences that could follow from a default by the landlord.

³⁷⁷ While they track the general remedies under the lease, defaults under the lease's green provisions may result in a tenant being responsible for noncompliance costs and higher charges for waste removal and utility consumption. With the expansion of regulatory requirements, landlords are at increased risk in connection with tenant's noncompliance with green covenants. Landlord needs to be sure it can be made whole if tenant defaults under green requirements. Are there other remedies appropriate to green defaults? Some commentators suggest an increase in rent or the imposition of fines, but rarely do they suggest how to implement such concepts and, in particular, what dollar amounts are appropriate. Would the same dollar amount or percentage of base rent apply to all green defaults? If this approach is so useful in the context of green defaults, why isn't it in common use for traditional, non-green, nonmonetary defaults generally?

ARTICLE 21: SUBORDINATION AND ATTORNMENT³⁷⁸

SECTION 21.1 Subordination

This Lease and Tenant's interest hereunder is and shall remain subject and subordinate (i) to any document encumbering title to the Building and now or hereafter recorded in the land records where the Building is located, including, without limitation, any historic preservation or conservation easement, and (ii) to the lien of any and all current and future **"Mortgages"** (which term shall include both construction and permanent financing and shall include mortgages, deeds of trust, deeds to secure debt and similar security instruments, and **"Mortgagee"** shall mean the holder or beneficiary or secured party under any Mortgage), and ground leases which may now or hereafter encumber the Building and/or the Land, or any part thereof, and to all and any renewals, extensions, modifications, recasts or refinances thereof. At any time after the execution of this Lease, the holder of any Mortgage or ground lease to which this Lease is subordinate shall have the right to declare this Lease to be superior to the lien of such Mortgage or such ground lease. The foregoing subordination and/or superiority shall be automatic and shall not require execution of a separate instrument of subordination or superiority to be effective; however, in confirmation thereof, Tenant shall, within ten (10) days³⁷⁹ after Landlord's request, execute any requisite or appropriate certificate or other document.³⁸⁰ Tenant hereby constitutes and appoints Landlord as Tenant's attorney-in-fact to execute any such certificate or other document for or on behalf of Tenant.³⁸¹

378 This Article addresses "subordination"—the tenant agrees that this lease can be wiped out in a foreclosure of a mortgage or in the termination of ground lease—and "attornment"—the tenant agrees to acknowledge any successor who takes title after a foreclosure or a deed-in-lieu of foreclosure as the new landlord. But this Article does not give the tenant any "nondisturbance"—there isn't any agreement in exchange here that the successor landlord will not terminate this lease as long as the tenant abides by its terms. The ability of a tenant to obtain "nondisturbance" protection will vary with the economy, with customary lending practices, with who the lender is, with who the landlord is and the state of the building's financing, and with the tenant and its importance to the building. There are a considerable number of alternative methods to address a tenant request for "nondisturbance" including: (i) the landlord agrees to use "reasonable efforts" to obtain a nondisturbance agreement for the tenant's benefit; (ii) the landlord agrees to use "best efforts" (agreements to use "best efforts" about anything are not recommended because the legal meaning of "best efforts" is often far more severe than its plain-English implications to simply do your best) to obtain a nondisturbance agreement for the tenant's benefit; (iii) subordination by the tenant is "contingent" upon the landlord obtaining a nondisturbance agreement from the current mortgagee and using reasonable/best efforts to obtain nondisturbance agreements from future mortgagees; and (iv) subordination by the tenant is "contingent" upon the landlord obtaining a nondisturbance agreement from the current mortgagee and from future mortgagees.

379 A tenant may want a longer period and/or a second reminder notice before it faces any consequences of non-delivery.

380 Most lenders will want a separate subordination agreement from the tenant (and usually ask the landlord to sign it also). The tenant's opportunity to get a "nondisturbance" agreement usually lies in negotiating that separate subordination agreement by incorporating nondisturbance into it. Consideration should be given to whether the lease should state that this separate lender-tenant agreement should be: (i) as stated in this lease provision, in whatever form the mortgagee wants; or (ii) "on the mortgagee's then-standard form," which usually contains various provisions that are de facto amendments of the lease to the mortgagee's benefit and adversely affect the tenant (examples of some of those terms are also found in Section 21.2(b) below); or (iii) on "commercially reasonable" terms, which may be too vague and uncertain to assure a lender of success; or (iv) on "terms reasonably acceptable to the tenant," which is even more vague and uncertain to assure a lender of success; or (v) on terms substantially similar to those set forth on a sample form nondisturbance agreement negotiated in advance that can be attached as an exhibit to this lease (thereby giving the landlord and mortgagees advance notice of the tenant's acceptable parameters). The parties should consider whether anything needs to be recorded in the land records, particularly if the tenant gets any nondisturbance protection. A decision regarding recordation should take into account any transfer taxes that may be triggered (especially if no prior memorandum or notice of lease was recorded).

381 It is unlikely that a mortgagee would accept a document signed by the landlord on behalf of the tenant and tenant will be hesitant to allow landlord to act as its attorney-in-fact.

SECTION 21.2 Attornment³⁸²

- (a) Tenant agrees that in the event of the foreclosure of any Mortgage encumbering the Building, the Land, or any part thereof, or the termination of any ground lease affecting the Building, the Land, or any part thereof, Tenant shall be deemed to automatically attorn to the purchaser at such foreclosure sale or to any ground lessor, as the case may be, and shall recognize such party as Landlord under this Lease. Tenant waives the provisions of any statute or rule of law now or hereafter in effect which may give or purport to give Tenant any right to terminate or otherwise adversely affect this Lease and the obligations of Tenant hereunder in the event any such foreclosure proceeding or termination is prosecuted or completed. The foregoing attornment does not abrogate, limit or otherwise affect the rights of any Mortgagee or ground lessor whose Mortgage or ground lease is superior to this Lease or of any purchaser at a foreclosure sale pursuant to such a Mortgage.
- (b) A ground lessor, Mortgagee or a successor-in-interest to any ground lessor or Mortgagee shall not be: bound by any prepayment on the part of Tenant of any rent for more than one month in advance except to the extent actually received by the ground lessor, Mortgagee or successor-in-interest;³⁸³ bound by the payment of any security deposit except to the extent actually received by it;³⁸⁴ liable for any default, act or omission of any prior landlord;³⁸⁵ subject to any counterclaims, defenses or offsets which Tenant might have against any prior landlord; required to repair casualty or condemnation damage unless it first determines to not apply any insurance proceeds or condemnation award to payment of the obligations owed to it and second has sufficient proceeds or awards to complete the repair work; perform build-out work or pay any tenant allowances that were due before the Mortgagee, ground lessor or other third party took title to the Property;³⁸⁶ or bound by this Lease or any termination, amendment or modification of this Lease unless the ground lessor or Mortgagee, as may be applicable, at the applicable time had approved the same in writing or the termination, amendment or modification is otherwise ratified by the then-current ground lessor or Mortgagee or one of its predecessors-in-interest.³⁸⁷

382 Compare the benefits given to a successor landlord in this Section to the straightforward attornment in Section 16.2 for traditional arm's-length voluntary purchasers. This difference is customary.

383 A tenant is rarely asked for the prepayment of rent more than a month in advance (unless, for example, a landlord requires the prepayment of both the first month's rent and the last month's rent in advance). Aside from the liquidity aspects of prepaying rent, a tenant should keep this risk of potential loss in mind, it being highly unlikely that a defaulting landlord is going to deliver advance payments of future rent to the lender.

384 This standard non-liability of a mortgagee for any security deposit it did not receive is another incentive to a tenant to post its security deposit as a letter of credit instead of in cash. Although some lenders require that security deposits be delivered to them or that the lender otherwise receive some security interest in the security deposit, it is highly unlikely that a cash security deposit will ever find its way to a mortgagee, particularly if there is a loan default. A tenant who has posted a cash security deposit has essentially lost it if there is a foreclosure or a deed-in-lieu of foreclosure.

385 This clause does not absolve a successor landlord from the responsibility of curing a continuing default that began under a prior landlord. A landlord (and mortgagee) should be willing to accept that and further clarify that upon request.

386 This clause absolving the successor landlord from build-out or tenant improvement allowance obligations is routinely sought and can have enormous financial repercussions to the tenant. The tenant will essentially be waiving a significant economic inducement (i.e., a significant cash payment up front), it thought it had obtained as part of "the business deal." Even worse for the tenant, note that the tenant's rent rate isn't reduced to take that waiver into account. The successor landlord thus enjoys the full rent stream without the obligation to pay the tenant the improvement allowance that the tenant negotiated for. And, of course, this lease, like most leases, forbids rent offsets. If a tenant wants a rent offset, it must negotiate for one (and may get it in the circumstance of a clear nonpayment because the violation is clear and the dollars at issue are determinable). But rent offset is not always a great remedy because it requires the tenant to bear the unexpected up front cost of the build-out and then recover that money over time.

387 These protective provisions are fairly standard in the industry. A tenant, however, may want to exclude from this provision any amendment that implements a provision in the lease (e.g., an expansion or renewal option) or, more vaguely, does not "materially adversely" affect the lender.

SECTION 21.3 Rights of Mortgagees and Ground Lessors To Cure Defaults

Tenant agrees to simultaneously furnish to any ground lessor and/or Mortgagee of which Tenant has notice copies of any default or other notices delivered by Tenant to Landlord in connection with this Lease, and no such notice shall be effective unless and until a copy of it is sent to each such ground lessor or Mortgagee. Each such ground lessor and Mortgagee shall have the right (but not the obligation) to cure any default by Landlord within the same time period afforded to Landlord to cure any such default, plus such additional period of time thereafter as may be reasonably necessary for such ground lessor or Mortgagee to cure such default, including (without limitation) any period necessary for such ground lessor or Mortgagee to obtain possession of the Property in order to cure such default.³⁸⁸

ARTICLE 22: DELIVERY AT END OF LEASE TERM

SECTION 22.1 Surrender of Premises

On the date of the expiration or termination of the Lease Term, Tenant shall quit and surrender the Premises broom clean and in good condition and repair³⁸⁹ (ordinary wear and tear and insured damage by fire or other casualty excepted), together with all the Alterations that may have been made in or attached to the Premises, but otherwise empty, unless otherwise required pursuant to Section 10.4 hereof.³⁹⁰

³⁸⁸ This is an open-ended cure period for mortgagees and ground lessors. It is often required by a lender. Tenants should note that it essentially leaves them paralyzed because there isn't any deadline imposed and the tenant remains frozen until the unknown end. A tenant should try to impose an outside deadline on cure rights.

³⁸⁹ Some concern has been raised that this provision could be read more broadly than it is written, specifically that it could require large-scale restoration or replacement of roofs and other common elements if they were in any way affected by the tenant's previous alterations. For example, would the removal of a rooftop satellite dish, which necessarily involved roof penetrations, require the tenant to replace the entire roof?

³⁹⁰ This cross-reference to Section 10.4 ties this provision about the condition of the premises at the expiration of the lease term to the earlier provisions about alterations and the tenant's obligation to remove alterations.

SECTION 22.2 Holding Over

In the event that Tenant or any party claiming under Tenant shall not immediately surrender the Premises³⁹¹ in the condition required by Section 22.1 on the date of the expiration or termination of the Lease Term, Tenant shall become a tenant by the month at the greater of the then-fair market rent or one hundred fifty percent (150%)³⁹² of the Fixed Monthly Rent in effect during the last month of the Lease Term,³⁹³ plus one hundred percent (100%) of all additional rent in effect during the last month of the Lease Term³⁹⁴ (subject to increases thereafter as determined by Landlord in accordance with the provisions of this Lease). Said monthly tenancy shall commence on the first day following the expiration of the Lease Term. As a monthly tenant, Tenant shall be subject to all the terms, conditions, covenants and agreements of this Lease, except as to the amount of the monthly rent, which shall be in the amount specified in this Section. As a monthly tenant, Tenant shall give to Landlord at least thirty (30) days' written notice of any intention to quit the Premises, and Tenant shall be entitled to thirty (30) days' written notice to quit the Premises, unless an Event of Default exists hereunder, in which event Tenant shall not be entitled to any notice to quit, the usual thirty (30) days' notice to quit being hereby expressly waived. Notwithstanding the foregoing provisions of this Section, in the event Tenant shall hold over after the expiration of the Lease Term and if Landlord shall desire to regain possession of the Premises promptly at the expiration of the Lease Term, then at any time prior to Landlord's acceptance of rent from Tenant as a monthly tenant hereunder Landlord, at its option, may forthwith re-enter and take possession of the Premises without process or by any legal process in force in the jurisdiction in which the Building is located.³⁹⁵ Landlord may accept rent in the holdover amount and concurrently commence legal proceedings to regain possession of the Premises. Tenant shall also pay to Landlord all damages sustained by Landlord resulting from retention of possession by Tenant, including the loss of any proposed subsequent tenant for all or any portion of the Premises.³⁹⁶ Force *majeure* is not an excuse to holding over.³⁹⁷

391 Essentially, a tenant must surrender the entire premises, not retain possession of any of the premises. If a tenant is obligated to remove and restore anything that cannot be removed and restored by the expiration of the lease term, the tenant may find itself to be a holdover tenant even if it seems to have moved out. If a tenant has moved out but is disputing the scope of its restoration obligation, is that tenant then a holdover?

392 Though occasionally as high as 200%, holdover rates of 150% or even 125% are typical. Sometimes a tenant can negotiate for holdover rates that increase as the length of the holdover increases.

393 Some states establish statutory rates for holdover rent. Check local law to see whether those statutes can be varied by contractual agreement.

394 Many leases try to charge the tenant a holdover rate on both the base rent and the operating expense and real estate tax pass-throughs. That converts the operating expense and real estate tax pass-throughs into a profit center for the landlord because it is collecting more than its actual expenses. This may or may not be permitted under applicable law but it is not an approach adopted here in any case.

395 Before exercising this right, a landlord should confirm its legality in the applicable locale.

396 In effect, the tenant is both paying the holdover rent and indemnifying the landlord against any loss the landlord incurs as a result of the holdover. Note the breadth of this indemnity. The tenant is accepting responsibility if a successor tenant is completely lost (i.e., walks away because of a holdover by the indemnifying tenant). That is a significant indemnity, particularly in a down market when replacement tenants may be hard to find.

397 This clause is intended to defeat a holdover tenant's claim that, if it is still in occupancy after its lease term expired because its new premises aren't ready for it for no fault of its own, it is not a "holdover" and should not be paying holdover rent because the cause is outside its control. Relocation is the departing tenant's risk (or possibly the risk of the next landlord if it is that landlord's failure that causes the delay), not this landlord's risk.

ARTICLE 23: TENANT'S QUIET ENJOYMENT; ESTOPPEL CERTIFICATES; LANDLORD'S RESERVATION OF RIGHTS

SECTION 23.1 Quiet Enjoyment³⁹⁸

Landlord covenants that it has the right to make this Lease for the Lease Term and that if Tenant shall pay all rent when due and punctually perform all of the covenants, terms, conditions and agreements of this Lease to be performed by Tenant, Tenant shall have the right, during the Lease Term, to occupy and enjoy the full possession of the Premises without molestation or hindrance by Landlord or any party claiming through or under Landlord, subject to the provisions of this Lease.

SECTION 23.2 Tenant Estoppel Certificates

Tenant agrees, at any time from time to time, upon not less than ten (10)³⁹⁹ days' prior written notice by Landlord, to execute, acknowledge and deliver to Landlord a statement in writing:⁴⁰⁰ (a) certifying that this Lease is unmodified and in full force and effect (or if there have been modifications, that the Lease is in full force and effect as modified and stating the modifications); (b) stating whether Tenant has taken possession of the Premises; (c) stating whether Tenant has sublet all or any part of the Premises or assigned this Lease in whole or in part (and if so to whom); (d) stating whether any rent abatements exist under this Lease, the amount of Fixed Rent and estimated monthly installments of additional rent currently payable, and the dates to which the rent has been paid by Tenant; (e) stating whether Landlord has given Tenant any notices alleging a default or an Event of Default (and, if so, identifying the same), and whether or not, to the best knowledge of Tenant, Landlord is in default in the performance of any covenant, agreement or condition contained in this Lease and, if so, specifying the nature of such default and whether Tenant claims a rent offset; (f) if any improvements are required to be paid for or performed by Landlord under this Lease, stating that all such work has been satisfactorily paid for or completed or, if not, providing a list of items excepted; (g) stating the Lease Commencement Date, the rent commencement date and the scheduled expiration date of the Lease Term; (h) stating whether any security deposit has been posted and its amount and nature (cash or letter of credit); (i) stating whether Tenant has any knowledge of any environmental problem affecting the Premises or the Property; (j) stating whether Tenant has any expansion, contraction, renewal or termination options of any sort or any right to purchase the Building and/or the Land and, if Tenant does have any of the foregoing, stating the right claimed and whether Tenant has exercised such option(s); (k) stating whether Tenant has any defenses to the enforcement of this Lease; (l) stating the address to which notices to Tenant are to be sent; and (m) certifying as to such other matters as may reasonably be requested.⁴⁰¹ Any such statement delivered by Tenant may be relied upon⁴⁰² by Landlord, any owner of the Building or the Land, any

³⁹⁸ Despite the use of the industry term "quiet enjoyment," this clause does not actually grant the tenant the right to quiet, to be free from noisy neighbors. The term "quiet enjoyment" is a term of art not used in its plain-English sense. It entitles the tenant to not be dispossessed from, and to enjoy physical dominion over, its own premises,

³⁹⁹ A ten-day turn-around may be inadequate. A tenant may want a longer period and/or a second reminder notice before it faces any consequences of non-delivery. Rarely does a landlord suddenly find itself in need of a tenant estoppel certificate without sufficient lead time. So the turn-around time provided here is usually of more consequence to the tenant, oddly enough. Why? Because if "defaults" preclude a tenant from exercising renewal or expansion options or other rights, a failure to timely return an estoppel certificate could create such a pretext for a landlord.

⁴⁰⁰ A tenant would prefer to say as little as possible and have to do as little investigation or fact-checking as possible. Therefore, tenants prefer to delete as many items as possible (particularly those a buyer or lender can self-evaluate from the lease) or dilute (e.g., with "to the tenant's [actual] knowledge" and maybe by further defining or qualifying which individuals constitute the tenant's "knowledge").

⁴⁰¹ Clause (m) requiring the tenant to make such additional certifications as may reasonably be requested is not found in many landlord forms. Yet it is the most important of the clauses because it allows the landlord to ask beyond the enumerated items. It serves as a valuable right when a potential mortgagee or purchaser presents its own form to the landlord and the tenants.

⁴⁰² "Relied upon" is not defined as a matter of law in the context of an estoppel certificate. It is questionable if an estoppel is binding on the tenant, or if it is just an advisory statement that establishes a prima facie (presumption of fact) case.

prospective purchaser of the Building or Land, any Mortgagee or prospective Mortgagee of the Building or Land or of Landlord's interest therein, or any prospective assignee of any such Mortgagee.⁴⁰³ Any failure by Tenant to timely execute, acknowledge and deliver an estoppel certificate may be declared by Landlord to be an Event of Default and shall also entitle Landlord to charge Tenant, as additional rent, a late delivery fee of \$250 for each day of delay in delivery beyond the deadline first set forth, which fee is not liquidated damages. Tenant hereby irrevocably constitutes and appoints Landlord as Tenant's attorney-in-fact to execute, acknowledge and deliver any such certificate for or on behalf of Tenant should Tenant fail to timely deliver such certificate. Any such statement delivered by Landlord as Tenant's attorney-in-fact may be relied upon as aforesaid.⁴⁰⁴

SECTION 23.3 Landlord's Reservation of Rights

Landlord hereby reserves to itself and its successors and assigns the following rights (all of which are hereby consented to by Tenant): (a) to change the street address and/or name of the Building⁴⁰⁵ and/or the arrangement and/or location of entrances, passageways, doors, doorways, corridors, elevators, stairs, toilets or other public parts of the Building and to change the design or configuration of the Building;⁴⁰⁶ (b) to erect, use, and maintain pipes and conduits in and through the Premises;⁴⁰⁷ and (c) to grant to anyone the exclusive right to conduct any particular business or undertaking on the Property.⁴⁰⁸ Landlord may exercise any or all of the foregoing rights without being deemed to be guilty of an eviction, actual or constructive, or a disturbance or interruption of the business of Tenant or of Tenant's use or occupancy of the Premises.

403 Estoppel certificates themselves are often issued in blank, not addressed to anyone in particular, or, conversely, issued naming only the landlord and maybe one or two other named persons. Either of those approaches is flawed because the class of beneficiaries who can rely on the estoppel certificate may therefore be limited, e.g., if only a purchaser is named, the purchaser's mortgagee may not be able to rely on the tenant's estoppel certificate.

404 It is unlikely that a prospective mortgagee or purchaser would accept an estoppel certificate signed by the landlord on behalf of the tenant. See Footnote 381.

405 A tenant may negotiate for the landlord to pay for the tenant's new stationery, business cards, announcements and other out-of-pocket expenses if the landlord changes the building's address or name.

406 A tenant may negotiate by including a clause such as "as long as the Premises and Tenant's use and enjoyment thereof are not materially adversely affected." A tenant may want to include visibility or accessibility concerns, in particular whether from the exterior of the building or from an elevator lobby.

407 A tenant may negotiate by including a clause such as "as long as the Premises and Tenant's use and enjoyment thereof are not materially adversely affected" or require that any new pipes or conduits in the Premises be located within existing walls.

408 A tenant that has an exclusive use clause of its own may want to make clause (c) "subject to Tenant's rights under this Lease."

SECTION 23.4 USA Patriot Act and Prohibited Persons⁴⁰⁹

Tenant and Landlord (each, a “**Representing Party**”) each represents and warrants to the other⁴¹⁰ that: (a) neither the Representing Party nor any person or entity who directly owns a ten percent (10%)⁴¹¹ or greater equity interest in it, nor any of its officers, directors, partners or managing members, is a person or entity with whom United States persons or entities are restricted from doing business under regulations of the Office of Foreign Asset Control of the Department of the Treasury (including those named on the Office of Foreign Asset Control’s “Specially Designated Nationals and Blocked Persons” list, found at <http://www.treas.gov/offices/enforcement/ofac>) or under any statute, Executive Order (including Executive Order 13224 signed on September 24, 2001 and entitled “Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit,

409 For those not familiar with the USA PATRIOT Act or Executive Order 13224, they are two of the chief legal responses to the terrorist attacks of September 11, 2001. The Executive Order essentially prohibits anyone from doing business with anyone whose name appears on the OFAC SDN List. Although there is widespread belief to the contrary, neither the USA PATRIOT Act nor Executive Order 13224 requires that any party provide the certifications contained in this Section or agree to the covenants contained in this Section. Accordingly, this Section is optional. However, the parties should note that the Executive Order makes it illegal to do business with anyone whose name appears on the OFAC SDN list, and, unless the parties include the covenants that are part of this Section or alternative provisions allowing the innocent party to terminate, they actually wouldn’t have contractual grounds to terminate this lease in the future should a party become listed in the future. The Executive Order effectively requires that each party to a transaction check the other party’s name against the OFAC SDN List; the Executive Order does not require, or even imply, that a party should get a certification from the other party whether it is on the OFAC SDN List, nor does the Executive Order, read literally, create a defense for anyone who does business with a prohibited party in reliance on such a certification. (However, it is possible that a “good faith” defense will evolve over time, in which case obtaining such a certification is possibly helpful.) The USA PATRIOT Act requires all persons to report to the U.S. Treasury Department any transaction in which the other party pays more than \$10,000 in cash (meaning, literally, currency or coins); a similar reporting requirement (to the Internal Revenue Service) already existed for such behavior, so this requires a second separate report for the same behavior. To the extent relevant to private behavior, the USA PATRIOT Act otherwise applies to “financial institutions,” which is very broadly defined but, as of this writing, landlords and tenants are not “financial institutions” simply by virtue of engaging in a lease transaction. (A landlord or a tenant may be defined as a “financial institution” for other reasons, of course, such as because it is a bank or a stock broker or a pawnshop or any other entity that is defined as a “financial institution” in the USA PATRIOT Act.) “Financial institutions” are required to enact compliance programs to monitor, catch and prevent money laundering and other suspicious transactions.

410 This section has been written reciprocally. Most lease clauses only demand certifications and compliance by the tenant. As noted in the preceding footnote, both the landlord and the tenant are required to check the other party’s name against the OFAC SDN List. The law applies equally to landlords and to tenants. Therefore, to the extent either is required to obtain a certification or thinks that it should obtain a certification, the requirement should be applied reciprocally in the interest of fairness.

411 The Executive Order does not address checking principals within the other party. However, by law or by custom, the practice has developed under other, similar, government contracting requirements to check the principal owners as well. The 10% threshold in this section is probably aggressive in that sense. Checking only those principals who own 25% or more seems to be sufficient under other, similar legal requirements and informal OFAC guidance.

or Support Terrorism”), or other governmental action; and (b) the Representing Party’s activities do not violate the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001⁴¹² or the regulations or orders promulgated thereunder (as amended from time to time). Each Representing Party covenants that, throughout the Lease Term, it shall not be or become a person or entity listed on any list stated in preceding clause (a),⁴¹³ and it shall comply with Executive Order 13224 and with the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001 and the regulations or orders promulgated thereunder (as amended from time to time).⁴¹⁴

412 This Act is part of the USA PATRIOT Act. Except for the universally applicable requirement to report transactions involving the exchange of more than \$10,000 in cash, these money laundering provisions apply only to “financial institutions” as defined in the Act. Tenants and landlords who are not “financial institutions” therefore have nothing to “comply with” under the USA PATRIOT Act.

413 A violation of that covenant creates a default and the innocent party can then try to terminate this lease. Of course, a “default” brings with it significant other legal baggage too. It may be possible to write a straightforward “right to terminate” for this situation, without the consequences of a default. However, if the defaulting party is the tenant, unlike a termination for default a straightforward termination would cause the innocent landlord to forfeit the prospective rent for the rest of the originally anticipated lease term.

414 This last sentence of Section 23.4 is very open-ended and vague (and refers to legal requirements that are, particularly under the USA PATRIOT Act, open-ended and vague). What would be the consequence of a party breaching this covenant—or even broader covenants found in other leases (and usually written in such a way that only the tenant is bound, as if the USA PATRIOT Act and the Executive Order applied only to tenants)—in a manner wholly unrelated to this lease? For example, what, in the context of the lease itself, would be the consequence of one party or the other doing business (knowingly or accidentally, in a material way or just incidentally) with someone whose name appears on the OFAC SDN List? Or what would be the consequence if a party to the lease is a “financial institution” which completely separately fails to maintain an appropriate compliance program to look for money laundering activity? Would that party then be in default under this lease? The answer to that question is “yes,” as this clause is written. Considering that such a default is essentially incurable under the terms of this lease (i.e., the act happened and cannot be retroactively undone), should such a violation be an Event of Default under this lease, exposing the defaulting party to the remedies provided elsewhere (including, if the offending party is the tenant, termination)? In formulating an answer, consider whether a violation of the USA PATRIOT Act or Executive Order 13224 should be any more of a default under a lease than violation of any other civil or criminal statute unrelated to the lease itself. None of those other legal violations are defaults or Events of Default under this lease or virtually any other responsible lease form for the simple reason that most leases do not require either party to live a legally or morally punctilious life unrelated to the lease relationship itself. Should violations of the USA PATRIOT Act and Executive Order 13224 be treated differently? Probably not except, as noted above, if the party is listed on the OFAC SDN list or any other list of those with whom doing business is prohibited, in which case the non-listed party to the lease legitimately may want to terminate the lease. See the preceding footnote for a discussion of that last issue.

ARTICLE 24: GENERAL PROVISIONS

SECTION 24.1 No Representations

Tenant acknowledges that neither Landlord nor any broker, agent or employee of Landlord has made any representations or promises with respect to the Premises or the Property except as herein expressly set forth, and no rights, privileges, easements or licenses are acquired by Tenant except as herein expressly set forth.⁴¹⁵

SECTION 24.2 Financing Requirements

If any person, including but not limited to any bank, insurance company, university, pension or welfare fund, savings and loan association, real estate investment trust, business trust, or other financial institution providing any construction and/or permanent financing for the Property requires, as a condition of such financing, that modifications to this Lease be obtained, and provided that such modifications (a) do not materially adversely⁴¹⁶ affect Tenant's use of the Premises as herein permitted, and (b) do not increase the rent required to be paid by Tenant hereunder, Landlord shall submit an amendment to this Lease containing such required modifications to Tenant and Tenant agrees to execute said amendment within thirty (30) days thereafter. If Tenant does not enter into and execute said written amendment hereto incorporating such required modifications within thirty (30) days after the same has been submitted to Tenant by Landlord, then Landlord shall thereafter have the right, at its sole option, to do any or more of the following, at Landlord's option: (w) withdraw the requested modification; (x) cancel this Lease,⁴¹⁷ (y) sign said amendment on behalf of Tenant pursuant to a power of attorney, which is hereby irrevocably and expressly granted to Landlord by Tenant,⁴¹⁸ or (z) to declare an Event of Default under this Lease.⁴¹⁹ Such options shall be exercisable by Landlord giving Tenant written notice of the option elected.

SECTION 24.3 No Partnership

Nothing contained in this Lease shall be construed as creating a partnership or joint venture of or between Landlord and Tenant,⁴²⁰ or to create any other relationship between the parties hereto other than that of landlord and tenant.

SECTION 24.4 Brokers

Landlord and Tenant recognize _____ as the sole broker procuring this Lease on behalf of Landlord and _____ as the sole broker procuring this Lease on behalf of Tenant. Landlord shall pay said broker(s) a commission therefor pursuant to a separate agreement between said broker(s) and Landlord.⁴²¹ Landlord and Tenant each represent and warrant to the other that, except as provided above, neither

⁴¹⁵ This is somewhat repetitive of a concept also addressed early in the lease. The tenant has only the benefits expressly stated in the lease. The landlord is trying to negate any implied terms or any promises made outside the lease.

⁴¹⁶ This does give the tenant some protection. "Materially adversely" is open for interpretation.

⁴¹⁷ Canceling the lease would seem to be the leasehold equivalent of "mutual assured destruction" in a nuclear exchange. This is an unlikely option by the landlord. A lender should prefer a slightly flawed lease over no lease.

⁴¹⁸ It is unlikely that anyone, including a lender, would accept a lease amendment signed by the landlord on the tenant's behalf under a power of attorney. Would the answer be different if the tenant had affirmatively refused the request, or if the tenant had simply never responded to the request?

⁴¹⁹ Would declaring a default under clause (z) allow the landlord to also hold the tenant liable for the rent for the remainder of the lease term, a pro-landlord difference between termination for default under clause (z) and a contractual right to terminate under clause (x)?

⁴²⁰ This concept is found in most leases, but it is most relevant to retail leases that contain a percentage rent clause because there the landlord is participating in the tenant's gross income.

⁴²¹ In many cases, the landlord actually pays a commission only to its own broker, and the landlord's broker pays the commission to the tenant's broker. In those cases, there is no agreement between the landlord and the tenant's broker, and a landlord might want to modify this sentence to accurately reflect the situation.

of them has employed or dealt with any broker, agent or finder in carrying on the negotiations relating to this Lease. Landlord shall indemnify and hold Tenant harmless, and Tenant shall indemnify and hold Landlord harmless, from and against any claim or claims for brokerage or other commissions arising from or out of any breach of the foregoing representation and warranty by the respective indemnitor. No broker is a third party beneficiary of this Lease.

SECTION 24.5 Waiver of Jury Trial⁴²²

LANDLORD AND TENANT EACH HEREBY WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER OF THEM AGAINST THE OTHER IN CONNECTION WITH ANY MATTER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS LEASE, THE RELATIONSHIP OF LANDLORD AND TENANT HEREUNDER, TENANT'S USE OR OCCUPANCY OF THE PREMISES AND/OR ANY CLAIM OF INJURY OR DAMAGE.

SECTION 24.6 Notices

- (a) Whenever any notice, demand or request is required or permitted hereunder, such notice, demand or request shall be hand-delivered (which term includes delivery by overnight courier services) or sent by United States Mail, registered or certified, return receipt requested, postage prepaid,⁴²³ to the addresses set forth in the Basic Lease Information. Tenant shall also send a copy of any notice to any Mortgagee identified pursuant to Section 21.3.⁴²⁴
- (b) Either Landlord or Tenant shall have the right from time to time to designate by written notice to the other party such other persons or places in the United States as Landlord or Tenant may desire written notice to be delivered or sent in accordance herewith; provided, however, at no time shall either party be required to send more than an original and three (3) copies of any such notice, demand, or request required or permitted hereunder.⁴²⁵
- (c) Any notice, demand, or request which shall be served upon either of the parties in the manner aforesaid shall be deemed sufficiently given for all purposes hereunder (i) at the time such notice, demand or request is hand-delivered or (ii) on the third (3rd) day after the mailing of such notice, demand or request in accordance with the preceding portions of this Section.⁴²⁷ Any notice not received because of the intended recipient's failure to provide a correct current address or affirmative refusal to accept delivery shall be deemed given upon attempted delivery.

⁴²² In many places, landlord-tenant courts decide landlord-tenant disputes at bench trials held by judges acting without juries. A tenant may be able to remove the case from the landlord-tenant court — which is usually a faster process — and cause delays by having the case tried in regular civil court if the lease does not contain a waiver of jury trial.

⁴²³ Another commonly accepted method of giving notice is by email (often not made effective until the next business day if received after normal business hours or only made effective if notice is also sent by one of the other stated means. Hand-delivery, courier service or certified mail with a return receipt are more advantageous due to evidence of delivery, i.e., someone signs to acknowledge receipt. Notice by facsimile is often included as well (with terms similar to that of email), but as the popularity of fax machines continues to decline, so does facsimile notice.

⁴²⁴ Many leases forget this, or bury it in the mortgagee provisions of the lease where it is often overlooked by anyone giving notice.

⁴²⁵ Giving notice internationally has its complications, such as "certified mail" not being available. Some leases restrict this to "the continental United States" (excluding landlords and tenants with offices in Hawaii, Alaska, Puerto Rico or the various territories).

⁴²⁷ Absent this restriction it is possible for one party to require unlimited multiple copies of notices.

⁴²⁷ Many leases create clauses attempting to establish timelines for various types of notice. The most pro-landlord versions of these clauses make notice given by mail effective upon deposit in the U.S. Mail (or one day after deposit in the U.S. Mail), even if that day is a weekend or holiday. This is astounding because it makes notice given by mail effective immediately, even before notice given by overnight courier, before the other party (usually the tenant) could possibly receive a notice given by mail. It seems most fair to make notice effective upon receipt.

SECTION 24.7 Partial Invalidity

If any provision of this Lease or the application thereof to any person or circumstances shall to any extent be invalid or unenforceable, the remainder of this Lease, or the application of such provision to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each provision of this Lease shall be valid and enforced to the fullest extent permitted by law.

SECTION 24.8 Pronouns

Feminine or neuter pronouns shall be substituted for those of masculine form, and the plural shall be substituted for the singular number in any place or places herein in which the context may require such substitution.

SECTION 24.9 Successors and Assigns

The provisions of this Lease shall be binding upon, and shall inure to the benefit of, the parties hereto and each of their respective representatives, successors and assigns, subject to the provisions hereof prohibiting or restricting assignment or subletting by Tenant.

SECTION 24.10 Entire Agreement; Amendments

The Basic Lease Information is incorporated into this Lease by this reference. This Lease contains the entire agreement of the parties, and no representations, inducements or agreements, oral or otherwise, not contained in this Lease shall be of any force or effect. This Lease may not be modified or changed in whole or in part in any manner other than by an instrument in writing duly signed by both parties⁴²⁸ hereto.

SECTION 24.11 Governing Law; Jurisdiction and Venue

- (a) This Lease shall be governed by and construed in accordance with the laws of the jurisdiction in which the Building is located without regard to conflicts of laws.⁴²⁹
- (b) The parties consent to the non-exclusive jurisdiction of any federal or State court having jurisdiction over the jurisdiction in which the Building is located, and to venue therein. Each party waives any objection to any such jurisdiction and venue, including any objection under the theory of forum non conveniens (inconvenient forum).

SECTION 24.12 Section Headings

Article and Section headings are used herein for the convenience of reference and shall not be considered when construing or interpreting this Lease.

SECTION 24.13 No Offer⁴³⁰

The submission of an unsigned copy of this document to Tenant for Tenant's consideration does not constitute an offer to lease the Premises or an option to or for the Premises. This document shall become effective and binding only upon the execution and delivery of this Lease by both Landlord and Tenant.

428 Some leases allow amendments signed by only one party, as long as it is the party to be bound by the amendment. That is quite consistent with the idea that a party can unilaterally waive a provision of this lease that is to its benefit. However, some states may require that a lease signed by two parties can be amended only if both parties sign the amendment.

429 Unless the phrase "without regard to conflicts of laws" or some equivalent is added, there could be debate whether the law of the state in which the building is located should look to the home state law governing an out-of-town landlord or tenant.

430 This provision means that this lease is only a withdrawable offer and only becomes effective if both parties sign it. Common sense and fair enough. But if the parties have not signed this lease, then how can this clause be binding? After all, non-signature means, as a matter of common sense and under the text of this clause, that this lease, and therefore this clause, is not effective to bind either party. Thus, we have a clause that is not effective until the lease is signed and that renders itself ineffective simultaneous with the lease being signed.

SECTION 24.14 Multiple Counterparts

This Lease may be executed in multiple counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same document.

SECTION 24.15 Time of Essence

TIME IS OF THE ESSENCE WITH RESPECT TO THE CARRYING OUT BY TENANT OF EACH TERM OR PROVISION OF THIS LEASE TO BE PERFORMED BY TENANT.

SECTION 24.16 Conflict

In the event of any conflict between the main text of this Lease and any Exhibit hereto, the provisions of the main text of this Lease shall prevail unless otherwise stated.⁴³¹

SECTION 24.17 Execution by Tenant

If Tenant is a corporation, a limited liability company, an association or a partnership, it shall, concurrently with the signing of this Lease, at Landlord's option, furnish to Landlord certified copies of the resolutions of its board of directors (or of the executive committee of its board of directors) or consent of its members or partners authorizing Tenant to enter into this Lease. Moreover, each individual executing this Lease on behalf of Tenant hereby represents and warrants that he or she is duly authorized to execute and deliver this Lease and that Tenant is a duly organized corporation, limited liability company, association or partnership under the laws of the state of its incorporation or formation, is qualified to do business in the jurisdiction in which the Building is located, is in good standing under the laws of the state of its incorporation or formation and the laws of the jurisdiction in which the Building is located, has the power and authority to enter into this Lease, and that all corporate or partnership action requisite to authorize Tenant to enter into this Lease has been duly taken.

SECTION 24.18 Joint and Several Liability

If more than one person or entity shall ever be Tenant, the liability of each such person and entity shall be joint and several.

SECTION 24.19 Force Majeure

In the event that either party shall be directly or indirectly delayed or hindered in or prevented from the performance of any act or obligation required of it under this Lease by reason of acts of God, labor strike, lockout, inability to procure materials, failure of power, riot, insurrection, war or warlike act, terrorist act, utility blackout or brownout, legal requirement or other reason not within the reasonable control of that party, then performance of such act or obligation by that party shall be excused for a period equivalent to the period of such delay. Notwithstanding the foregoing, the provisions of this Section shall not apply to or affect any rental or other monetary obligation hereunder or Tenant's obligation to vacate the Premises at the expiration or termination of the Lease Term.

SECTION 24.20 No Construction of Lease Against Drafter

Should any provision of this Lease require judicial interpretation, the court interpreting or considering same shall not apply the presumption that the terms hereof should be construed more strictly against the party who itself or through its agent prepared the same. All parties have participated in the preparation of this Lease and legal counsel was consulted by each party (or opportunity for such legal consultation afforded to each party) before the execution of this Lease.

⁴³¹ This section probably reverses the common expectations of the parties and of the courts that the Exhibit is probably more specific and therefore should take precedence over the presumably more general main lease text. However, if the Exhibit has priority over the main lease text, then a provision specifically negotiated in the main lease text would be superseded by a generic and inconsistent provision in the rules and regulations, which are a lease Exhibit and which often are not reviewed and negotiated with care.

IN WITNESS WHEREOF, Landlord and Tenant have executed this Lease⁴³² under seal⁴³³ as of the day and year first above written.

LANDLORD:

ATTEST/WITNESS:

By: _____

Name: _____

Title: _____

[CORPORATE SEAL]⁴³⁴

TENANT:

ATTEST/WITNESS:

By: _____

Name: _____

Title: _____

[CORPORATE SEAL]

⁴³² Be sure to follow local law requirements regarding applicable signatures. Some states may require two officers, or multiple witnesses, or that signatures be notarized, or impose other requirements.

⁴³³ Some jurisdictions still adhere to distinctions between documents signed “under seal” or as “sealed instruments” and other documents. Whether a lease is required to abide by this distinction or should abide by this distinction is a matter of local practice. Local requirements or custom and practice should be followed on a case-by-case basis.

⁴³⁴ When a signatory is a corporation, some jurisdictions may require that an actual impressed corporate seal be used. Other jurisdictions may allow the hand drawing of a circle with the handwritten words “Corporate Seal.” Other jurisdictions may accept the simple typed words “Corporate Seal,” as done here. Many jurisdictions require nothing in this regard at all. Local law requirements should be determined on a case-by-case basis.

EXHIBIT A: THE PREMISES

[cross-hatched]

**EXHIBIT B: CERTIFICATE OF LEASE COMMENCEMENT DATE
AND EXPIRATION OF LEASE TERM**

Attached to and made a part of the Lease dated the _____ day of _____, 20____, by and between _____
_____, as Landlord, and _____, as Tenant.

Landlord and Tenant do hereby declare that:

- (1) The Lease Commencement Date is _____, 20____; and
- (2) The first Lease Year is the period _____, 20____ to _____, 20____; and
- (3) The Lease Term shall expire (unless the Lease is extended or sooner terminated in accordance with the provisions thereof) on _____, 20____.

LANDLORD:

By: _____

Name: _____

Title: _____

TENANT:

By: _____

Name: _____

Title: _____

EXHIBIT C: BUILDING RULES AND REGULATIONS⁴³⁵

The following rules and regulations have been formulated for the safety and well-being of all tenants of the Property. Strict adherence to these rules and regulations and any successors or additions thereto is necessary to provide every tenant a safe and undisturbed occupancy of its premises. Landlord reserves the right to amend these rules and regulations and to promulgate additional rules and regulations, but all rules and regulations shall be subject to a tenant's own lease.⁴³⁶ Any violation of these rules and regulations and any successors or additions thereto by Tenant shall constitute a default by Tenant under the Lease.

1. Throughout the Lease Term, Tenant covenants and agrees to the following:⁴³⁷
 - A. Not to use any equipment, machinery or advertising medium which may be heard outside the Premises.
 - B. Not to use any plumbing facilities for any purpose other than that for which they were constructed.
 - C. Not to use or permit the use of any portion of the Premises as sleeping apartments, lodging rooms or for any unlawful purpose or purposes.⁴³⁸
 - D. Not to solicit business in the common or public areas of the Property, nor distribute or display any hand-bills or other advertising matters or devices in common or public areas.
 - E. Except for packages delivered by small package couriers, not to receive or ship articles of any kind outside the designated loading area of the Building or other than during the designated loading times.
 - F. Not to employ any of Landlord's employees for any purpose whatsoever, or request such employees to do anything outside of their regular duties.
 - G. To provide adequate security within the Premises for Tenant's employees, agents, licensees, invitees, assignees, subtenants, concessionaires, customers, clients, family members or guests.⁴³⁹
 - H. Not to obstruct or encumber any sidewalks, entrances, passages, courts, elevators, vestibules, stairways, corridors, halls or any other part of the Property.
 - I. Not to permit any awnings, signs, placards and the like, or any projections of any kind whatsoever to be attached to the outside walls of the Building or affixed to the windows of the Building without the prior written consent of Landlord.
 - J. Not to permit any drapes, blinds, shades or screens to be attached to, hung in or used in connection with any window or door relating to the Premises without the prior written consent of Landlord.
 - K. Not to permit any showcases, mats or other articles to be placed or allowed to remain in front, in the proximity of or affixed to any part of the exterior of the Building.
 - L. Not to permit or encourage any loitering in or about the Premises.⁴⁴⁰

⁴³⁵ These Rules and Regulations assume a multi-tenant, multi-floor office building. Some revisions will be necessary if the factual situation is otherwise.

⁴³⁶ This clause and Section 24.16 of the main lease text make it unnecessary to conform the rules and regulations to avoid any inconsistencies or conflicts with the express terms of the main text of the lease. However, a tenant may wish to do so.

⁴³⁷ These are presented in a traditional format used by most leases in this regard, where things have been added into the Rules and Regulations as they arise over the years. Also note that the Rules and Regulations deal with a wide array of topics, and that a tenant who simply accepts these Rules and Regulations as routine boilerplate without substantive effect may be doing itself a disservice.

⁴³⁸ This is a traditional rule and regulation, but it's also somewhat redundant to the main text of the lease restricting use and requiring compliance with law. Many leases go further and also prohibit "immoral" uses, without specifying what they are or who decides.

⁴³⁹ Most tenants provide no security whatsoever, except, perhaps, a locked suite entry door. This rule and regulation may shift the responsibility for breaches of security onto the tenant.

⁴⁴⁰ A tenant may find it difficult to discourage loitering in or about the Premises, particularly if by unrelated persons.

- M. Not to enter upon or use the roof of the Building.
- N. If requested to do so by Landlord, to install a locking system for the Premises compatible with the locking system being used by Landlord at the Property.
- O. Not to permit or encourage any canvassing, soliciting, peddling or demonstrating in or about the Premises.
- P. Not to install or permit the installation of any wiring for any purpose on the exterior of the Premises or the Building.
- Q. Not to mark, paint, drill into or deface any part of the shell or core of the Building.⁴⁴¹
- R. Not to cook in the Premises or permit any cooking in the Building without obtaining Landlord's prior written consent (and not to cause or permit any odor to emanate if consent is given).
- S. Not to bring in or keep any firearms in the Premises or the Building.
- T. Not to purchase merchandise or services from any company or person who has repeatedly violated Building regulations.⁴⁴²
- U. Not to affix any floor covering to any floor of the Premises with adhesive of any kind without obtaining Landlord's written consent.
- V. Not to bring any bicycles, motor scooters or other vehicles into the Building except as permitted by those provisions of the Lease allowing use of the parking lots and/or garage, as applicable. Tenant may park electric-powered bicycles and motor scooters (but not motorcycles) in bicycle racks or other clean, safe, lockable area designated by Landlord.⁴⁴³
- W. Not to install or permit the installation in the Premises of any coin- or token-operated vending machine or similar device except for the exclusive use of Tenant's employees in areas of the Premises not accessible to the public.⁴⁴⁴
- X. Not to allow any animals in the Premises, except service animals assisting persons with disabilities or otherwise required by law.⁴⁴⁵
- Y. Not to allow live or artificial Christmas trees. Artificial Christmas trees may be permitted by Landlord if any lighting thereon is approved by Landlord and is turned off at the end of each business day.
- Z. Not to permit space heaters or other energy-intensive equipment. Any space conditioning equipment that is placed in the Premises with Landlord's consent for the purpose of increasing comfort to tenants shall be operated on sensors or timers that limit operation of equipment to hours of occupancy in the areas immediately adjacent to the occupying personnel.

441 Many boilerplate rules and regulations go further and prohibit marking, painting, drilling or defacing of any part of the building. If read literally, such boilerplate rules and regulations would prohibit tenants from painting their own premises and from hanging pictures, flower pots, etc. That is probably excessive and, again, unless the main text of the lease takes priority over the Exhibits, would result in the tenant losing via a boilerplate exhibit a right often negotiated for in the main lease text.

442 Many boilerplate rules and regulations include a version of this clause that more broadly prohibits tenants from using any vendor not approved by the landlord.

443 There may be building conditions or tenant concerns that could result in revision of this rule. If there are space limitations or security concerns in the bicycle storage area, alternative bicycle storage options (including interior building locations) may be necessary.

444 Many boilerplate rules and regulations more broadly prohibit any vending machines, even those for the use only of the tenant's own employees.

445 Many boilerplate rules and regulations simply prohibit animals, period. That is a violation of the Americans with Disabilities Act, which requires that places of public accommodation, such as office buildings, permit persons with disabilities to bring in "service animals." "Service animals" include traditional seeing-eye dogs but can be other kinds of animals for other disabilities.

AA. Tenant shall report lighting purchases to Landlord on a quarterly or semi-annual basis in a format suitable to Landlord.

2. Tenant acknowledges that it is Landlord's intention that the Property be operated in a manner which is consistent with Landlord's sustainability practices. Tenant is required to comply with these practices within the Premises, and shall cause its vendors and subcontractors operating in the Premises, if any, to also comply with Landlord's sustainability practices in connection with any services rendered in the Premises of the Building.⁴⁴⁶
3. Tenant acknowledges that it is Landlord's intention that the Property be operated in a manner which is consistent with the highest standards of cleanliness, decency and morals in the community which it serves. Tenant shall not sell, distribute, display or offer for sale any item which, in Landlord's judgment, is inconsistent with the quality of operations of the Property or may tend to impose or detract from the moral character or image of the Property.⁴⁴⁷
4. Landlord shall have the right to prescribe the weight and position of file systems, safes, computer systems, and other heavy items, equipment and fixtures, which shall, if considered necessary by Landlord, be positioned in consultation with Landlord in order to distribute their weight. Any and all damage or injury to the Premises or the Building caused by moving the property of Tenant into or out of the Building, or due to the same being in or upon the Premises, shall be repaired by and at the sole cost of Tenant. No furniture, equipment or other bulky matter of any description will be received into the Building or carried in the elevators except as approved by Landlord and all such furniture, equipment and other bulky matter shall be delivered only through the designated delivery entrance of the Building and the designated freight elevator. All moving of furniture, equipment and other materials shall be under the direct control and supervision of Landlord who shall not, however, be responsible for any damage to or charges for moving the same. Tenant agrees promptly to remove from the sidewalks adjacent to the Building any of Tenant's furniture, equipment or other materials delivered or deposited.
5. No additional locks or bolts of any kind shall be placed upon any of the doors or windows by Tenant, nor shall any changes be made in existing locks or the mechanism thereof.⁴⁴⁸ Tenant shall, upon the expiration or termination of its tenancy, return to Landlord all keys used in connection with the Premises, including any keys to the Premises, to rooms and offices within the Premises, to storage rooms and closets, to cabinets and other built-in furniture, and to toilet rooms, whether such keys were furnished by Landlord or procured by Tenant and in the event of the loss of any such keys, Tenant shall pay to Landlord the cost of replacing the locks. On the expiration of this Lease, Tenant shall disclose to Landlord the combination of all locks for safes, safe cabinets and vault doors, if any, remaining in the Premises.
6. Landlord reserves the right to exclude from the Building at all times any person who is not known or does not properly identify himself to the Building Manager. Landlord may at its option require all persons admitted to or leaving the Building to register. Tenant shall be responsible for all persons for whom it authorizes entry into the Building and shall be liable to Landlord for all acts of such persons.⁴⁴⁹

⁴⁴⁶ By applying this rule to tenant's vendors, sustainability programs apply to recycling and sustainable chemicals that are used within the premises—even if not used directly by tenant.

⁴⁴⁷ Both parties should fully disclose all aspects of operations to assure there are no objections. That said, the language of this rule is vague and would be open to interpretation.

⁴⁴⁸ This clause may need some revision for tenants that have special security needs. This issue is also addressed in the main Lease text.

⁴⁴⁹ Although presented benignly as a logical extension of the preceding sentences, the last sentence of this regulation extends fairly far. What if the person admitted by the tenant properly conducts his/her business with the tenant as employee or visitor but then commits an act, criminal or tortious, in the building, outside the leased premises, completely outside the scope of his/her employment or relationship with the tenant? See similar issues in Section 18.1 of the main lease text in the context of a casualty loss.

EXHIBIT D: CONSTRUCTION RULES AND REGULATIONS⁴⁵⁰

1. WORK APPROVAL

Prior to Contractor (as defined below) commencing any work or Alterations at the Premises, Tenant shall obtain written acknowledgement from Contractor as to the contents of this Exhibit D. Upon request from Landlord, Tenant shall provide such written acknowledgement to Landlord. All plans must comply with building codes such as ASHRAE 189.1 or other, more stringent, standards as may be imposed by law (such as International Green Construction Code, if adopted in the jurisdictions in which the Premises is located) and contain a scorecard or other chart evidencing the anticipated score of the Alteration under the then-most current Third Party Sustainability Standard acceptable to Landlord. Construction drawings must be approved by Landlord prior to the start of construction.⁴⁵¹

The general contractor (“**Contractor**”) and all subcontractors must be approved to conduct their trades in the jurisdiction in which the Building is located by any and all governmental entities with such authority. Tenant or Contractor must provide Landlord with names, addresses and phone numbers for all subcontractors prior to commencement of work by the subcontractor. An agent or representative of Contractor must be present on the site at all times when work is in process.

2. PERMITS

Permits and licenses necessary for the onset of all work shall be secured and paid for by Contractor and posted as required by applicable law.

3. INSPECTIONS

All inspections which must be performed by testing any or all of the life safety system, e.g., alarms, annunciator, voice activated, strobe lights, etc., must be performed prior to 8:00 a.m. or after 4:30 p.m., and the on-site engineer must be present. At least 48 hours notice must be provided to the Building Manager and the on-site engineer advising that an inspection has been requested.

4. ELEVATORS

The use of the freight elevator for deliveries and removals shall be scheduled in advance by Contractor with the Building engineer’s office for the transfer of all construction materials, tools, and trash to and from the construction floor. Passenger elevators shall not be used for these purposes. The elevator walls and floor shall be protected at all times during Contractor’s use. From time to time, Contractor may be required to share the freight elevator with the cleaning crew, other tenants, etc. Large transfers of materials, whether for deliveries or removals, must be done prior to 7:00 a.m. or after 6:00 p.m. No deliveries of any kind or nature shall be brought in through the front door of the Building at any time.⁴⁵²

5. NON-CONSTRUCTION AREAS

Contractor shall take all necessary precautions to protect all walls, carpets, floors, furniture, fixtures and equipment outside of the work area and shall repair or replace damaged property without cost to Landlord.

Masonite must be placed as a walkway on the public corridors from the freight elevator to the construction site to protect the carpet and/or flooring. Common area carpet and flooring protection is to be used and removed daily and the carpet and flooring vacuumed or dust mopped, whichever is appropriate, on a daily basis.

⁴⁵⁰ Many leases do not include any rules and regulations specifically aimed at construction. This Exhibit is a combination of rules and regulations sometimes found in leases regarding the conduct of alterations and sometimes found in leases regarding initial tenant build-out.

⁴⁵¹ This sentence may or may not be consistent with the main text of the lease, particularly if a design-build model is used.

⁴⁵² This last sentence is consistent with the Rules and Regulations regarding deliveries.

6. EROSION AND SEDIMENT CONTROL

If any exterior ground work is to be performed, Contractor agrees to provide a management plan prior to any exterior ground work being performed to prevent loss of soil during construction by stormwater runoff and/or wind erosion, including protecting topsoil by stockpiling for reuse, preventing sedimentation of storm sewer or receiving streams, and preventing polluting the air with dust and particulate matter. Contractor shall log building operations and maintenance activity to ensure that the plan has been followed.

7. WATER AND ELECTRICITY

Sources of water and electricity will be furnished to Contractor without cost, in reasonable quantities for use in lighting, power tools, drinking water, water for testing, etc. “Reasonable quantities” will be determined on a case-by-case basis but are generally intended to mean quantities comparable to the water and electrical demand Tenant would use upon taking occupancy. Larger quantities shall be provided only if available and at additional cost to Tenant. Contractor shall make all connections, furnish any necessary extensions, and remove same upon completion of work. Contractor shall use reasonable efforts to encourage energy and water efficiency on the job site, including, without limitation, turning off lights, turning off faucets, addressing water leaks, and turning off or adjusting heating, ventilating and air conditioning systems that are not in use during the construction project, if applicable.

8. DEMOLITION

In addition to the requirements of Sections 10 and 16 below, demolition of any area in excess of 100 square feet must be performed before 8:00 a.m. or after 6:00 p.m.

9. USE OF GREEN ACCREDITED PROFESSIONAL

All projects shall be reviewed for potential impact to reduction targets and environmental programs.⁴⁵³ For any project over [\$50,000], Tenant agrees to engage a third party Green Globes or LEED Accredited Professional or similarly qualified professional to oversee and validate that the project has met the standards for Landlord’s sustainability practices.⁴⁵⁴

10. CONSTRUCTION MANAGEMENT PLAN FOR INDOOR AIR QUALITY⁴⁵⁵

Tenant shall implement an Indoor Air Quality (IAQ) Management Plan for the construction and pre-occupancy phases of the area being built out as follows:

- During construction, meet or exceed the recommended Design Approaches of the Sheet Metal and Air Conditioning National Contractors Association (SMACNA) IAQ Guideline for Occupied Buildings Under Construction, 2007 (2nd edition), Chapter 3, as it may be amended, supplemented or replaced from time to time.
- Protect stored on-site or installed absorptive materials from moisture damage.
- Contractor shall notify the Building engineer’s office at least one full business day prior to commencement of extremely dusty work (sheet rock cutting, sanding, extensive sweeping, etc.) so arrangements can be made for additional filtering capacity on the affected HVAC equipment. Failure to make such notification will result in Contractor absorbing the costs to return the equipment to its proper condition. All recessed lights must be covered during high dust construction due to a plenum return air system.
- If air handlers must be used during construction, filtration media with a Minimum Efficiency Reporting Value (MERV) of 13 must be used at each return air grill, as determined by ASHRAE 52.2-2012, during construction.

⁴⁵³ The outcome of the review should determine if a Green Globes or LEED accredited professional or a professional with expertise in the affected program (e.g., EPA Climate Leaders, WasteWise, National Environmental Performance Track, 2007 Energy Independence and Security Act) is required or desired even for small projects.

⁴⁵⁴ LEED and Green Globes do not require a third-party consultant for all projects.

⁴⁵⁵ These requirements are in line with the current version of LEED 3.0 for Commercial Interiors Construction IAQ

- Replace all, or install new, filtration media immediately prior to occupancy with filtration media having a MERV of 13 or greater.⁴⁵⁶
- Remove contaminants that may be remaining at the end of the construction period.⁴⁵⁷
- For an occupied building, after completion of high-emitting construction activities (e.g. painting), conduct a Building flush-out with new filtration media with 100% outside air in volumes meeting any applicable Third-Party Sustainability Standard utilized by Landlord after construction ends and prior to occupancy of the affected space. Repeat procedure until all requirements have been met. After flush-out, replace the filtration media with new media, except for filters solely processing outside air.

Or

- For a partially occupied building, after completion of high-emitting activities (e.g. painting), conduct a baseline indoor air quality testing procedure for the affected space in the Building that demonstrates that the concentration levels for the chemical air contaminants are below specified levels. For each sampling point where the maximum concentration limits are exceeded, conduct a partial Building flush-out with 100% outside air in volumes meeting any applicable Third-Party Sustainability Standard utilized by Landlord during non-business hours, for a minimum of two weeks, then retest the specific parameter(s) that were exceeded to indicate the requirements are achieved. Repeat procedure until all requirements have been met.

11. OPTIMIZE USE OF IAQ COMPLIANT PRODUCTS

Documentation of all covered materials purchased and the total cost of these purchases shall be provided. Documentation shall be provided in a format acceptable to Landlord.

Ongoing indoor air quality requires the use of low- or no-VOC paints, stains, finishes, sealants, janitorial supplies, adhesives, furniture, and fabrics that do not exceed the VOC and chemical component limits of Green Seal's Standards, Bay Area Air Resources Board Reg. 8, Rule 51, the then-current version of LEED for Commercial Interiors, for example for LEED v3 for Commercial Interiors, credits 4.1 and 4.2, South Coast Air Quality Management District regulations or other comparable standards (including, without limitation, the then-current version of LEED for Commercial Interiors) as adopted by Landlord from time to time.

Paints are to be brush-applied only; spray painting is not allowed on site.

All painting must be done on weekends or after 5:00 PM and before 7:00 AM on weekdays.

Carpet must meet the requirements of the Carpet and Rug Institute (CRI) Green Label Plus Carpet Testing Program. Carpet cushion must meet the requirements of the CRI Green Label Testing Program.⁴⁵⁸

Non-carpet flooring must be FloorScore–certified.

Composite panels and agrifiber products must not contain added urea-formaldehyde resins. Laminate adhesives used to fabricate on-site and shop-applied assemblies containing these laminate adhesives must contain no urea-formaldehyde.

Heating, ventilating, air conditioning and refrigeration equipment shall not contain CFCs, halons, or HCFCs.

⁴⁵⁶ If the building does not use this standard, substitute “with filtration media meeting building standards as established from time to time by Landlord” at the end of the sentence.

⁴⁵⁷ If this “flush-out” process isn't practicable (e.g., it simply can't be implemented for technical reasons or time constraints, or because it would be prohibitively expensive given economic constraints), omit this paragraph. In reality, such a flush-out is often not completed.

⁴⁵⁸ These requirements are in line with the current version of LEED for Commercial Interiors 2009 Low Emitting Materials, Carpet System credit (Indoor Environmental Quality credit 4.3).

12. WATER USE EFFICIENCY

Tenant shall maintain maximum fixture water efficiency within the Building to reduce the burden on potable water supply and wastewater systems.

If Tenant is responsible for any or all of these systems, fire systems, domestic water systems, cooling towers, and landscape irrigation systems are separate systems and are to be maintained and metered separately. Modifications to the water systems must maintain the integrity of these three systems. Without limiting the foregoing, irrigation lines are not to be connected to domestic supply lines.

Faucets, shower heads, toilets and urinals must be low-flow (no more than 1.28 gpf for toilets, 0.5 gpf for urinals, 0.50 gpm for faucets, and 2.0 gpm for showerheads). The total water efficiency of all interior fixtures shall be at least 20 percent more efficient than the baseline set by the Energy Policy Act of 1992. For additional information please see— <https://www.usgbc.org/credits/we2>.⁴⁵⁹

When available, Tenant shall install products certified by the U.S. Environmental Protection Agency's Water Sense® program. (However, the flow requirements stated in the preceding paragraph shall be required even of Water Sense®-certified products.)

All water-using equipment, appliances and controls must conform to the Building's then-current standards and practices, and be approved by the Building's chief engineer and/or energy manager.

13. ENERGY MANAGEMENT

Contractor shall install, calibrate and operate fundamental Building elements and systems in the Premises as intended so they can deliver functional and efficient performance and leverage the Building's energy management system. Tenant shall engage a commissioning authority independent from the design and construction responsibilities as the responsible party for all commissioning activities. All energy-related systems to be included in the commissioning process activities include as a minimum:⁴⁶¹

- Heating, ventilating, air conditioning and refrigeration systems (mechanical and passive) and associated controls
- Lighting controls, including daylighting
- Domestic hot water systems
- Renewable energy systems⁴⁶²

All energy-using equipment, appliances, lamps, ballasts and controls acquired, ordered, purchased, leased or installed after the date of this Lease⁴⁶³ must be state-of-the-art energy efficient and ENERGY STAR qualified

459 In order to earn credit under the current version of LEED for Commercial Interiors rating system, a tenant space must reach efficiency of 20% better than the Energy Policy Act of 1992. Additional points are available for efficiency gains of 30%, 35% and 40%.

460 For more information on the U.S. EPA's Water Sense® Program, see <http://www.epa.gov/watersense/>.

461 These requirements are in line with the current version of LEED for Commercial Interiors Fundamental Commissioning prerequisite (Energy & Atmosphere prerequisite 1).

462 Renewable energy systems may include photovoltaic, wind, solar, etc.

463 This lease intentionally requires that all newly-obtained equipment be ENERGY STAR-qualified, if available. This requirement applies to all equipment acquired after the date of this lease, so all equipment acquired for the initial build-out is covered. (If the phrase is changed to read "after the Lease Commencement Date" then the initial build-out would be exempt from this requirement and the requirement would be largely ineffective.) As a gesture to tenants, this clause therefore allows tenants to bring with them and use previously-purchased equipment that is not ENERGY STAR-qualified.

where available,⁴⁶⁴ must conform to the Building’s then-current standards for energy management, and tie in to existing Building controls and monitoring systems. With regard to ENERGY STAR QUALIFICATION, “available” means that the product type has an ENERGY STAR qualification— see <https://www.energystar.gov/productfinder/>.

Lamps and ballasts, including manufacturer, type, watts, and mercury content are specified and are to be replaced with “like” or better. Tenant shall meet lighting power density established by ASHRAE/IESNA Standard 90.1-2010.

Install occupancy sensors with manual override capability in all regularly-occupied spaces and daylight responsive controls in all other spaces within 15 feet of windows and under skylights.⁴⁶⁵

All energy-related improvements must be reviewed and approved by the Building’s chief engineer and/or energy manager.

Documentation shall be provided in a format acceptable to Landlord.

14. PURCHASING

Landlord has a comprehensive sustainable purchasing policy as part of its sustainability practices.

Tenant is encouraged to use recycled construction materials and to acquire furniture, fixtures and equipment incorporating recycled, renewable and recyclable materials. Tenant is also encouraged to acquire construction materials and furniture, fixtures and equipment that are extracted, harvested, sourced or manufactured within 500 miles of the Building. Landlord will supply a standard formatting for reporting purposes that will include, but not be limited to, data on cost, energy use, recycled content, salvaged content, Forest Sustainability Council (FSC)-certified wood, rapidly renewable materials, and geographic origin.⁴⁶⁶ Tenant shall promptly complete and return reports as and when materials and supplies are acquired or on such basis as Landlord may determine from time to time.

15. HOUSEKEEPING PRACTICES

Tenant and Tenant’s vendors shall use sustainable cleaning and maintenance practices while performing Alterations, including:

- Using sustainable cleaning chemicals that meet the Green Seal GS-37, the U.S. Environmental Protection Agency’s Design for the Environment, or the then-current version of the LEED Indoor Environmental Quality credit, for example the 3.3 standards, as required by Landlord;⁴⁶⁷
- Use of micro-fiber wipes, dust cloths and dust mops in place of paper wipes (and where paper products are used, use of products that contain at least 30% recycled content and which are recyclable);

⁴⁶⁴ This lease requires that ENERGY STAR-qualified equipment be used only if available. Other leases often require the use of ENERGY STAR-qualified equipment regardless of availability. A tenant might also want to consider if ENERGY STAR is always the best alternative, even if available, or if other means to manage electrical usage are preferable. To earn credit under the current version of LEED for Commercial Interiors rating system in a tenant space, at least 70 percent of eligible equipment and appliances must be ENERGY STAR qualified. Additional credit is available for a 90 percent purchase rate.

⁴⁶⁵ These requirements are in line with the LEED 3.0 for Commercial Interiors Optimize Energy Power, Lighting Controls credit (Energy & Atmosphere credit 1.2).

⁴⁶⁶ These requirements are in line with the LEED 3.0 for Existing Buildings: O&M Sustainable Purchasing; Facility Alterations & Additions credit (Materials & Resources credit 3) and the LEED 3.0 for Commercial Interiors Materials & Resources credits 3-7.

⁴⁶⁷ Aqueous ozone or liquid ozone products may be used in lieu of traditional cleaning products.

- Chemicals for which the GS-37 or a U.S. Environmental Protection Agency's Design for the Environment rating is not applicable, for example, floor finishes and strippers shall be durable, slip resistant and free of zinc (metal-free) and compliant with the Green Seal GS-40 standard and/or CCD-147;
- Carpet care products shall meet the requirements of the Green Seal GS-37 Standard and/or CCD-148;
- Proper training of maintenance personnel in the hazards, use, maintenance and disposal of cleaning chemicals, dispensing equipment and packaging;
- Use of hand soaps that do not contain antimicrobial agents, except where required by health codes, and that meet Green Seal GS-41 Standard;
- Use of cleaning equipment that reduces impacts on indoor air quality.

Tenant shall adopt a low environmental impact cleaning policy that meets these criteria. Tenant shall provide documentation that this policy has been followed, showing:

- Specifications for chemicals used;
- Dates and activities associated with cleaning maintenance; and
- Dates and outline of cleaning worker training.

16. REMOVAL OF WASTE MATERIALS

Any and all existing building materials removed and not reused in the construction shall be disposed of by Contractor as waste or unwanted materials, unless otherwise directed by the Building Manager. Tenant agrees to recycle, salvage or divert from landfills, and shall provide documentation demonstrating that, at least 70 percent by volume of any and all demolition and construction waste were recycled, salvaged or otherwise diverted from landfill and incineration.⁴⁶⁸ Landlord reserves the right to monitor and measure the waste leaving the project site and, if Tenant is in violation of the standards established by this Section, to charge Tenant as additional rent for the cost of the investigation and any remedial monitoring. Any demolition is also subject to the provisions of Section 8, above.

Contractor shall at all times keep areas outside the work area free from waste material, rubbish and debris, and shall remove waste materials from the Building on a daily basis.

17. CLEANUP UPON COMPLETION

Upon construction completion of any phase of work, Contractor shall remove all debris and surplus material and thoroughly clean the work area and any common areas impacted by the work.

18. WORKING HOURS

Standard construction hours are 6:30 a.m. - 5:00 p.m. The Building engineer must be notified at least two full business days in advance of any work that may disrupt normal business operations (e.g., drilling or cutting of the concrete floor slab). The Building Manager reserves the right to determine what construction work is considered inappropriate for normal business hours and inappropriate work will be performed only outside normal business hours. Work performed outside standard construction hours requires an on-site engineer, who shall be billed at the then overtime rate.

⁴⁶⁸ This requirement is in line with the LEED-EB Solid Waste Management: Facility Additions and Alterations credit (Materials & Resources credit 9). The LEED 3.0 for Commercial Interiors rating system has credits available beginning at a minimum of 50% waste diversion. The higher 70% rate is recommended here to ensure that Landlord can comply with LEED-EB requirements. However, if the 70% rate cannot feasibly be met, this requirement can be omitted or reduced.

19. WORKER CONDUCT

Contractor and subcontractors are to use care and consideration for others in the Building. No abusive language or actions on the part of the workers will be tolerated. Contractor and subcontractors shall remain in the designated construction area so as not to unnecessarily interrupt other tenants. No sleeveless shirts are allowed. Long pants and proper work shoes are required. All workers must wear company identification.

20. CONSTRUCTION INSPECTIONS

Contractor is to perform a thorough inspection of all common areas to which it requires access prior to construction to document existing Building conditions. Upon completion of work, if necessary, Contractor shall return these areas to the same condition in which they were originally viewed. Any damage caused by the Alterations shall be corrected at Tenant's (or Contractor's) sole cost.

21. SIGNAGE

Contractor or subcontractor signage may not be displayed in the Building common areas, on the exterior of the Building, or on any of the window glass.

22. POSTING OF RULES AND REGULATIONS

A copy of these rules and regulations must be posted on the job site in a manner allowing easy access by all workers. It is Contractor's responsibility to familiarize all workers, including subcontractors, with these rules and regulations.

23. INSURANCE REQUIREMENTS

Contractor will provide and maintain at its own expense the following minimum insurance:

- Worker's Compensation for statutory limits in compliance with applicable State and Federal laws.
- Comprehensive General Liability with limits not less than \$5,000,000 combined single limit per occurrence for Bodily Injury and Property Damage.
- Automobile liability including owned, non-owned and hired automobiles with limits not less than:

Bodily Injury	\$500,000 each person
	\$500,000 each accident
Property Damage	\$500,000 each accident

24. CERTIFICATE OF INSURANCE

NAMED INSUREDS: _____, OWNER, ANY BUILDING MANAGER FOR
OWNER, AND ANY MORTGAGEE AND/OR GROUND LESSOR OF THE BUILDING
AND/OR THE LAND

Certificates of Insurance in the form of an ACORD 25-S certificate evidencing the required coverages and naming the additional insureds as stated must be furnished thirty (30) days prior to starting the contract work. Each certificate will contain a provision that no cancellation or material change in the policies will be effective except upon thirty (30) days prior written notice.

25. EMERGENCY PROCEDURES

In case of emergency, Contractor shall call the police/fire department and/or medical services, followed immediately by a call to the Building Manager.

26. DELIVERIES

At no time will the Building staff accept deliveries on behalf of Contractor or any subcontractor.

27. CHANGES

These Construction Rules and Regulations are subject to change and are not limited to what is contained herein. Landlord and the Building Manager reserve the right to implement additional rules and regulations as may be prudent based on each individual project.

[THIS VERSION OF EXHIBIT E IS TO BE USED ONLY IF LANDLORD DOES THE INITIAL BUILDOUT]

EXHIBIT E: WORK LETTER

1. Plans.

- 1.1 Generally. [IF TENANT HAS ALREADY PROVIDED APPROVED PLANS AND SPECS, USE THE FOLLOWING 1.1 AND OMIT 1.2 AND 1.3] Tenant has previously provided to Landlord drawings, plans and specifications for all of the Tenant Improvement Work to be done in the Premises. Landlord has approved said drawings, plans and specifications.⁴⁶⁹ Said drawings, plans and specifications are hereinafter referred to as the **“Plans.”**

[IF TENANT HAS NOT YET PROVIDED APPROVED PLANS AND SPECS, USE THE FOLLOWING ALTERNATIVE VERSION AS 1.1 AND ALSO USE 1.2 AND 1.3] Tenant and its architects and engineers shall consult with and coordinate the preparation of the proposed drawings, plans and specifications with Landlord, the building manager, and the project manager. The drawings, plans and specifications, once approved in accordance with the following procedure, are hereinafter referred to as the **“Plans.”**

- 1.2 LEED-CI or equivalent. The Plans shall be prepared in accordance with the then-current standards to obtain certification at the Silver⁴⁷⁰ (or higher) level under the U.S. Green Building Council’s LEED for Commercial Interiors (“LEED-CI”) rating in effect on the date hereof or under any comparable Third Party Sustainable Standard that may be approved from time to time by Landlord.⁴⁷¹ Landlord shall provide to Tenant an electronic copy of such documentation about the design, engineering and construction of the Building as Tenant may reasonably request for that purpose.⁴⁷² Tenant shall pay Landlord any reasonable out-of-pocket cost incurred by Landlord in doing so.⁴⁷³ [OPTION 1: Tenant shall diligently pursue the rating set forth above and shall provide evidence to Landlord that such rating has been obtained within one (1) year after the Lease Commencement Date. ⁴⁷⁴] [OPTION 2: The foregoing does not require Tenant to formally obtain the rating set forth above, but Tenant shall, upon request from time to time, provide evidence that the Tenant Improvement Work complies with that standard.] Notwithstanding any confidentiality requirement that may be set forth elsewhere in this Lease, Tenant may provide a copy of this Lease to any third-party organization whose sustainability rating system is applicable to the Alterations if providing a copy of this Lease is required by the third party as part of its evaluation.

⁴⁶⁹ It is advisable to attach a list of the approved plans and specs.

⁴⁷⁰ “Silver” is the second-lowest of the LEED ratings, above “Certified.” The Green Building Initiative’s Green Globes system has a somewhat comparable rating of two “globes” out of four.

⁴⁷¹ LEED has market dominant status in the United States but it is not the only green standard.

⁴⁷² Should the landlord also be required to do everything possible, or at least certain specific things, regarding the base building to enhance the tenant’s ability to obtain a LEED-CI certification? Note that this paragraph does not do that, it simply requires the landlord to provide the tenant with information about the base building.

⁴⁷³ It will be difficult for a tenant to design and build to a green rating without knowing the green attributes of the base building. This is really only a carry-forward of the same concept that underlies the traditional design process. Note that this proposed clause requires the tenant to request the information and to pay any cost incurred by the landlord in providing the information, and it requires the landlord to provide the information in electronic (not paper) format. If not independently verifiable, a tenant may request that landlord represent and warrant to any LEED or other green building certifications applicable to the building as of lease commencement. Such a request is reasonable, but landlord should be careful to limit the representation and warranty to present conditions and avoid a covenant with regard to future certification standards.

⁴⁷⁴ Should the tenant be required to actually obtain the third-party rating or should the tenant be required only to design and construct in accordance with the third-party standard? This is a philosophical choice. The first option here requires the tenant to obtain the rating, a choice that has cost consequences to the tenant and creates the possibility of a default (with uncertain remedies) if the standard isn’t achieved within the stated time frame (and raises the possibility of negotiating for force majeure extensions), but does provide the ultimate third-party determination of whether the standard was met. The second option leaves this less formal and also leaves it somewhat vague just how a determination of success or failure would be made and what the consequences would be. For these reasons, option one is preferred. However, if option two is pursued, consequences should be clear and may include higher rent.

- 1.3 Preparing and Approving the Plans. On or before _____, 20____, Tenant shall deliver to Landlord proposed drawings, plans and specifications for all work to be performed. Working drawings must be initialed by Tenant to indicate Tenant's approval and must be in form and substance sufficient to be submitted to the government in whose jurisdiction the Building is located as part of an application for a building permit, including (without limitation) being stamped as approved by an architect registered in that jurisdiction.⁴⁷⁵ All of the foregoing shall be subject to Landlord's approval, such approval not to be unreasonably withheld, conditioned or delayed, and must comply with ASHRAE 189.1 standards or other, more stringent, standard as may be imposed by law, and contain a scorecard or other chart evidencing the anticipated score of the Tenant Improvement Work under the then-most current version of any Third Party Sustainability Standard acceptable to Landlord. If Landlord does not give notice of disapproval or make a written request for additional information or make corrections or changes to Tenant's submissions within ten (10) business days after Tenant submits the same to Landlord for approval, then Tenant may resubmit the proposed submissions to Landlord along with a typed bold print reminder that Landlord's failure to respond within ten (10) business days after this second notice will be deemed to be Landlord's approval and, if Landlord still does not respond, the submitted item shall be deemed approved. Tenant shall revise the proposed drawings, plans and specifications to address Landlord's comments and shall resubmit them to Landlord within seven (7) business days after Tenant's receipt of Landlord's comments. The foregoing procedure shall be repeated until such time as Landlord approves Tenant's submissions.
- 1.4 Adequacy and Legal Sufficiency. Notwithstanding its review under Section 1.1 of this Work Letter, Landlord makes no representation or warranty as to the completeness or accuracy of the Plans or their legal sufficiency, and shall have no liability for or in connection with any other deficiency in the Plans. Tenant agrees to look solely to its architect, engineer and other design consultants in that regard.
- 1.5 Changes to the Plans. Tenant shall not be entitled to make any changes to the Plans without Landlord's approval. Landlord's consent to any changes shall not be unreasonably withheld, conditioned or delayed. All changes shall be at Tenant's expense [IF LANDLORD IS PROVIDING A TENANT IMPROVEMENT ALLOWANCE ADD: (subject to the availability of funds from the Tenant Improvement Allowance)] unless necessitated by the failure of Landlord or its agents or contractors to perform the Tenant Improvement Work in accordance with the Plans and this Work Letter. If Tenant requests Landlord's approval of a proposed change to the Plans and if the proposed change causes a delay in substantial completion of the Tenant Improvement Work, then, in accordance with Section 5 of this Work Letter, the Lease Commencement Date shall occur on the date on which substantial completion of the Tenant Improvement Work would have occurred but for the delay caused by Tenant's proposed change.
- 1.6 Tenant Improvement Work. As used in this Work Letter, "**Tenant Improvement Work**" means all work shown on the Plans, as they may be amended from time to time in accordance with this Work Letter. The Tenant Improvement Work is subject to all of the provisions of this Lease applicable to Alterations as well as to this Work Letter.
2. Performance of Tenant Improvement Work. The Tenant Improvement Work shall be performed in accordance with the following:
- 2.1 Contractor. All Tenant Improvement Work shall be performed by Landlord, the general contractor selected by Landlord and subcontractors selected by Landlord and its general contractor.⁴⁷⁶

475 The landlord should make sure that the tenant's plans are prepared by a locally-licensed architect so that they can be stamped for a building permit by the governing authority.

476 Tenants may want approval rights over the landlord's choice of general contractor; any such approval should not be unreasonably withheld, conditioned or delayed. A tenant may want to advise the landlord who the general contractor should be but a landlord should resist that, although it may be acceptable to allow a tenant to require that a landlord consider a specified general contractor in making its own hiring decision.

2.2 Landlord's Obligation. Landlord shall cause the Premises to be improved and completed, in a good and workmanlike manner, substantially in accordance with the Plans.⁴⁷⁷ Notwithstanding the foregoing, Landlord reserves the right to (a) make substitutions of material of equivalent or better grade and quality when and if any specified material may not be readily and reasonably available or if a more environmentally sustainable material or product is available at no increase in cost, provided that substitutions may not materially alter the Plans and (b) make changes necessitated by unanticipated physical conditions met in the course of construction.

2.3 Tenant's Rights. Subject to safety concerns, Tenant may enter the Premises at any time to inspect the performance of the Tenant Improvement Work. If the same can be accomplished without interference with Landlord's work during the last thirty (30) days before the projected substantial completion of the Tenant Improvement Work, Tenant shall be permitted to enter the Premises (without being deemed to have taken or accepted possession) for the purpose of completing any special work it is doing independently of the Tenant Improvement Work, to store or install its furniture, furnishings and equipment, and to conduct its physical move into the Premises.⁴⁷⁸ All such inspections and entries shall be at Tenant's own risk and shall be subject to the provisions of this Lease concerning Tenant Delays.

3. Costs.

3.1 Landlord's Obligation.

- (a) Landlord shall pay for the costs of the Tenant Improvement Work up to a maximum of _____ Dollars (\$_____) per rentable square foot in the Premises (the **"Tenant Improvement Allowance"**).⁴⁷⁹ As used in this Work Letter, the costs of the Tenant Improvement Work include all hard construction costs, including (without limitation) general conditions, overhead and profit, and all soft costs⁴⁸⁰ relating thereto, including (without limitation) architectural, engineering and design fees and expenses relating to the work shown on the Plans, the costs of obtaining permits, the costs of measuring the rentable square footage of the Premises, Landlord's costs of reviewing the Plans, Landlord's project management fee, and costs associated with sustainability practices, documentation, registration and certification.
- (b) [IF THE TENANT IMPROVEMENT ALLOWANCE IS PROVIDED ON A "USE IT OR LOSE IT" BASIS, DO NOT ADD THIS SUBSECTION. ⁴⁸¹ BUT IF TENANT IS GOING TO BE CREDITED WITH ANY UNUSED BALANCE OF THE TENANT IMPROVEMENT ALLOWANCE, ADD THE FOLLOWING] If

477 Note that there is nothing stated about a schedule for the landlord's performance, an anticipated date of substantial completion, or remedies for the tenant if the landlord does not complete the build-out (or the building) on time. These can be very fact-specific and contentious issues. Resolving them is beyond the scope of a sample lease form of this sort.

478 The preceding sentence should be used only if the tenant's overlapping entry in the premises will not materially affect the completion of the landlord's work. Further, the sentence can easily be customized. For example, note that it allows the tenant to not only perform its own build-out work in the premises, but also to store its furniture and equipment, and even to begin to move in to the premises. This section should be edited to meet the specific requirements of the situation.

479 This lease does not address the important issue in many lease negotiations of securing the landlord's obligation to pay the Tenant Improvement Allowance with a cash escrow, a letter of credit, and direct commitment from a construction lender, a guaranty from a parent entity, or any other method. Negotiations over this issue are important business issues. The solutions (when tenants win) are often very customized and beyond the scope of this kind of sample document.

480 Landlord may consider limiting the percentage of the allowance that may be used for soft costs.

481 Without this subsection, the landlord's obligation will only be the obligation set forth in the preceding subsection, which is to fund the build-out costs "up to" the dollar cap stated. If the build-out cost is less than the stated dollar cap, then the rest of the money that would otherwise have been available for build-out remains with the landlord. This may or may not be the expectation of the parties as a business matter. Note that under this scenario, the rent rate stays the same even if the tenant does not get all of the tenant improvement allowance. Both parties should be aware of this section to assure there are no disagreements upon completion of the build-out.

the Tenant Improvement Work is completed for less than the amount of the Tenant Improvement Allowance, then the unused balance shall be applied to either (i) the actual cost to Tenant of its furniture, fixtures and equipment (including, without limitation, Tenant's telephone and data cabling) installed in the Premises, [but not more than _____ Dollars (\$_____).] (ii) to Tenant's actual out-of-pocket moving costs, [but not more than _____ Dollars (\$_____).] or (iii) to the rent, [but not more than _____ Dollars (\$_____).] at Tenant's option.⁴⁸² Said unused balance of the Tenant Improvement Allowance shall be paid only in a single lump sum payment if paid in cash.

3.2 Tenant's Obligation. Tenant shall be responsible for paying any costs of the Tenant Improvement Work in excess of the Tenant Improvement Allowance.⁴⁸³ Such payments shall be made by Tenant within thirty (30) days after receipt of an invoice from Landlord with respect thereto. Landlord shall provide Tenant with supporting data and such other information as Tenant may reasonably request with each invoice for such costs. Tenant's failure to make any payment required under this Work Letter within any applicable notice and/or grace period shall be deemed a default in the payment of rent under this Lease.

4. Substantial Completion.

4.1 Definition. For purposes of this Work Letter and the Lease, the term "**substantial completion**" (or its grammatical variations) with respect to the Tenant Improvement Work shall mean when the Tenant Improvement Work has been completed (or would have been completed but for a Tenant Delay (as defined below)) in accordance with the Plans, notwithstanding that minor or insubstantial details of construction, mechanical adjustment, or decoration remain to be performed, the noncompletion of which does not materially adversely interfere with Tenant's beneficial use of the Premises.⁴⁸⁴ Substantial completion may be evidenced by the issuance of a certificate of substantial completion on the then current form issued by the American Institute of Architects by the project architect.⁴⁸⁵

4.2 Punch List⁴⁸⁶. Contemporaneous with substantial completion of the Tenant Improvement Work, Landlord shall provide Tenant with a preliminary list of the items of Tenant Improvement Work Landlord believes remain to be completed. Landlord and Tenant shall then promptly jointly inspect the Premises and note any additional items of Tenant Improvement Work that remain to be completed and any items of Tenant Improve-

482 Some landlords will allow the unused tenant improvement allowance to be spent on (some or all of) furniture, fixtures and equipment or to be used on moving costs and on other out-of-pocket expenses borne by the tenant, but may not allow the unused tenant improvement allowance to be spent on rent (or will cap the amount that can be applied to rent). If that is the case, the preceding sentence needs to be modified.

483 Landlords should note that this Work Letter assumes that all of the Tenant Improvement Allowance will be spent before the tenant is expected to contribute to the cost of any Tenant Improvement Work. This section should be revised if the negotiated agreement is similar to "loan balancing" as applied by construction lenders (i.e., the expected budget is calculated up front, and, if the cost exceeds the Tenant Improvement Allowance, then each party, in this case the landlord and the tenant, contributes pro rata toward each monthly invoice). Also revise this section if the tenant's financial contribution towards build-out costs is to be funded first.

484 Many definitions of "substantial completion" use phrases along the lines of "the work is substantially complete except for punch list items," which is somewhat circular. Further it could also be internally inconsistent. If a major item in the build-out is on the punch list, that material an omission would indicate that the project is actually not substantially complete, creating an ambiguity. The definition should be modified to meet the agreement between the landlord and tenant.

485 Note that this lease does not use the issuance of a certificate of occupancy (or equivalent) from the government as a standard to determine substantial completion. This is because a certificate of occupancy is usually granted upon a determination of compliance with building code, which may occur well before finish work is done or the premises would in any sense be considered usable.

486 Tenants may notice that, aside from correcting punch list problems, nothing is said about post-completion warranties. This is typical: if the landlord does the build-out then the landlord holds the construction warranties and enforces them as it sees fit as part of its ongoing maintenance and repair obligations.

ment Work noted on Landlord's preliminary list that have been completed. On the basis of Landlord's preliminary list, as modified during Landlord's and Tenant's joint inspection,⁴⁸⁷ Landlord shall prepare and deliver to Tenant a final list (the "**Punch List**") setting forth all of the items of Tenant Improvement Work that remain to be completed. The joint inspection, delivery of the Punch List, and completion of the Punch List are not prerequisites to the occurrence of substantial completion of the Premises⁴⁸⁸ or, if the definition thereof is dependent upon substantial completion, the occurrence of the Lease Commencement Date. Landlord shall use reasonable efforts to cause all items set forth on the Punch List to be completed within one (1) month following preparation of the Punch List⁴⁸⁹ unless the item is a long-lead item that cannot reasonably be completed within that period, in which event Landlord shall diligently complete the same as soon as practicable.

5. **Tenant Delays.** As used herein, the term "**Tenant Delay**" means any delay in substantial completion of the Tenant Improvement Work⁴⁹⁰ that is a result of: (a) Tenant's failure to timely deliver drawings, plans and specifications to Landlord for Landlord's review, and/or Tenant's failure to properly or make in a timely fashion revisions to such drawings, plans and specifications as required by Landlord as set forth in this Work Letter; or (b) changes in the work to be performed by Landlord in readying the Premises for Tenant's occupancy which are requested by Tenant after the Plans have been approved by Landlord (Landlord having no obligation to agree to any such changes except as set forth in Section 1.6 of this Work Letter); or (c) the performance or completion of any work or activity by a party employed by Tenant, including any of Tenant's employees, agents, contractors, subcontractors and materialmen; or (d) any interference by Tenant or Tenant's contractors, subcontractors, materialmen, employees or agents with the performance of the Tenant Improvement Work; or (e) the inclusion in the Plans of any long-lead items whose procurement or installation will delay the Tenant Improvement Work.

If any Tenant Delay occurs, then (notwithstanding anything herein or in the Lease to the contrary), the Lease Commencement Date shall be the date that the Tenant Improvement Work would have been substantially complete and Landlord would have been able to deliver possession of the Premises ready for Tenant's occupancy but for such Tenant Delay, as reasonably determined by Landlord. No failure to give Tenant possession of the Premises on any estimated Lease Commencement Date shall affect the obligations of Tenant hereunder or under the Lease except for the commencement of the Lease Term and of Tenant's obligations to pay rent, or as may otherwise be specifically set forth in the Lease.⁴⁹¹

487 Note the emphasis in this subsection on "joint inspection." Although this form isn't explicit on the point, it is preferable to forms that allow tenants to unilaterally submit lists of purported punch list items and then simply obligate the landlord to complete all punch list items as if the tenant's list is conclusively correct.

488 This section allows the landlord to prevent an uncooperative tenant from blocking the determination that substantial completion has occurred.

489 Tenants may disagree with the phrase "use reasonable efforts" with regard to the landlord completing the punch list within a month and may want to impose a hard deadline. Hard deadlines in the construction business are generally avoided. From the landlord's perspective, there is no specified penalty if the landlord agrees to a hard deadline and fails to meet it, so the consequences (other than an aggrieved tenant) do not seem severe. Conversely, tenants may also object that there is no obligation here on the landlord's part to complete punch list items faster than the one-month deadline if possible. If the landlord is amenable, the phrase "within one month following preparation of the Punch List" can be replaced with a seemingly stronger phrase, such as "as soon as practicable with the exercise of normal commercial diligence."

490 Note that the occurrence of these events aren't automatically Tenant Delays and do not automatically absolve the landlord from its obligation to timely completion of the work. These events are Tenant Delays only if they actually cause a delay.

491 The final sentence of this section isn't necessarily related to the rest of the section and may not be consistent with the "the deal" struck in the main text of the lease (see Section 2.1(c)). Care should be taken to be consistent.

[THIS VERSION OF EXHIBIT E IS TO BE USED ONLY IF TENANT DOES THE INITIAL BUILDOUT]

EXHIBIT E: WORK LETTER

1. Plans.

- 1.1 Preparing the Plans. [IF TENANT HAS ALREADY PROVIDED APPROVED PLANS AND SPECS, USE THE FOLLOWING LANGUAGE AND OMIT 1.2. AND 1.3] Tenant has previously provided to Landlord drawings, plans and specifications for all of the initial Tenant Improvement Work to be done in the Premises. Landlord has approved said drawings, plans and specifications.⁴⁹² Said drawings, plans and specifications are hereinafter referred to as the “**Plans.**”

[IF TENANT HAS NOT YET PROVIDED APPROVED PLANS AND SPECS, USE THE FOLLOWING ALTERNATIVE VERSION OF 1.1 AND ADD 1.2 AND 1.3] Prior to commencing any Tenant Improvement Work (as hereinafter defined) in the Premises, Tenant shall deliver to Landlord:

- (a) Proposed space plans and preliminary drawings by no later than [_____, 20____]; [_____] (____) days after the date of this Lease];
- (b) Proposed drawings, plans and specifications for all work to be performed, said drawings, plans and specifications to be initialed by Tenant to indicate Tenant’s approval and otherwise to be in form and substance sufficient to be submitted to the government having jurisdiction over the Building as part of an application for a building permit, including (without limitation) being stamped as approved by an architect registered in the jurisdiction in which the Building is located;⁴⁹³ and
- (c) Final drawings, plans and specifications for all work to be performed, which must be initialed by Tenant to indicate Tenant’s approval and must be stamped as approved by an architect registered in the jurisdiction in which the Building is located.

Each of the foregoing shall in turn be subject to Landlord’s approval before the next submission is made, such approval not to be unreasonably withheld, conditioned or delayed⁴⁹⁴ and must comply with ASHRAE 189.1 standards or other, more stringent standard as may be imposed by law and contain a scorecard or other chart evidencing the anticipated score of the Tenant Improvement Work under the then-most current Third Party Sustainability Standard acceptable to Landlord. If Landlord does not give notice of disapproval or make a written request for additional information or make corrections or changes to Tenant’s submissions within ten business (10) days after Tenant submits the same to Landlord for approval, then Tenant may resubmit the proposed submissions to Landlord along with a typed bold print reminder that Landlord’s failure to respond within ten business (10) days after this second notice will be deemed to be Landlord’s approval and, if Landlord still does not respond, the submitted item shall be deemed approved. Tenant shall revise its drawings, plans and specifications and resubmit them to Landlord within seven (7) business days after Tenant’s receipt of Landlord’s comments. This procedure shall be repeated until Landlord’s approval is granted. The foregoing drawings, plans and specifications, once approved in accordance with the foregoing procedure, are hereinafter referred to as the “Plans.” Tenant shall use its own architect(s), engineer(s) and other design professionals to prepare the Plans on its behalf.

492 It is recommended to attach a list of the approved plans and specifications.

493 A landlord wants to make sure that the tenant’s plans are prepared by a locally-licensed architect so they will qualify for a building permit from the governing authority.

494 Reminder: Landlord has sustainability practices and standards and compliance with these standards will be evaluated as part of Landlord approval.

- 1.2 LEED-CI or equivalent. The Plans shall be prepared in accordance with the then-current standards to obtain certification at the Silver⁴⁹⁵ (or higher) level under the U.S. Green Building Council's LEED for Commercial Interiors rating or under any comparable third-party rating that may be approved from time to time by Landlord.⁴⁹⁶ Landlord shall provide to Tenant an electronic copy of such documentation about the design, engineering and construction of the Building as Tenant may reasonably request for that purpose.⁴⁹⁷ Tenant shall pay Landlord any reasonable out-of-pocket cost incurred by Landlord in doing so.⁴⁹⁸ [OPTION 1: Tenant shall diligently pursue the rating set forth above and shall provide evidence to Landlord that such rating has been obtained within one (1) year after the Lease Commencement Date.⁴⁹⁹] [OPTION 2: The foregoing does not require Tenant to formally obtain the rating set forth above, but Tenant shall, upon request from time to time, provide evidence that the Tenant Improvement Work complies with that standard.] Notwithstanding any confidentiality requirement that may be set forth elsewhere in this Lease, a copy of this Lease may be provided to any third-party organization whose sustainability rating system is applicable to the Alterations if providing a copy of this Lease is required by the third party as part of its evaluation.
- 1.3 Adequacy and Legal Sufficiency. Notwithstanding its review of the drawings, plans and specifications, Landlord makes no representation or warranty as to the completeness or accuracy of the Plans or their legal sufficiency, and Landlord shall have no liability for or in connection with any other deficiency in the Plans. Tenant agrees to look solely to its architect, engineer and other design consultants in that regard.
- 1.4 Changes to the Plans. Tenant shall not be entitled to make any changes to the Plans without Landlord's approval. Landlord's consent to changes shall not be unreasonably withheld, conditioned or delayed. All changes shall be reviewed and constructed at Tenant's sole cost and expense. If Tenant requests Landlord's approval of a proposed change in the Plans, and if the proposed change causes a delay in substantial completion of the Tenant Improvement Work, the outside date set forth in Section 2.2(a) of the Lease for the Lease Commencement Date shall not be adjusted.
- 1.5 Tenant Improvement Work. As used in this Work Letter, **"Tenant Improvement Work"** means all work shown on the Plans, as they may be amended from time to time in accordance with the terms of this Work Letter.
2. Construction Services. All work requested by Tenant and approved by Landlord for the Tenant Improvement Work shall be performed by the general contractor selected by Tenant and approved by Landlord, such approval not to be unreasonably withheld, conditioned or delayed. Tenant shall enter into its own contract with the general contractor so selected. Tenant is responsible for providing its general contractor with a copy of the rules and regulations for the Building and for ensuring its general contractor's (and the subcontractors') compliance therewith.
3. Allocation of Costs.
- 3.1 Tenant's Responsibility. The cost of all Tenant Improvement Work shall be Tenant's, subject to reimbursement or direct payment by Landlord up to the amount of the Tenant Improvement Allowance.

495 See Footnote 470.

496 See Footnote 471.

497 See Footnote 472.

498 See Footnote 473.

499 See Footnote 474.

3.2 Tenant Improvement Allowance. [IF SUBSECTION (b) IS INCLUDED, THIS SHOULD BECOME SUBSECTION (a)]

- (i) Landlord shall provide Tenant with up to _____ Dollars (\$_____) per rentable square foot in the Premises (the **“Tenant Improvement Allowance”**)⁵⁰⁰ to be applied to the cost of the Tenant Improvement Work.
- (ii) As used in this Work Letter, the cost of the Tenant Improvement Work includes all hard construction costs (including, without limitation, general conditions, overhead and profit), the cost of all cabling, the cost of all hard-wired security systems, sprinklering, all soft costs (including, without limitation, architectural, engineering and design fees and expenses)⁵⁰¹, permit costs, Landlord’s costs of reviewing the drawings, plans and specifications submitted to it, Landlord’s supervisory fee, and costs associated with sustainability practices, documentation, registration and certification.
- (iii) The Tenant Improvement Allowance shall be paid by Landlord to Tenant upon submission of paid invoices (together with such supporting documentation as Landlord may reasonably request) by Tenant or evidence that the invoiced costs will be paid for with Landlord’s disbursement, together with a certification from Tenant’s architect on the American Institute of Architects (AIA) standard form that all of the work or supplies so invoiced have in fact been provided to the Premises. Each request for payment must be accompanied by partial releases (or, in the case of final payment, final releases) of lien rights from all contractors and subcontractors. Each request for payment shall also be deemed to be a certification by Tenant that all of the invoices, paid or unpaid, for which payment is requested from the Tenant Improvement Allowance relate to the Tenant Improvement Work and have been incurred by Tenant. Disbursement of the Tenant Improvement Allowance for the foregoing purposes shall be made in monthly increments.⁵⁰² Notwithstanding anything to the contrary in this Work Letter, all disbursements of the Tenant Improvement Allowance are made on a percentage-of-completion basis. In addition, Landlord shall not be obligated to make any payments if there are any liens, suits, actions or proceedings pending which may affect the Building or the Land with respect to any Tenant Improvement Work or if Tenant is otherwise in default of its obligations under this Lease at the time a disbursement is requested or is otherwise to be made, and Landlord may offset against the Tenant Improvement Allowance to reduce Landlord’s damages in such event (without thereby waiving or curing the default). Tenant may bond or otherwise discharge any lien and, as long as there is no effect on the Building or the Land from the underlying dispute, Landlord shall disburse the unused Tenant Improvement Allowance in accordance with the foregoing provisions. At such time as any default by Tenant is cured within the applicable notice and/or cure period, the withheld disbursement of the Tenant Improvement Allowance shall be disbursed to Tenant.

[IF THE TENANT IMPROVEMENT ALLOWANCE IS PROVIDED ON A “USE IT OR LOSE IT” BASIS, DO NOT ADD THE FOLLOWING SUBSECTION.⁵⁰³ IF TENANT IS GOING TO BE CREDITED WITH ANY UNUSED BALANCE OF THE TENANT IMPROVEMENT ALLOWANCE, ADD THE FOLLOWING]

- (b) If the Tenant Improvement Work is completed for less than the amount of the Tenant Improvement Allowance, then the unused balance shall be applied to either the actual cost to Tenant of its actual out-of-pocket moving expenses or to the cost of acquiring furniture, fixtures and equipment or other personal property installed in the Premises, or to the rent, at Tenant’s option.⁵⁰⁴

500 See Footnote 479.

501 See Footnote 480.

502 The frequency of making disbursements is open to negotiation. Monthly disbursements are common.

503 See Footnote 481.

504 See Footnote 482.

[IF TENANT WANTS TO PROTECT ITSELF AGAINST LANDLORD DELAYS MAKING IT IMPOSSIBLE TO MEET THE LEASE COMMENCEMENT DATE SET FORTH IN SECTION 2.2(a) OF THE LEASE, ADD THE FOLLOWING SECTION]

4. Landlord Delay. As used herein, the term “**Landlord Delay**” means any delay in the substantial completion of the Tenant Improvement Work that is a result of: (a) the performance or completion of any work or activity by a party employed by Landlord, including any of Landlord’s employees, agents, contractors, subcontractors and materialmen; or (b) any interference by Landlord or Landlord’s contractors, subcontractors, materialmen, employees, or agents with the performance of the Tenant Improvement Work. If any Landlord Delay occurs, then (notwithstanding anything herein or in the Lease to the contrary), the Lease Commencement Date shall be the date that the Tenant Improvement Work is substantially completed taking into account such Landlord Delay. No Landlord Delay shall affect the obligations of Tenant hereunder or under the Lease except for the commencement of the Lease Term and of Tenant’s obligations to pay rent.

[IF THIS IS A RETAIL LEASE AND “PERCENTAGE RENT” IS TO BE CHARGED BASED ON THE TENANT’S SALES,⁵⁰⁶ ATTACH THIS EXHIBIT]

EXHIBIT F: PERCENTAGE RENT

In addition to Fixed Annual Rent, Tenant shall pay Landlord percentage rent (“**Percentage Rent**”) as determined by this Exhibit. The Percentage Rent for each calendar year shall be an amount equal to ____ percent (___ %) (the “**Percentage Rent Rate**”) times the amount of Gross Sales made during such calendar year in excess of the Annual Sales Base (as defined below). The “**Annual Sales Base**” for any calendar year that is a full calendar year shall be the Fixed Annual Rent for that calendar year (reduced by any abatement of Fixed Annual Rent for that calendar year under the terms of this Lease)⁵⁰⁷ divided by ____ one-hundredths (0.____). The Percentage Rent for any partial calendar year shall be an amount equal to the Percentage Rent Rate times the amount of Gross Sales made during such partial calendar year in excess of the Annual Sales Base multiplied by a fraction, the numerator of which shall be the number of days in said partial calendar year for which Annual Fixed Rent was payable and the denominator of which shall be 360. In no event will Percentage Rent be abated under this Lease.⁵⁰⁸ The Percentage Rent obligations shall survive the expiration of the Lease Term.

Tenant shall furnish to Landlord at its main office within fifteen (15) days after the end of each month⁵⁰⁹ (each such period being a “**Percentage Rent Period**”) during the Lease Term (except that if the Lease Commencement Date is other than the first day of a calendar month, the Gross Sales during the period of the first partial month shall be added to the Gross Sales during the next succeeding full Percentage Rent Period) a complete statement, certified by Tenant, or a responsible financial officer thereof if Tenant is an entity, of the amount of Gross Sales made from the Premises during said Percentage Rent Period, the statement to be in form and style and contain such details and breakdown (including an itemization of all deductions taken) as Landlord may reasonably require. Tenant shall pay to Landlord simultaneously with each statement the amount which is equal to the Percentage Rent Rate times the amount of Gross Sales made during the portion represented by said statement in excess of the “**Periodic Sales Base**” (being one-twelfth (1/12th) of the Annual Sales Base) or, in the case of a partial month of a Lease Year, an equitably pro-rated Periodic Sales Base.

Tenant will furnish to Landlord at its main office, within thirty (30) days after the end of each calendar year, a complete annual statement certified by Tenant, or a responsible financial officer thereof if Tenant is an entity (and accompanied by the opinion required below), showing the amount of Gross Sales made during such calendar year and the amount of Percentage Rent paid to Landlord pursuant to this Exhibit in such calendar year, the statement to be in form and style and contain such details and breakdown (including an itemization of all deductions taken) as Landlord may reasonably require. The annual statement must be certified to be true and correct by an independent certified public accountant. The annual statements provided for in this Exhibit shall be accompa-

506 A percentage rent lease may not be cost effective for a landlord who does not regularly use or have the resources to manage this method.

507 If this parenthetical clause is not used, and it often is not, then the tenant gets an extra break during rent abatement periods. Not only does the tenant not have to pay the base rent during the abatement period, but the percentage rent payable is calculated on the (higher) natural breakpoint that would be applicable if the tenant was paying base rent.

508 There is usually no point to abating percentage rent, even if there is a casualty loss or other circumstance that traditionally abates base rent. The theory of percentage rent is that the landlord gains only parallel to the tenant’s success so Percentage Rent is payable if the tenant’s sales are sufficient, regardless of what else is happening.

509 Some percentage rent clauses calculate percentage rent quarterly or annually. The less frequently percentage rent is payable, the further behind the landlord falls. If percentage rent is payable quarterly, substitute the word “quarter” for “month” here and, in the last sentence of this paragraph, change “one-twelfth (1/12th)” to “one-quarter (1/4)” and change “month” to “quarter.” Do not change “month” in the parenthetical in the first sentence of this paragraph. If percentage rent is payable only annually, you can delete this entire paragraph because this paragraph addresses only interim estimated payments during the year.

nied by a signed opinion stating specifically that the person certifying such statement has read the definition of “**Gross Sales**” contained in this Lease, that he has examined the report of Gross Sales of such calendar year, that his examination included such tests of Tenant’s books and records as he considered necessary under the circumstances, and that such report accurately presents the Gross Sales of such calendar year. An adjustment shall thereupon be made with respect to the Percentage Rent as follows: If Tenant has paid to Landlord an amount greater than Tenant is required to pay as Percentage Rent under the terms of this Exhibit, Tenant shall receive a credit of such difference against the next installment(s) of rent due and payable (or, if none, then Landlord shall promptly refund such amount to Tenant) or, if Tenant shall have paid an amount less than was required to be so paid, then Tenant shall pay such difference at the time of submission of its annual statement. Tenant shall cause any subtenant, concessionaire or licensee of Tenant to submit similar periodic and annual statements

The term “**Gross Sales**” means the total amount charged by Tenant or anyone in Tenant’s behalf or by subtenants, concessionaires or licensees of Tenant⁵¹⁰ in connection with any and all sales of food, beverages, merchandise and service to patrons and customers, made or rendered on, in, or from the Premises (unless specifically excluded by this Exhibit), or resulting from initial sales made on, in or from the Premises, or from advertising, either oral or written, originating at the Premises, and sales, wherever made,⁵¹¹ including telephone sales of merchandise stored on the Premises, or merchandise shipped from other locations on orders taken in or through the Premises, either personally or by telephone or in writing, or by persons reporting to the Premises, whether or not such amounts shall be for cash or on credit (excluding, however, interest, finance charges or insurance payments to be paid by the customer to Tenant because of a charge, credit or deferred payment sale), whether paid or unpaid, collected or uncollected, including, without limiting the generality of the foregoing, all proceeds from all automatic or coin-operated vending, weighing, games, and any other machines or devices, including telephones, or other dispensing or sanitary facilities as shall be in the Premises, whether or not owned or operated by Tenant, except those which are operated for the sole benefit and enjoyment of Tenant’s employees. The gross sales price of lottery tickets sold on, in or from the Premises shall also be included in Gross Sales.⁵¹² (The inclusion in the foregoing enumeration of an item does not imply that an item is permitted to be sold on, in or from the Premises or supersede the provisions of this Lease relating to permitted uses; such provisions shall control.) Each charge or sale upon installment or credit shall be treated as a sale for the full price in the month during which such charge or sale shall be made, irrespective of the time when Tenant shall receive payment (whether full or partial) therefor. The amount of any deposit on a layaway sale, or any other deposit not refunded, shall be included in Gross Sales. No discounts shall be deducted from any sale price for any selected category of customer. Discounts, interest charges and other charges payable to credit card companies or finance companies shall not be deducted in computing Gross Sales.

510 Note that this attempts to include the gross sales by subtenants and concessionaires in the tenant’s own gross sales. But, usually the tenant only collects rent from its subtenants and concessionaires, not their gross sales. The landlord should consider whether percentage rent should be charged directly to third parties or, more likely, to the tenant on a basis that would include sub-rent or other payments made to the tenant by its subtenants or concessionaires. The Gross Sales provisions in the lease should be customized in light of the tenant’s industry.

511 Note that this definition attempts to attribute to these premises all sales made on-site, all sales made off-site if initiated on this site, and all sales made on-site even if initiated off-site. This is extremely pro-landlord and could mean that a tenant would have to count the same sale at multiple locations. A tenant should conform this clause to match its own allocation policy.

512 There was some debate about the propriety of including the gross sales price of lottery tickets. Tenants have argued that the tenant was in a sense buying the ticket from the state and would have to turn substantially all of the proceeds to the state. However, the sale of lottery tickets is not much different than a sale of any other item of stock at or just above the retailer’s own cost; the gross sales price is included in “Gross Sales” even if most of or all of the revenue is paid over to a wholesaler or manufacturer and not retained by the retailer.

If Tenant's Gross Sales or any other measure of receipts or sales⁵¹³ are required to be reported on any Federal, State or local sales tax or similar tax return, then Tenant shall deliver a copy of each such return to Landlord, and if Gross Sales as so reported shall exceed the Gross Sales reported under this Lease by Tenant, then the Gross Sales shall be taken at the highest figure so reported. If any governmental authority shall increase the Gross Sales reported by Tenant on any such tax return, after audit, then Tenant shall promptly notify Landlord of such increase, supply a true copy of such audit, and pay any additional Percentage Rent due, together with interest thereon calculated as set forth below.

The business of Tenant and of any subtenant, licensee or concessionaire shall be operated so that a duplicated dated sales slip, dated invoice or dated cash register receipt, serially numbered, shall be issued with each sale or transaction, whether for cash, credit or exchange, and Tenant shall utilize, or cause to be utilized, cash registers equipped with sealed continuous totals and numbering consecutive rings or such other devices for controlling sales as Landlord shall approve to record all sales.

Tenant shall keep at all times during the Lease Term, at the Premises or at its office address, full, complete and accurate books of account and records in accordance with generally accepted accounting practices with respect to all operations of the business to be conducted on, in or from the Premises, including the recording of Gross Sales and the receipt of all inventory or merchandise into and the delivery of all inventory or merchandise from the Premises during the Lease Term. Tenant shall retain such books and records, copies of all sales tax reports and tax returns submitted to taxing authorities, as well as copies of contracts, vouchers, checks, inventory records, dated cash register tapes and sales slips and other documents and papers in any way relating to the operation of such business for at least three (3) years from the end of the period to which they are applicable, or, if any audit is required or a controversy should arise between the parties hereto regarding the Percentage Rent payable hereunder, until such audit or controversy is terminated even though such retention period may be after the expiration of the Lease Term or earlier termination of this Lease. Tenant's subtenants, concessionaires and licensees shall also be bound by the provisions of this paragraph.

Landlord agrees to keep any information obtained pursuant to this Exhibit confidential, except that Landlord shall be permitted to divulge the contents thereof if such disclosure is in connection with any financing arrangements or sales or assignments of Landlord's interest in the Building or in connection with any arbitration, administrative or judicial proceeding in which Landlord is involved.

Landlord shall have the right, in the event of Tenant's delinquency in delivering Gross Sales statements, to conduct an examination or audit of Tenant's books and records with the cost thereof, together with any charges occasioned thereby, to be the obligation of Tenant and to be paid to Landlord as additional rent upon demand. If all of the necessary books and records are not maintained or available to Landlord, or if Tenant fails to continuously operate in the Premises during the required hours of operation, Landlord may require Tenant to pay twenty-five percent (25%) of the Fixed Annual Rent as Percentage Rent in lieu of the Percentage Rent otherwise required by this Lease for the period in question.⁵¹⁴

513 It is unlikely that a tenant would have to report "Gross Sales," which is a lease-specific term unique to this lease, to any government. The phrase "or any other measure of receipts or sales" was added in an attempt to require the tenant to turn over any similar reports.

514 This entire paragraph tries to address the situation where the tenant simply does not report or may not keep records. In the former situation, the landlord's audit may be a useful tool, but an audit is costly and is not very useful if the tenant does not keep records in the first place.

The acceptance by Landlord of payments of Percentage Rent shall be without prejudice to Landlord's rights to an examination of Tenant's books, records and accounts in order to verify the amount of Gross Sales. Such books and records shall be open at all reasonable times (and, if requested by Landlord, shall be made available at the Premises or Landlord's main office) for the inspection of Landlord or its duly authorized representatives as provided in this Exhibit. Landlord and its representatives shall have full and free access to such books and records, the right to make copies of the same and the right to require of Tenant, its agents and employees, such information or explanation with respect to such books and records as may be necessary for a proper examination and audit thereof. If such examination, audit or the tax returns delivered pursuant to this Exhibit shall disclose that any of Tenant's statements of Gross Sales understates Gross Sales made during the reporting period of the statement, Tenant shall pay to Landlord as additional rent within ten (10) days after demand the deficiency in Percentage Rent, which deficiency shall be payable together with interest thereon from the date when originally due if accurately reported at the rate of eighteen percent (18%) per annum or the maximum rate permitted by law, whichever is less. In addition, if any such examination or audit by Landlord shall disclose an understatement of Gross Sales by two percent (2%)⁵¹⁵ or more as aforesaid, or if any such audit is conducted following Tenant's failure to deliver any periodic or annual statement of Gross Sales required by this Exhibit (regardless of any discrepancy found), then Tenant shall pay to Landlord as additional rent within ten (10) days after demand the costs of such audit. For purposes hereof, a report of the findings on such examination and audit by Landlord's accountant shall, if reasonable, be binding and conclusive upon Landlord and Tenant. The furnishing of any willfully or grossly inaccurate⁵¹⁶ statement of Gross Sales may be deemed, at Landlord's sole option and discretion, a default under this Lease without any notice or cure being afforded with respect thereto.

515 Recall that under Section 4.7, Landlord reimburses Tenant for the costs of an operating expense audit only if a discrepancy of 3% is found.

516 Note that "grossly inaccurate" is vague and not defined. A tenant should vigorously resist such a default. A tenant should probably vigorously resist this entire sentence because of the harsh consequences.

EXHIBIT G: ROOFTOP EQUIPMENT

[IF LANDLORD AGREES TO PERMIT TENANT TO PLACE COMMUNICATIONS EQUIPMENT ON THE BUILDING'S ROOF, ATTACH THIS PART OF EXHIBIT G AND MODIFY SECTION 12 OF THE LEASE, AS NOTED THEREIN]

Rooftop Communications Equipment

Landlord hereby grants its consent to Tenant's installation of _____ (—) [satellite transmitting and/or receiving dish(es), transmitting and/or receiving antenna(e)] [collectively], the **"Communications Equipment"**⁵¹⁷, on the roof of the Building,⁵¹⁸ subject to all of the following terms and conditions:

- (a) The Communications Equipment shall be used only [to receive over-the-air and satellite broadcast television stations][to communicate with other facilities operated by Tenant or by third parties under contract to provide services to Tenant] incident to Tenant's use of the Premises and shall not be used for any other purpose, including the transmission of any signals intended for the use of the general public or of subscribers.⁵¹⁹ Use of the Communications Equipment is restricted solely to Tenant and its permitted subtenants of the Premises. The right to use the Communications Equipment may not be sold, assigned, leased or otherwise given to any third party except as may be incident to that third party's permitted use of the Premises.⁵²⁰
- (b) Tenant shall bear all of the cost and expense of designing, purchasing, installing, operating, maintaining, repairing, removing and replacing the Communications Equipment, and for repairing and restoring any damage to the Building or to Landlord's or any other person's or entity's property or equipment, including but not limited HVAC equipment, arising therefrom.⁵²¹ Landlord may require that the Communications Equipment be installed, maintained, repaired, removed and/or replaced at Tenant's expense by Landlord's contractors, or that Tenant utilize contractors approved by Landlord for such purpose. Upon written request from Tenant, a location on the roof of the Building for the Communications Equipment shall be delivered by Landlord in its then "as is, where is" condition for purposes of this Exhibit. Tenant shall or Landlord may temporarily remove or relocate the Communications Equipment from time to time to allow for roof repairs or replacements if and when requested by Landlord. Landlord is not required to make any structural or other alterations, additions or improvements to the Building to accommodate the Communications Equipment.
- (c) Tenant shall be responsible for obtaining any and all Federal, State, county and municipal governmental permits, approvals, licenses and certificates necessary for the installation and operation of the Communications Equipment, and shall comply with all laws, statutes, ordinances, codes, rules and regulations relating thereto, including (without limitation) building and zoning codes

517 A tenant may seek authority to install a broader scope of rooftop equipment, including solar arrays, wind turbines, and measurement equipment. If broader equipment is permitted on the roof, landlord will need to further examine ownership, profits, and related power agreements, all of which may require a separate document. Landlord should carefully consider implications for granting such rights, including competing rooftop interests of tenants (such as signage blocking solar arrays. Any roof rights landlord may grant should be subordinate to landlord's required access.

518 If the Communications Equipment is to be placed on a surface parking lot, open space, garage roof or elsewhere, make appropriate conforming changes throughout this Exhibit.

519 This clause is written to clarify, both by affirmative and negative language, that the rooftop equipment is only for the space tenant's own internal communications. That may or may not be the case, and this language can be deleted or modified accordingly.

520 Again, the intent here is to make it clear that the tenant cannot sell its rooftop rights to anyone separate from a sublease of the premises themselves. Even though they are not mentioned by name, assignees of this lease automatically receive the right to use the rooftop equipment for their own use simply because an assignee is itself a "Tenant."

521 The point of this subparagraph and following subparagraph (c) is that the entire burden of using the roof is on the tenant.

- (d) No Communications Equipment shall be permitted if it or its ancillary equipment interferes with transmissions to or from any other satellite communications dish, antenna, other transmitting equipment, telecommunications system, or other computer or electronic equipment then on, in or near the Building.⁵²² Tenant shall be afforded a reasonable opportunity to avoid, ameliorate or cure any such interference problem but shall be solely liable for, and shall defend, indemnify and hold Landlord harmless from and against, any damage incurred by a third party as a result of interference from the Communications Equipment. [INSERT IF APPLICABLE: Without limiting the foregoing, Tenant acknowledges that at least one third party is already using and shall continue to use the Building's roof for transmissions.]
- (e) The Communications Equipment shall be installed and maintained by Tenant in a manner reasonably acceptable to Landlord. Landlord may require that Tenant provide a certificate of a licensed independent structural engineer reasonably acceptable to Landlord certifying to the compliance of the installation with the requirements of this Exhibit. In addition to other factors set forth elsewhere in this Exhibit, Landlord may consider the quality of the proposed physical installation and its safety, and the size, shape and appearance of the Communications Equipment and its effect on the Building's appearance. Without limiting the foregoing, the Communications Equipment must be securely affixed to the roof so as to prevent its dislodging in high winds, and the Communications Equipment must not be visible from the street level building line of any buildings currently located [INSERT GEOGRAPHIC AREA]. The Communications Equipment shall not be permitted to interfere with the views from the Building's roof deck. All wires and cable between the Communications Equipment and the Premises must be installed in existing Building conduit or in an alternative conduit approved by Landlord and must be properly shielded. No Communications Equipment shall be permitted if its installation will void or adversely affect any warranty of the roof or if its installation and/or operation would otherwise adversely affect the Building. Tenant shall maintain the area of any roof penetration and repair any damage to the roof caused by the installation or operation of the Communications Equipment.
- (f) Nothing herein grants Tenant any right to access the roof of the Building unless accompanied by an employee of the Building Manager or other representative of Landlord, except that access shall be permitted in emergencies. Access to any Communications Equipment running through another tenant's premises shall be subject to the terms of such other tenant's lease. If any overtime or other cost is incurred by Landlord in making access available to Tenant, such cost shall be additional rent payable by Tenant.
- (g) Tenant shall maintain such insurance on the Communications Equipment and relating to the Communications Equipment as Landlord may reasonably require from time to time. Such insurance shall name Landlord, the Building Manager and any Mortgagee or ground lessor as additional insureds. All provisions of this Lease applicable to insurance and indemnification shall apply to the Communications Equipment.
- (h) Notwithstanding any provision of this Lease to the contrary, unless agreed to by Landlord and Tenant at the time Tenant installs the Communications Equipment, the Communications Equipment shall remain the property of Tenant during and after installation and shall be removed by Tenant at its expense at the expiration or earlier termination of the Lease Term.⁵²³

522 Many similar clauses address interference with other users of the same rooftop. Note that this clause goes further and addresses interference with adjacent but off-site facilities. Also note that this clause does not care whose equipment was installed first. Any interference, even if with others whose subsequent installations equipment are the cause of the interference, is the tenant's problem.

523 Communications equipment is typically customized so there is no interest on the landlord's part in retaining it for use by other tenants. Although other provisions of the lease may address removal of alterations in the premises, it is possible that those other provisions require some sort of affirmative notice from the landlord directing the tenant to remove the alteration. Occasionally, those other provisions are inadvertently written to apply only to alterations made by the tenant within the leased premises. To avoid all doubt and confusion, this subsection directly requires removal of this particular improvement.

- (i) Tenant's failure to perform any obligation or abide by the terms and conditions of this Exhibit shall constitute a default by Tenant under this Lease after the expiration of any applicable notice and/or cure period. In addition to any other remedy available to Landlord under this Lease, (a) Landlord shall have the right to cure any failure by Tenant to comply with the terms and conditions of this Exhibit, and all of Landlord's costs incurred in connection therewith shall be payable by Tenant as additional rent upon demand, and (b) Landlord may require Tenant to remove the Communications Equipment and, if Tenant does not promptly do so, Landlord may do so at Tenant's expense as additional rent payable upon demand.⁵²⁴
- (j) From and after the date Tenant commences physical installation of any of the Communications Equipment⁵²⁵ and until all of the Communications Equipment is removed in accordance with the terms of this Exhibit, and regardless of whether the Communications Equipment is in actual use at any time, Tenant shall pay Landlord, as additional rent, _____ Dollars (\$_____) per calendar month (prorated for portions of a calendar month based on actual numbers of days elapsed), such amount to be increased at the commencement of each Lease Year by the rate of increase between the last CPI published before the date of this Lease and the last CPI published before the start of the then-applicable Lease Year. As used herein, "CPI" means the Consumer Price Index for _____, All Urban Consumers (1984 = 100⁵²⁶) as published from time to time by the United States Department of Labor, Bureau of Labor Statistics or, if such index is discontinued, a comparable index selected by Landlord in its reasonable discretion and an appropriate conversion factor shall be used to accommodate the transition between the two indices. Such additional rent shall be payable in advance on the first day of each calendar month during the period set forth in the first sentence of this subsection (and in advance on the date physical installation commences if such date is other than the first day of a calendar month), without abatement, notice, set-off, counterclaim, deduction or demand.
- (k) Tenant's rights under this Exhibit are non-exclusive.

[IF LANDLORD AGREES TO PERMIT TENANT TO PLACE A SOLAR PHOTOVOLTAIC SYSTEM ON THE ROOF, WHETHER FOR TENANT'S OWN USE OR FOR THE SALE OF ELECTRICITY TO THIRD PARTIES, ADD THE FOLLOWING. THIS CAN ALSO BE USED, WITH MINOR ADAPTATION, IF THE GENERATING EQUIPMENT IS A GENERATOR OR CO-GENERATION FACILITY TO BE LOCATED ELSEWHERE IN THE BUILDING, SUCH AS IN A BASEMENT OR PARKING AREA.]

Rooftop Electrical Generating Equipment⁵²⁷

Landlord hereby grants its consent to Tenant's installation of electrical generating equipment as described in the attached exhibit (together with its connecting cabling or wiring and ancillary facilities, the "**Generating Equipment**") on the roof of the Building, subject to all of the following terms and conditions:

524 This remedy seems logical and proportional to the offense. However, a tenant should consider the consequences, such as disruption of its communications network, before agreeing to it. Also, before a landlord exercises this remedy, it should determine whether applicable law permits the removal of the equipment. For example, in jurisdictions that prohibit landlords from using self-help to evict tenants, would removal of rooftop communications equipment be considered impermissible self-help?

525 Landlords often do not charge rent for rooftop rights. Note that this particular lease does charge rent. Also, this lease charges rent only if and when the tenant actually begins to install rooftop communications equipment. Rent is not charged under this lease for the unexercised right to use the rooftop. If the landlord desires to change that, the introductory clause of subsection (j) must be revised.

526 See Section 3.2 of this lease for more commentary on the use of the Consumer Price Index. This exhibit uses a much simplified version of what is provided in Section 3.2. If Section 3.2 is used in the lease, it is best to simply not define the CPI here and allow Section 3.2 to define the CPI.

527 The same footnotes as apply above to communications equipment are generally applicable to electrical generating equipment.

- (a) The Generating Equipment shall be ancillary to the primary Permitted Use of the Premises and shall not be used for any other purpose without Landlord's written consent. Use of the Generating Equipment is restricted solely to Tenant, any third-party energy services company that is approved by Landlord in the exercise of its reasonable discretion (an **"Approved ESCO"**), and any public utility company to which electricity generated by the Generating Equipment is sold; use of the Generating Equipment may not be otherwise sold, assigned, leased, or made available to any third party. Landlord's approval of the Generating Equipment or the Approved ESCO under this Addendum does not obligate Landlord to purchase any electricity produced by the Generating Equipment.
- (b) Tenant shall bear all of the cost and expense of designing, purchasing, installing, operating, maintaining, repairing, removing and replacing the Generating Equipment, and for repairing and restoring any damage to the Building or to Landlord's or any other person's or entity's property arising therefrom. Landlord may require that the Generating Equipment be installed, maintained, repaired, removed and/or replaced at Tenant's expense by Landlord's contractors, or that Tenant utilize contractors approved by Landlord for such purpose. Tenant may delegate its obligations under this Addendum to an Approved ESCO, but Tenant shall remain primarily liable to Landlord for the performance of such obligations. Upon written request from Tenant, a location on the roof of the Building for the Generating Equipment shall be delivered by Landlord in its then "as is, where is" condition for purposes of this Addendum. Landlord does not represent or warrant that the roof of the Building is a suitable location for such a purpose or that the Building has unimpeded rights to light or view, and Tenant must make its own determination of those issues. Landlord is not required to make any structural or other alterations, additions or improvements in or to the Building to accommodate the Generating Equipment. Tenant shall or Landlord may temporarily remove or relocate the Generating Equipment from time to time at Tenant's expense to allow for roof repairs or replacement if and when requested by Landlord without any compensation to Tenant.
- (c) Tenant and any Approved ESCO shall be responsible for obtaining any interconnection agreement with a utility grid and any and all utility company and Federal, State, county, and municipal governmental permits, approvals, licenses and certificates necessary for the installation and operation of the Generating Equipment, and shall comply with all laws, statutes, ordinances, codes, rules and regulations relating thereto, including (without limitation) building and zoning codes.
- (d) No Generating Equipment shall be permitted if it or its ancillary equipment interferes with transmissions to or from any satellite communications dish, antenna, other transmitting equipment, telecommunications system, or other computer or electronic equipment then on, in or near the Building. Tenant shall be afforded a reasonable opportunity to avoid, ameliorate or cure any such interference problem, but shall be solely liable for, and shall defend, indemnify and hold Landlord harmless from and against, any damage incurred by a third party as a result of interference from the Generating Equipment.
- (e) The Generating Equipment shall be installed and maintained by Tenant in a manner reasonably acceptable to Landlord. Landlord may require that Tenant provide a certificate of a licensed independent structural engineer reasonably acceptable to Landlord certifying to the compliance of the installation with the requirements of this Exhibit. In addition to other factors set forth elsewhere in this Exhibit, Landlord may consider the quality of the proposed physical installation and its safety, and the size, shape and appearance of the Generating Equipment and its effect on the Building's appearance. Without limiting the foregoing, the Generating Equipment must be securely affixed to the roof so as to prevent its dislodging in high winds, and the Generating Equipment must not be visible from the street level building line of any buildings currently located [INSERT GEOGRAPHIC AREA]. The Generating Equipment shall not be permitted to interfere with the views from the Building's roof deck. All wires and cable between the Generating Equipment and the Premises must be installed in existing Building conduit or in an alternative conduit approved by Landlord and must be properly shielded. No Generating Equipment shall be permitted if its installation will void or adversely affect any warranty of the roof or if its installation and/or operation would otherwise adversely affect the Building. Tenant shall maintain the area of any roof penetration and repair any damage to the roof caused by the instal-

lation or operation of the Generating Equipment. [IF THE ROOF INSTALLATION BY TENANT IS EXTENSIVE, LANDLORD SHOULD CONSIDER WHETHER TENANT SHOULD BE MADE RESPONSIBLE FOR ROOF MAINTENANCE AT TENANT'S OWN EXPENSE. LANDLORD SHOULD MAKE ANY SUCH DECISION CAREFULLY, AND SUCH A DECISION IS NOT ADVISABLE IN A MULTI-TENANT BUILDING.]

- (f) Nothing herein grants Tenant any right to access the roof of the Building unless accompanied by an employee of the Building Manager or other representative of Landlord, except that access shall be permitted in emergencies. Access to any Generating Equipment running through another tenant's premises shall be subject to the terms of such other tenant's lease. If any overtime or other cost is incurred by Landlord in making access available to Tenant, such cost shall be additional rent payable by Tenant.
- (g) Tenant shall maintain such insurance on the Generating Equipment and relating to the Generating Equipment as Landlord may reasonably require from time to time. Such insurance shall name Landlord and its agents as additional insureds. All provisions of this Lease applicable to insurance and to indemnification shall apply to the Generating Equipment as if it was part of the Premises.
- (h) Notwithstanding any provision of this Lease to the contrary, unless agreed to by Landlord and Tenant at the time Tenant installs the Generating Equipment, the Generating Equipment shall remain the property of Tenant (or an Approved ESCO) during and after installation. Landlord's approval of a third-party energy services company is for Landlord's own benefit and in approving (or disapproving) any such company Landlord undertakes no obligation to Tenant; without limiting the foregoing, Landlord makes no representation or warranty about any agreement between Tenant and an Approved ESCO or the financial prospects of a return to Tenant. Tenant (or the Approved ESCO) shall also be the owner of the electricity produced by the Generating Equipment, may use and/or re-sell said electricity for Tenant's own benefit, and shall be entitled to all tax incentives and renewable energy credits resulting from the Generating Equipment. Landlord may not make any claims about the energy produced by the Generating Equipment. The Generating Equipment shall be removed by Tenant at its expense at the expiration or earlier termination of the Term. If the Generating Equipment was providing electricity to the Premises, Tenant shall restore electrical service from a third-party utility to the Premises of the same quantity and character as existed before the Generating Equipment was installed.
- (i) Tenant's failure to perform any obligation or abide by the terms and conditions of this Exhibit shall constitute a default by Tenant under this Lease after the expiration of any applicable notice and/or cure period. In addition to any other remedy available to Landlord under this Lease, (a) Landlord shall have the right to cure any failure by Tenant to comply with the terms and conditions of this Exhibit, and all of Landlord's costs incurred in connection therewith shall be payable by Tenant as additional rent upon demand, and (b) Landlord may require Tenant to remove the Generating Equipment and, if Tenant does not promptly do so, Landlord may do so at Tenant's expense as additional rent payable upon demand.
- (j) From and after the date Tenant commences physical installation of any of the Generating Equipment and until all of the Generating Equipment is removed in accordance with the terms of this Section, and regardless of whether the Generating Equipment is in actual use at any time, Tenant shall pay Landlord, as additional rent, _____ Dollars (\$_____) per calendar month (prorated for portions of a calendar month based on actual numbers of days elapsed), such amount to be increased at the commencement of each Lease Year by the rate of increase between the Consumer Price Index last published at least six (6) months before the date of this Lease and the Consumer Price Index last published at least six (6) months before the start of the then-applicable Lease Year. Such additional rent shall be payable in advance on the first day of each calendar month during the period set forth in the first sentence of this subsection (and in advance on the date physical installation commences if such date is other than the first day of a calendar month), without abatement, notice, set-off, counterclaim, deduction or demand.
- (k) Tenant's rights under this Exhibit are non-exclusive.

[IF LANDLORD AGREES TO PERMIT TENANT TO OBTAIN TELECOMMUNICATIONS SERVICES FROM THIRD PARTY PROVIDERS, ATTACH EXHIBIT H AND ADD SECTION 12.4 OF THE LEASE]

EXHIBIT H: TELECOMMUNICATIONS PROVIDERS

- (a) Equipment Installation. All telephone and telecommunications services desired by Tenant shall be ordered, maintained and utilized at the sole cost and expense of Tenant. Except in the event that Landlord otherwise requests or consents in writing, all of Tenant's telecommunications equipment shall be and remain solely in the Premises and the telephone closet(s) on the floor(s) on which the Premises are located,⁵²⁸ in accordance with rules and regulations adopted by Landlord from time to time and at Landlord's sole and absolute discretion. Such equipment shall not be placed in any other part of the Building without Landlord's prior written consent, which Landlord may withhold in its sole and absolute discretion.⁵²⁹ Unless otherwise specifically agreed to in writing, Landlord shall have no responsibility whatsoever for the maintenance of Tenant's telecommunications equipment and facilities, including wiring; nor for any other wiring, cabling or other infrastructure to which Tenant's telecommunications equipment may be connected, whether in the Building, or on or about the Building or its roof, unless damage thereto is caused by Landlord's gross negligence or willful misconduct. Notwithstanding anything to the contrary stated in the foregoing, however, Landlord, at Landlord's sole cost and expense, shall be responsible for all building standard wiring throughout the Building as of the Lease Commencement Date up to the central telephone board located in the telephone closet on the floor on which the Premises are located, and Tenant shall be responsible, at Tenant's sole cost and expense, for the wiring required by Tenant for connecting the Premises to the central telephone board,⁵³⁰ and for all wiring within the Premises.
- (b) Equipment Removal; Reversion to Landlord. Any and all telecommunications wiring installed in the Premises or elsewhere in the Building by or on behalf of Tenant shall be removed, or remain in the Building, upon the expiration or earlier termination of the Lease Term in accordance with Section 10.4 of this Lease.
- (c) New Service Provider. In the event that Tenant desires at any time to engage and utilize the services of a telephone or telecommunications provider whose equipment is not then servicing the Building ("**New Provider**"), no such New Provider shall be permitted to install its lines, wiring, cables or other equipment within the Building without the prior written approval of Landlord, whose approval will not be unreasonably withheld, conditioned or delayed.⁵³¹ Such approval by Landlord shall in no way be construed as a warranty or representation by Landlord, including, without limitation, any warranty or representation as to the quality, suitability, competence or financial strength of the New Provider. Without limitation of the foregoing standard, unless all of the following conditions are satisfied to Landlord's reasonable satisfaction, it shall be reasonable for Landlord to refuse its approval: (i) Landlord shall incur no expense whatsoever with respect to any

528 The landlord and tenant might each want to consider the practical ramifications of the tenant's use of a telephone closet that might be located in a publicly-accessible part of the floor, or that might be shared with another tenant. The landlord cannot guaranty the security of the telephone closet in those circumstances.

529 The preceding sentence granting the landlord "sole discretion" to approve the placement of the tenant's telecom equipment elsewhere in the building is arguably inconsistent with the landlord's obligation in subsection (c) to be "reasonable" in approving the placement of a third-party service provider's equipment in the building. (Conversely, the "reasonable" consent under subsection (c) is so laden with qualifications and standards benefiting the landlord that it is not much different from "sole discretion".)

530 The tenant should confirm that this is indeed an accurate reflection of "the business deal" about sharing the cost and responsibility of installing telecom lines.

531 Compare this requirement that the landlord be "reasonable" with the "sole discretion" standard used in subsection (a). However, note that the list of requirements that follows in this subsection will make it very difficult for a tenant to claim that the landlord is being "unreasonable," so the practical distinction between the standards may not be significant. Additional consistency may be desired.

aspect of the New Provider's provision of its services, including, without limitation, the costs of installation, materials and service; (ii) prior to commencement of any work by the New Provider in or about the Building, the New Provider shall supply Landlord with all such written indemnities, insurance, financial statements and such other items as Landlord may reasonably deem necessary to protect its financial interests and the interest of the Building relating to the proposed activities of the New Provider; (iii) the New Provider agrees to abide by such Federal, State, county and municipal rules and regulations, building and other codes,⁵³² job site rules and such other requirements as are reasonably determined by Landlord to be necessary to protect the interests of the Building, other tenants in the Building and Landlord, in the same or similar manner as Landlord has the right to protect itself and the Building with respect to proposed Alterations as described in this Lease; (iv) Landlord reasonably determines that there is sufficient space in the Building for the placement of all of the New Provider's equipment, facilities and materials; (v) the New Provider agrees to abide by all reasonable requirements, if any, that the New Provider use existing Building conduits and pipes and use Building contractors (or such other contractors approved by Landlord); (vi) Landlord receives from the New Provider such compensation as is reasonably determined by Landlord to compensate it for space used in or about the Building for the storage and maintenance of the New Provider's equipment, facilities and materials, for the fair market value of the New Provider's access to the Building,⁵³³ and the costs which Landlord may reasonably be expected to incur as the result of the foregoing; (vii) the New Provider agrees to deliver to Landlord detailed "as-built" plans within ten (10) business days after installation of the New Provider's equipment, facilities and wiring is complete; and (viii) all of the foregoing matters are documented in a written license agreement between Landlord and the New Provider, the form and content of which are reasonably satisfactory to Landlord and Landlord's counsel.

- (d) Rejection of New Provider. Notwithstanding anything to the contrary in this Lease, the refusal of Landlord to grant approval to any prospective New Provider shall not be deemed a default or breach of any of Landlord's obligations under this Lease. In the event Landlord refuses to grant its approval of a New Provider, Tenant shall have no right to terminate this Lease or claim any entitlement whatsoever to rent abatement or any other credit against rent. Tenant may as its sole and exclusive remedy under this subparagraph seek a judicial order of specific performance compelling Landlord to grant its approval as to the specific New Provider in question.⁵³⁴ The provisions of this subparagraph shall be enforceable solely by Landlord and Tenant, are not for the benefit of any other party, and specifically and without limitation, no New Provider or any other telephone or telecommunications provider shall be deemed a third party beneficiary of any provision of this Lease.
- (e) Service Interruptions. Landlord shall have the right, upon reasonable notice to Tenant (such notice not required to be given more than forty-eight (48) hours in advance) to interrupt, disconnect or turn off Tenant's telecommunications services or facilities in the event of emergency or as deemed reasonably necessary by Landlord in its reasonable discretion in connection with repairs to Building. Such interruption(s) shall not

532 Even if the landlord and the tenant omitted the introductory portion of clause (iii) from this subsection, is there any question that a third-party service provider would not be obligated to comply with applicable law? Is the effect of the sub-clause to make later non-compliance with applicable law by the third-party service provider a default by the tenant under this lease, or can the landlord only retroactively withdraw its consent to the third-party service provider, or is the only effect that the landlord can withhold its consent to the third-party service provider?

533 Note the breadth of this clause. The landlord is allowed to charge for not only the use of the Building space (as if it were charging rent) but also to charge for the "fair market value of the New Provider's access to the Building."

534 A tenant should vigorously contest this limitation on its remedies. Winning a court order for specific performance will take weeks, months or years, with legal fees to match.

exceed forty-eight (48) hours,⁵³⁵ and Landlord shall take all reasonable steps to enter the Premises during non-business hours⁵³⁶ and not to interrupt, disconnect or turn off Tenant's telecommunications service. To the extent any such telecommunications service is interrupted, curtailed or discontinued in any manner, Landlord shall have no liability with respect thereto in the absence of Landlord's gross negligence or willful misconduct, but shall be obligated to take any and all reasonable actions to restore such service to the extent that such restoration is within Landlord's reasonable control. It shall be the obligation of Tenant, at its sole cost and expense, to obtain substitute service.

- (f) Interference; Indemnification. In the event that telecommunications equipment, facilities and wiring installed by or on behalf of Tenant causes interference to equipment used, without limitation, by any other person or entity,⁵³⁷ Tenant shall defend, hold harmless and indemnify Landlord for such interference and for any and all damage or liability, whether actual or potential, caused thereby. Tenant shall use reasonable care and its reasonable commercial efforts and shall cooperate fully with Landlord and all other persons and entities to promptly eliminate any such interference resulting to other person or entities. In the event that Tenant is unable to eliminate such interference for any reason whatsoever within forty-eight (48) hours⁵³⁸ of receiving notice of the interference, whether from Landlord or any other person or entity, Tenant shall discontinue use of all equipment causing such interference and thereupon be entitled to promptly substitute alternative equipment at its sole cost and expense in order to remedy the situation (such alternative equipment shall be consistent in every regard with the requirements set forth in this Lease for the original equipment). If interference persists for any period exceeding forty-eight (48) hours, Tenant shall discontinue use of all equipment causing such interference, and at Landlord's discretion shall remove such equipment and restore the Building to the condition it was in before Tenant installed its equipment, facilities and wiring (ordinary wear and tear excepted).

535 What is the significance of "48 hours" shut-off? It is not clear that either party can or should live with that as a factual matter. It limits the landlord's flexibility even in circumstances where the tenant would not care if an interruption ran longer (e.g., over a three-day holiday weekend). Conversely, 48 hours is probably unacceptable under normal operating conditions and is presumably unacceptable during a critical period, whether a regularly anticipatable critical period – such as interrupting an accountant's business on April 14 and 15, or interrupting a florist's business on Valentine's Day or Mother's Day – or during some unscheduled crisis involving a major project.

536 If a tenant has special security concerns, which are dealt with elsewhere in the lease, those concerns should be cross-referenced here.

537 The tenant should note that this clause protects the landlord against inference claims made by both other tenants in the building and persons outside the building. Although being neighborly is a nice notion, why should the tenant place itself legally at risk for claims of interference made, rightly or wrongly, by any outsiders if no legal duty is owed by the tenant (or by the landlord) to those outsiders? (On the other hand, why should a landlord place itself at any such legal risk in order to help a tenant?) Further, the tenant should note that this clause gives the tenant no priority over those who install their equipment later; there's no concept here of "first in time, first in right."

538 The parties should consider the implications of the arbitrary 48-hour test used in this subsection. It is conceivable that this 48-hour period may be longer than the landlord can tolerate (e.g., if there is an emergency or if the interference breaches some other agreement the landlord has with another tenant or with a neighbor). Conversely, it is conceivable that this 48-hour period may be shorter than the tenant can tolerate operationally.

[IF LANDLORD AGREES TO PERMIT TENANT TO PURCHASE ELECTRICITY DIRECTLY FROM AN OFF-SITE PROVIDER, ATTACH EXHIBIT I AND MODIFY SECTION 15 OF THE LEASE]

EXHIBIT I: ELECTRICITY⁵³⁹ OPTION

- (a) Tenant shall have the option to contract directly with an off-site or on-site building approved utility provider for the provision of electrical energy to the Premises (“**Tenant’s Direct Power Procurement**”) provided that: (i) Tenant’s Direct Power Procurement does not affect Landlord’s ability to obtain electric power for the other tenants in the Building; (ii) such direct purchase of power does not result in capital costs to be incurred by Landlord; and (iii) Landlord shall not be required to provide space in the Property to accommodate Tenant’s electric provider.⁵⁴⁰
- (b) Under Tenant’s Direct Power Procurement, Tenant is solely responsible for: (i) payment of its own electricity charges; (ii) payment of any additional costs or fees (beyond straight electricity charges) imposed on Tenant arising directly or indirectly out of Tenant’s Direct Power Procurement, whether such fees are imposed by a private or a public entity; (iii) payment of any costs incurred by Landlord as a direct or indirect result of Tenant’s Direct Power Procurement, including but not limited to consulting fees, legal fees, service and maintenance fees, equipment and meter installation fees, exit fees, stranded costs or competitive transition costs imposed by any private or public entity, and (iv) payment of any penalty, fees, charges or other costs imposed under Landlord’s Building power supply contract resulting from Tenant’s going off, or coming back onto, such contract, or from causing Building contract usage to exceed the contractual capacity if Tenant comes back onto the Building power supply unannounced. Any such costs or fees incurred by Landlord shall be paid by Tenant directly to Landlord on a monthly basis or as such costs or fees are incurred by Landlord.
- (c) If Tenant invokes its right to a Tenant’s Direct Power Procurement, Landlord shall have no responsibility to provide electrical energy to the Premises; however, Landlord shall provide electrical energy to the common areas of the Building, for which Tenant must pay its pro rata share pursuant to Section 4.1 of this Lease.⁵⁴¹
- (d) If Tenant invokes its right to a Tenant’s Direct Power Procurement, Tenant shall report to Landlord on a quarterly basis, or on such other basis as Landlord may reasonably request from time to time, Tenant’s utility usage in the Premises by providing copies of Tenant’s utility bills to Landlord.⁵⁴²
- (e) Notwithstanding a utility company’s status as a building approved utility provider, in no event shall Landlord be liable or in any way responsible for the delivery of service by that utility company, for any fees, costs, expenses or charges levied by that utility company, or for any loss, damage, cost or expense arising from that utility company’s failure to perform its obligations, including (without limitation) those arising from service interruptions. Landlord’s approval is intended solely to protect the Property and Landlord’s own interests, and Tenant is not a third party beneficiary of that approval.

539 This Exhibit can be modified to also address a tenant’s direct procurement of natural gas or waste haulage. In each case, the tenant should still be required to report its usage to the landlord so that the landlord can track it and report it to any third party who requires that information by law or for purposes of the building’s sustainability rating.

540 Note that clause (iii), if read literally, could prevent the tenant from obtaining its own power even if as little as an additional electrical cable had to be installed in the building. A tenant may want to edit this clause in order to provide greater viability of the option.

541 The tenant’s own power provider supplies only the premises; the tenant still has to contribute its pro rata share toward common area power usage.

542 This information is needed for the landlord to be able to provide the necessary information for benchmarking, disclosure requirements, and sustainability certifications or ratings.

[IF LANDLORD AGREES THAT THE SECURITY DEPOSIT CAN BE POSTED IN THE FORM OF A LETTER OF CREDIT, ATTACH EXHIBIT J AND MODIFY SECTION 5 OF THE LEASE AS NOTED THEREIN]

EXHIBIT J: APPROVED FORM OF LETTER OF CREDIT

[NAME AND ADDRESS OF ISSUING BANK]⁵⁴³

STANDBY IRREVOCABLE LETTER OF CREDIT

[Date]

[Reference Number]

[Name and address of beneficiary]

Dear _____:

By the order of _____ (the “**Account Party**”), having a current address at _____, we hereby open in your favor our irrevocable letter of credit for the amount of _____ Dollars (U.S.) (U.S. \$____.00), available by your draft[s] at sight drawn on us at the above address, and accompanied by a statement purportedly signed by an authorized signer on your behalf in the form of Exhibit A attached hereto, but in any event not later than the expiration date hereof. Presentation may be made in person, by messenger or overnight courier service, or by mail.

This letter of credit expires at this office on _____, 20____. Notwithstanding the foregoing expiration date, the term of this letter of credit shall automatically be renewed from year to year, and shall finally be renewed so as to expire on _____, 20____, without notice to you or to our Account Party, unless we give you actual written notice of nonrenewal at least two (2) months prior to any annual expiration date or prior to the aforesaid final expiration date, as applicable. Upon your receipt of such notice, you may draw your sight draft on us prior to the then-relevant expiration date for the unused balance of this letter of credit.

[IF PARTIAL DRAWINGS⁵⁴⁴ OR MULTIPLE BENEFICIARIES ARE PROVIDED FOR, ADD:] Partial drawings are permitted. Drawings under this letter of credit will be honored in the order received, as determined by us (any such determination to be conclusive), and to the extent that there remains an aggregate amount available to satisfy such drawings.

You may change your address for the receipt of notices under this letter of credit by giving us notice in writing of your changed address.

[IF MULTIPLE BENEFICIARIES ARE PROVIDED FOR, ADD:] Any amendment to this letter of credit must be accepted by all beneficiaries for such amendment to become effective for any beneficiary.

⁵⁴³ It may not be possible for the tenant to present a letter of credit from a bank located in the metropolitan area in which the building is located. In that case, consider asking the tenant to have its issuing bank from elsewhere find a local correspondent bank at which presentation can be made. If that too isn't possible, then the landlord is going to have to travel in order to present the letter of credit for payment.

⁵⁴⁴ The ability to draw in part is highly desired by the beneficiary (the landlord). The balance of the drawable proceeds then remain in a letter of credit instead of in a cash security deposit administered by the landlord, and thus remain outside the effect of a bankruptcy stay affecting the tenant.

This letter of credit is transferable,⁵⁴⁵ without any transfer fee,⁵⁴⁶ and may be transferred more than once.⁵⁴⁷
 [ALTERNATIVE PRO-ISSUER LANGUAGE: No transfer will be effected until our transfer form, attached hereto as Exhibit B, is completed and returned to us along with the original of this letter of credit for endorsement.]

Except as is otherwise expressly stated herein, this letter of credit shall be governed by the Uniform Customs and Practices for International Standby Practices, 1998, International Chamber of Commerce Publication No. 590.

A draft drawn under and in compliance with the terms of this letter of credit will be duly honored if presented to us on or before the above-stated expiration date.

Very truly yours,

[NAME OF ISSUING BANK]

By: _____
 Name:
 Title:

545 If the letter of credit doesn't address transferability, then it is not transferable under both ISP and UCP rules. A non-transferable letter of credit could be a real problem for a landlord in a sale or financing because the buyer/lender will want to be able to access the security deposit.

546 Most issuers will levy a transfer fee (e.g., one quarter of one percent of the amount of the letter of credit). If an issuer levies a transfer fee, the issuer doesn't care whether the fee is paid by the beneficiary (the landlord) or by the account party (the tenant). The lease, not necessarily the letter of credit (which is between the issuer and the beneficiary and doesn't bind the tenant), should specify that any fees and costs are paid by the tenant.

547 Under ISP rules, if a letter of credit states it is transferable (above), then it is automatically transferable more than once. However, under UCP rules (a less desirable set of rules also created by the ICC but really intended for use in commercial, not standby, letters of credit), the letter of credit must state that it is transferable more than once if multiple transfers are to be permitted.

EXHIBIT 1 TO LETTER OF CREDIT

[Date]

[Name of issuing bank]

[Address of issuing bank]

Attn: _____

Subject: Your letter of credit number _____ dated _____, 20__ (the “**L/C**”)

Dear _____:

The undersigned hereby certifies that it is entitled to draw on the L/C under the terms of that certain Lease dated as of _____, 20__ between _____ and _____, as it has been amended, supplemented, assigned or otherwise modified to date.

The undersigned hereby presents the accompanying draft for payment in the amount of \$_____.

Very truly yours,

[NAME OF BENEFICIARY]

By: _____

Name:

Title:

EXHIBIT K: PROVISIONS REGARDING ROOFTOP UNITS

The following provisions shall apply to any rooftop units (“RTUs”) exclusively serving the Premises during the Term:

1. The end of useful service life of a rooftop unit (“RTU”) shall be determined by an unbiased third party agreed upon by both Landlord and Tenant.
2. Tenant is responsible for replacement of any RTU during the life of this Lease. If the RTU was purchased by Tenant and is replaced mid-lease, the depreciation schedule of the RTU matches the remaining length of the Lease.
3. Prior to delivery of possession to Tenant, Landlord shall pay for any additional RTUs to cover increased cooling capacity needs. This cost is outside of the Tenant Improvement Allowance. ANSI/ACCA Standard 5 for HVAC Quality Installation Specification must be followed for installation of any new RTUs.
4. Any new RTU that served the Premises must meet the DOE Better Buildings Allowance High-Efficiency RTU Specification sections addressing:
 - Cooling Performance
 - Heating Performance
 - Fan Operation
 - Controls
 - Economizers
 - Outside Air Dampers
 - Sizing
 - Quality Installation
 - Quality Maintenance
5. Tenant is responsible for maintenance of any RTUs serving the Premises during the Term. Tenant shall follow the ANSI/ASHRAE/ACCA Standard 180, Standard Practice for Inspection and Maintenance of Commercial Building HVAC Systems for all RTU maintenance activities.

SUBLEASE

The following model document is provided with no warranty whatsoever and does not define a “minimum standard of practice.” The advice of competent counsel, with expertise in both the subject matter and local law, customs and practices, is recommended. Consent is granted to modify and adapt this document for specific transactions but not for actual or de facto resale. This consent does not extend to reproducing this document in whole or in substantial part in seminar materials, presentations, articles, books, other model forms, or other publications, in any format, whether for-profit or not-for-profit.

SUBLEASE¹

between

[NAME OF SUBLANDLORD]

as Sublandlord

and

[NAME OF SUBTENANT]

as Subtenant

[DATE]

¹ There are two schools of thought on subleases. The first school of thought is to try to limit a sublease’s coverage to what are frequently referred to as “business issues.” The “legal issues” are largely addressed simply by incorporating the prime lease by reference. This school of thought believes that addressing those same “legal issues” in a sublease is usually (but not always) wasteful of time and effort, and can lead to substantive inconsistency with the prime lease. Even when the prime lease can be “improved,” there is usually little or no reason to do so in the context of a sublease; the sublandlord and the subtenant must live within the strictures of the prime lease even if they don’t think highly of it. The second school of thought is that a sublease is too complex a document to simply incorporate the prime lease by reference, even if some care is taken to adapt the prime lease. This school of thought allows for negotiation of a sublease de novo but with care taken to make sure that the sublease is consistent with the prime lease when the relationship with the landlord is involved. The worst outcome is to have a sublease that is inconsistent with the prime lease on an issue that concerns the prime landlord. That puts both the sublandlord and the subtenant at risk. But if the prime lease is not a green lease, green lease provisions could be included in the sublease without causing such problems.

SUBLEASE

THIS SUBLEASE (“Sublease”) is made as of the _____ day of _____, 20____ by and between _____, a _____ (“**Sublandlord**”), and _____, a _____² (“**Subtenant**”).

WITNESSETH:

WHEREAS, Sublandlord and _____ (“**Prime Landlord**”) are parties to that certain [Office Lease Agreement³] dated _____, _____ [as amended in that certain _____ dated _____, _____] (as it may hereafter be amended from time to time,⁴ the “**Prime Lease**”) relating to premises located at _____, _____ (the “**Building**”);

WHEREAS, Subtenant desires to sublease [all] [a portion] of said premises from Sublandlord, and Sublandlord desires to sublease [all] [said portion] of said premises to Subtenant, all on the terms more fully set forth below.

NOW, THEREFORE, in consideration of the foregoing, One Dollar (\$1.00), the terms set forth below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. The Demised Premises.

Sublandlord hereby subleases to Subtenant, and Subtenant hereby subleases from Sublandlord, the space (the “**Demised Premises**”) in the Building shown as Suite _____ on the floor plan attached hereto as Exhibit A.⁵ The Demised Premises contain approximately _____ rentable square feet; measurements of square footage under this Sublease use the same measurement methodology as used in the Prime Lease and are not subject to remeasurement.⁶

[IF SUBTENANT IS GOING TO BE USING FURNITURE, FIXTURES AND EQUIPMENT LEFT BEHIND BY SUBLANDLORD, RENUMBER THE PREVIOUS PARAGRAPH TO BE 1(a) AND ADD THE FOLLOWING AS 1(b):]

- (b) Sublandlord grants to Subtenant the right to use during the Sublease term all existing cubicle systems, furniture, telephone and data wiring and any other personal property located within the Demised Premises as more particularly described on the inventory attached hereto as Exhibit B (collectively, the “**FF&E**”), at no

2 It is recommended that the full legal name and legal status of the Subtenant be independently verified.

3 Insert actual name of document here.

4 Note that including future amendments of the prime lease in the definition of “Prime Lease” automatically makes the subtenant subject to those future amendments but gives the subtenant no approval rights over them. Subtenants rarely, if ever, get approval or veto rights over amendments of the prime lease, although it is arguable that they should get approval/veto rights over lease amendments that terminate the prime lease early or otherwise materially adversely affect the subtenancy.

5 Exhibit A should clearly show the subleased premises, particularly if the subleased premises are a subset, and not all, of the space leased under the prime lease. And use cross-hatching or some other easily determinable method that photocopies well; don’t use colors because colors don’t photocopy (at least under the current state of technology).

6 The preceding sentence probably isn’t necessary if all of the Sublandlord’s space is being subleased. Resist the temptation to use a “better” or more modern measurement methodology in this Sublease than is used in the Prime Lease, even if the Prime Lease doesn’t use a current BOMA methodology for example. The Sublease ought to be consistent with the Prime Lease whenever possible in these matters. It is easier to adjust the base rent rate to account for different measurement schemes than to try to reconcile differing pro rata shares for the same space, for example.

additional cost except as set forth in this subsection and on all of the terms and conditions of this Sublease. Any reconfiguration or relocation of the FF&E or any component thereof shall be subject to Sublandlord's prior written approval, which shall not be unreasonably withheld, conditioned or delayed. Subtenant shall be responsible for costs related to the wiring, networking, connectivity, set-up and/or configuration of any of the FF&E, including without limitation any charges and amounts payable to any third parties in connection with the set up or operation of the FF&E. Subtenant further understands and agrees that all FF&E is being provided to Subtenant in its "as is" condition, and that Sublandlord makes no representation or warranty, express or implied, with respect to the existence, condition, usefulness or suitability for Subtenant's intended use of any FF&E. In no event shall Sublandlord be liable for any defect in, or limitations on the use of, the FF&E. During the Sublease term, Subtenant shall maintain and repair the FF&E and/or replace components thereof that wear out with similar items of equal or higher value, and shall insure FF&E in the manner required for Tenant's personal property under the Prime Lease. Upon the expiration of the Sublease term, Subtenant shall return the FF&E to Sublandlord by leaving it in place in the Demised Premises in as good condition as first received by Subtenant, ordinary wear and tear and insured casualty excepted.

2. Term.

The first day of the term of this Sublease shall be _____, 20__ (the "**Term Commencement Date**") and the term of this Sublease shall expire at 11:59 p.m. local time on _____⁷ unless sooner terminated by law or in accordance with the terms hereof. If the Prime Lease is terminated for any reason, this Sublease shall terminate simultaneously.⁸ [Sublandlord shall not have any liability to Subtenant for such termination unless the termination of this Sublease resulted solely from either (i) a termination of the Prime Lease as a result of a default by Sublandlord, as tenant, thereunder that did not arise from a default by Subtenant under this Sublease, or (ii) a voluntary termination of the Prime Lease by Sublandlord.] [Subtenant has the right to enter the Demised Premises prior to the Term Commencement Date if Sublandlord has vacated the Demised Premises; provided, however, that any such entry shall be subject to all of the terms and conditions of this Sublease, including, without limitation, the payment of Base Rent and Additional Rent during the period of early occupancy.] Subtenant shall not have any right to renew the term of this Sublease [and Paragraph ____⁹ of the Prime Lease is not applicable to this Sublease]. Subtenant shall vacate the space on the terms and condition required in the Prime Lease and all of Sublandlord's remedies, including (without limitation) holdover penalties, shall apply if Subtenant fails to do so.¹⁰

7 The expiration date can be a fixed date or an anniversary date. Except in the extremely rare circumstances of a prime tenant agreeing to exercise a future renewal option in the prime lease and a subtenant who believes the prime tenant will follow through, in no event, obviously, should the sublease term expire after the prime lease term expires; at the latest, the sublease term must expire no later than the expiration of the prime lease term. In some States, a sublease term of the entire premises for what the parties consider to be the balance of the prime lease term must end at least one day before the prime lease term; otherwise, this document may be construed by law to be an assignment rather than a sublease.

8 This preceding clause is a seemingly self-evident statement that is nevertheless not always understood by subtenants. The next sentence grants Subtenant some fair, but unusual, recourse against Sublandlord if certain terminations of the Prime Lease occur. A sublandlord may not want to grant these rights, at least not unless asked.

9 Insert the Paragraph in the Prime Lease (if there is such a Paragraph) that grants Sublandlord a renewal or extension option. If there is no such Paragraph in the Prime Lease, simply omit this bracketed phrase.

10 This sentence assumes that the Prime Lease addresses these issues, as prime leases usually do. If the Prime Lease is not adequate on these points, see Article 22 of the BOMA lease form.

3. Base Rent.

- (a) Subtenant shall pay to Sublandlord as base rent (“**Base Rent**”) for the Demised Premises the following sums, commencing on [the Term Commencement Date¹¹]:

PERIOD	BASE RENT (per year)	MONTHLY PAYMENT
1	\$	\$
2	\$	\$
3	\$	\$
4	\$	\$
5	\$	\$

Base Rent is payable monthly in advance on the first calendar day of each month in equal monthly installments.¹² [Notwithstanding the foregoing, Base Rent for the months of _____ and _____, and for any period before _____ in which Subtenant is in possession of the Demised Premises pursuant to Section 2 above, shall be abated.] Base Rent for any partial month within the term shall be prorated on a per diem basis at 1/365th of the annual Base Rent for each day in such partial month, payable in advance. The Base Rent for the month of _____¹³ is due and payable upon Subtenant’s execution of this Sublease.

- (b) A late charge equal to five percent (5%) of the delinquent payment shall be levied on any payment of Base Rent or Additional Rent (as hereinafter defined) which is not paid within five (5) days after the date the same is due.¹⁴
- (c) All sums due to Sublandlord under this Sublease shall be paid to it in United States Dollars by wire transfer at such account as Sublandlord may give notice of from time to time or at its address for notices set forth below or at such other place as Sublandlord may designate in writing. All sums due to Sublandlord under this Sublease shall be payable without demand, deduction, set-off or abatement. The payment of Base Rent and Additional Rent is an independent covenant. Subtenant’s obligation to pay Base Rent and Additional Rent accruing during the term of this Sublease shall survive the expiration or termination of this Sublease.
- (d) *[NOTE: As a business matter, this subsection evidences a decision to NOT pass-through to Subtenant a prorata share of Sublandlord’s own operating expense and real estate tax pass-throughs. Instead, those pass-throughs would be built into the Base Rent under this Sublease. This business decision is made because most sublandlords are ill-suited to actually administer such pass-throughs and bill their subtenants, particularly for annual reconciliations. However, if the sublandlord wants to charge the subtenant for pass-throughs, delete this subsection]*

11 If the rent commencement date is the same as the start of the Sublease’s term, or if the simple rent abatement period created in the following portion of this Section 3(a) works as a business matter, then “the Term Commencement Date” will work fine here and there is no need in this document to create a defined term such as “Rent Commencement Date.”

12 There may be circumstances in which a different payment schedule—even payment in full in advance—is advisable as a business matter.

13 The first (full) month’s base rent will probably be payable in advance. If the rent commencement date isn’t the first day of a calendar month, it might be easier to have the first payment prepay the first full calendar month, and then later prorate and have the Subtenant then pay the base rent for the first partial month. In that circumstance, regular monthly payments of Base Rent would then start with the first calendar day of the second full calendar month.

14 If the Prime Lease already contains a late payment clause that is suitable, this subsection won’t be necessary because the provision in the Prime Lease is incorporated into this Sublease under Section 14 below.

and use Section 4(c) below.] Paragraphs ____, ____ and ____ and any other provision of the Prime Lease obligating the tenant to pay for Operating Charges¹⁵ (as defined in the Prime Lease), are not applicable to this Sublease.

4. Additional Rent.

- (a) All sums of any nature whatsoever, other than Base Rent, due under this Sublease are **“Additional Rent”**. Except as may otherwise be stated in this Sublease, Subtenant shall pay Additional Rent within fifteen (15) days of receipt of a statement (or such earlier date as may be established by any third party service provider), without other notice or demand, and without deduction, set-off or abatement.
- (b) Subtenant shall pay to Sublandlord, as Additional Rent, all charges for any additional services requested or actually used by Subtenant, including, without limitation, charges and fees for alterations and after-hours heating and air conditioning services and any utilities which may be separately submetered to the Demised Premises. If such additional services are requested or actually used by Sublandlord and/or any other subtenant it may have now or in the future, then the Additional Rent charged to Subtenant shall be equitably apportioned.
- (c) *[Note: This subsection evidences a business decision to charge operating expense and real estate tax pass-throughs to the subtenant. This subsection is therefore the opposite of Section 3(d) above; either Section 3(d) or this subsection must be deleted. They cannot both appear in the same sublease.]* Subtenant shall pay to Sublandlord [all] [Subtenant's Proportionate Share]¹⁶ of the sums due and payable by Sublandlord to Prime Landlord under Paragraph(s) ____¹⁷ of the Prime Lease. Payments due under this subsection are due and payable as and when payments by Sublandlord to Prime Landlord are due and payable under the provisions of the Prime Lease referenced in the preceding sentence. When reconciled by Prime Landlord, Subtenant shall be responsible for [any] [its Proportionate Share of] underpayments, and entitled to [any] [its Proportionate Share of] overpayments, of costs relating to the term of this Sublease. Subtenant's rights and obligations under this subsection shall survive expiration or termination of this Sublease. [**“Subtenant's Proportionate Share”** is a fraction, the numerator of which is the square footage of the Demised Premises and the denominator of which is the square footage of the premises leased by Sublandlord under the Prime Lease.¹⁸]

5. Parking.

During the term of this Sublease, Sublandlord shall allow Subtenant to use [all] [_____] (____)¹⁹ of the parking contracts allocated to Sublandlord under the Prime Lease.²⁰ Subtenant's rights under this Section are contingent upon Subtenant's payment monthly in advance as Additional Rent of all of Sublandlord's costs and expenses incurred or to be incurred in connection therewith. The Additional Rent due under this Section for the first (1st) month of the term is due and payable upon execution of this Sublease by Subtenant and all future payments are due and payable on the first day of each calendar month. All of said parking space contracts shall be maintained only in the name of Sublandlord and shall revert to Sublandlord's sole and exclusive use upon the expiration or termination of this Sublease or the failure of Subtenant to make payment therefor as set forth above, whichever first occurs.

15 Use the correct definition from the Prime Lease and consider whether real estate taxes are covered or need to be separately addressed here.

16 Choose the correct business term. “All” is appropriate if the subtenant subleases all of the premises. Otherwise, “Subtenant's Proportionate Share” is presumably more correct.

17 Cross-reference all appropriate provisions.

18 This sentence should be used only if Subtenant is leasing less than all of Sublandlord's space.

19 If the parties have used “Subtenant's Proportionate Share” in Section 4(c), then they can use it here if that suits their business agreement. Or they could insert a fixed number of spaces or a fixed percentage of spaces (but beware of rounding issues).

20 The rest of this subsection is probably irrelevant and can be deleted if parking is free and provided directly by the landlord (instead of by a third party operator or lessee). Also, if more sophisticated parking provisions, e.g., of hybrid or carpooling spaces, are needed, address that here.

6. Signage.

Subtenant may use [all] [Subtenant's Proportionate Share] of the directory listings made available to Sublandlord on the Building directory.²¹

7. Security Deposit.

Upon its execution of this Sublease, Subtenant shall deliver to Sublandlord cash²² in the sum of _____ Dollars (\$____,____.00) as a security deposit (and not as a prepayment of rent). Said security deposit shall be held by Sublandlord under the same terms and conditions as apply to the Security Deposit posted by Sublandlord under the Prime Lease.²³ As between Sublandlord and Subtenant, the amount of the Security Deposit posted under the Prime Lease is superseded. Sublandlord reserves all rights with respect to any security deposit posted under the Prime Lease.

8. Permitted Use.

[Subtenant shall use and occupy the Demised Premises solely for the uses expressly permitted in the Prime Lease and not for any other purpose.] [Notwithstanding any more permissive use in the Prime Lease, Subtenant shall use and occupy the Demised Premises solely as _____ and not for any other purposes.]²⁴

9. As Is Condition.²⁵

Subtenant acknowledges that Subtenant has caused an inspection to be made of the Demised Premises and the Building and that Subtenant is satisfied with their condition. Subtenant shall accept the Demised Premises "as is" in its state and physical condition on the day on which Subtenant takes possession of the Demised Premises.²⁶ Sublandlord does not make any representation or warranty, express or implied, about the condition of the Demised Premises, the size of the Demised Premises, or the habitability of the Demised Premises or their suitability for Subtenant's use, and all such representations and warranties are disclaimed. [Except to the extent necessary or appropriate to comply with the preceding sentences,]²⁷ Sublandlord shall not be required to make any repairs, alterations or improvements (including, but not by way of limitation, any improvements such as painting, finishing, plastering or decorating) in or to the Demised Premises, nor is Sublandlord obligated to make any monetary allowance available to Subtenant for such purposes.

21 Note that this Section doesn't address the allocation of any signage rights Sublandlord may have on the Building's exterior. If Subtenant is to get any such rights, this Section should be revised to say so.

22 If a letter of credit can be posted, a customized provision needs to be created for that purpose unless the Prime Lease already addresses that. See Article 5 of the BOMA form of lease for a sample provision.

23 Obviously, this sentence assumes that the Prime Lease already contains a provision addressing security deposits and thus just incorporates it by reference. If the Prime Lease does not contain a provision addressing security deposits then the parties need to create a substantive provision in this Sublease. See Article 5 of the BOMA form of lease for a sample provision.

24 The subtenant's permitted use can be narrower than the prime tenant's permitted use, but the subtenant's permitted use can't be broader than the prime tenant's permitted use.

25 Obviously, if the business deal isn't an "as-is" deal, this Section needs to be revised.

26 Note that as-is condition as of the date the Subtenant takes occupancy puts the Subtenant at risk of wear and tear, decay, move-out damage caused by the Sublandlord, casualty, even malicious damage, between signing the sublease and moving in. The Subtenant wants this clause to read "on the date hereof, ordinary wear and tear excepted" or something similar so that the "as is" condition is as of a date on which the condition of the premises can be more fixed.

27 Use the bracketed clause if the preceding sentences are revised as suggested in the preceding footnote.

10. Assignment and Subletting.

- (a) This Sublease is made subject to and subordinate to Paragraph ____²⁸ of the Prime Lease.²⁹ However, as between Sublandlord and Subtenant, the following provisions of this Section shall control.
- (b) As between Sublandlord and Subtenant, the provisions of this subsection shall control if Subtenant desires to sub-sublease all or any portion of the Demised Premises or assign this Sublease in its entirety (no partial assignments being allowed) to a parent, subsidiary or affiliate of Subtenant, or to any successor firm which succeeds to all or substantially all of Subtenant's assets, whether by merger, consolidation or otherwise. In that event, Subtenant may sub-sublease all or any portion of the Demised Premises or assign this Sublease in its entirety without the consent of Sublandlord, and Subtenant shall be entitled to retain all of any profit derived therefrom. Subtenant shall provide Sublandlord with a true, correct and complete copy of each such sub-sublease or assignment (and any amendments thereto), together with a certification signed by Subtenant and its sub-subtenant or assignee verifying their relationship under this subsection, promptly upon signing the sub-sublease or assignment.³⁰ No sub-subletting or assignment shall release the sub-lessor or assignor from its obligations under this Sublease. In the event of an assignment, the assignor and the assignee shall be jointly and severally liable for all of Subtenant's obligations under this Sublease, and the assignor hereby waives all defenses otherwise available to it in the event of any default by any successor Subtenant including (without limitation) suretyship defenses and other defenses arising from the amendment, renewal, termination or expiration of this Sublease without its knowledge or consent.³¹
- (c) As between Sublandlord and Subtenant, the provisions of this subsection shall control if Subtenant desires to sub-sublease all or any portion of the Demised Premises or assign this Sublease in its entirety (no partial assignments being allowed) to any person or entity not covered by the preceding subsection (b). Sublandlord's consent to such a sub-sublease or assignment shall not be unreasonably withheld, conditioned or delayed.³² If Sublandlord's consent is requested to any such sub-subletting of the Demised Premises or assignment of this Sublease, the following shall apply:
- (i) Both the identity of the sub-subtenant/assignee and the instrument of sub-subtenancy/assignment shall be subject to Sublandlord's approval. The reasonable costs incurred by Prime Landlord or Sublandlord in reviewing any proposed sub-subtenancy or assignment, the documents implementing the same, and any plans and specifications relating thereto shall be borne by Subtenant as Additional Rent due and payable upon demand.³³

28 Insert a cross-reference to the provision in the Prime Lease addressing subleasing and assignment.

29 If the Prime Lease adequately addresses subleasing and assignment the rest of this Section can be deleted. The rest of this Section assumes that the Sublandlord and Subtenant desire, for their own business reasons, to create their own terms and conditions governing assignment and subleasing.

30 The preceding sentences take the approach that the Sublandlord doesn't care about intra-corporate or merger activity by the Subtenant. The Subtenant is therefore given a free hand for those transactions. If that is not "the deal," revise this subsection accordingly.

31 If this Sublease is being used in a State that has its own special rules regarding waivers by sureties, be sure to implement those rules here.

32 The balance of this subsection assumes both (i) the Sublandlord has agreed to be "reasonable" in approving non-intra-family and non-merger subleases and assignments and (ii) that the Prime Lease doesn't adequately address reasonable consent. However, if Sublandlord agrees, as a business matter, to freely allow assignments and subleases in non-affiliated and non-merger circumstances, then subsection (c) can be rewritten like, or merged into, subsection (b). Conversely, if Sublandlord wants "sole and absolute discretion" control, then the rest of subsection (c) may be moot once the words "shall not be unreasonably withheld, condition or delayed" are replaced with the words "may be withheld in Sublandlord's sole and absolute discretion." Also, if the Prime Lease adequately addresses any of this, it can be incorporated by reference and this subsection should not address those issues.

33 Requests by prospective subtenants for a cap on these fees or a fixed fee should usually be rejected. The cost of review and approval is largely dependent on the quality of what the subtenant and proposed sub-subtenant submit in the first place and so cannot be predicted in advance. Also, the parties usually forget to index fee caps and fixed fees to inflation and so the fees become inordinately low as time passes.

- (ii) No sub-subletting or assignment shall release the sublessor or assignor from its obligations under this Sublease. In the event of an assignment, the assignor and the assignee shall be jointly and severally liable for all of Subtenant's obligations under this Sublease, and the assignor hereby waives all defenses otherwise available to it in the event of any default by any successor Subtenant including (without limitation) suretyship defenses and other defenses arising from the amendment, renewal, termination or expiration of this Sublease without its knowledge or consent.³⁴
- (d) If any sub-subtenant/assignee is to pay any rent, lump sum compensation, or other consideration in excess of the Base Rent payable by Subtenant under this Sublease (but not including any late fees, interest, charges or other sums payable by Subtenant as a result of its failure to perform its obligations under this Sublease), then half (1/2) of such excess shall be paid by Subtenant to Sublandlord as and when received by Subtenant. For purposes of this subsection, Subtenant may first deduct its marketing costs, brokerage commissions, reasonable legal fees, and costs of alterations performed by Subtenant for the sub-subtenant/assignee (or any cash allowance in lieu thereof), all amortized on a straight-line basis over the term of the sub-sublease/assignment, from the amount paid to it by the sub-subtenant/assignee, but no deduction for "vacancy loss" shall be allowed. If less than the entire Demised Premises are sublet, all computations shall be prorated on a per square foot basis.³⁵
- (e) The cost of any construction required to permit the operation of any sub-subleased space separate from the balance of the Demised Premises shall be an alteration and, as between Sublandlord and Subtenant, the cost thereof shall be borne solely by Subtenant.
- (f) For any period for which Subtenant is in default under this Sublease, Subtenant assigns to Sublandlord the rent, lump sum compensation or other consideration due to Subtenant from any sub-subtenant/assignee and hereby authorizes and directs each sub-subtenant/assignee to pay the same directly to Sublandlord following Sublandlord's demand therefor.

11. Default and Remedies.

If Subtenant shall default in the performance of any of the covenants, conditions or agreements contained in this Sublease or shall violate any of the provisions of the Prime Lease, Sublandlord shall be entitled to invoke the remedies which are available to Prime Landlord in the event of a default by Sublandlord under the Prime Lease. All cure periods for any default by Subtenant in performing an obligation referenced in the Prime Lease shall be reduced by half (and rounded to the next lowest whole number of days) to afford Sublandlord an opportunity (at its sole option) to cure on behalf of Subtenant.³⁶ Any costs and expenses incurred by Sublandlord in curing any default of Subtenant, together with interest thereon at the rate of eighteen percent (18%) per year or such lower rate as may be allowed by applicable law, shall be payable to Sublandlord as Additional Rent upon demand. The taking of any curative action by Sublandlord shall not waive Subtenant's default or any of Sublandlord's remedies, such curative action being taken solely on Sublandlord's own behalf.

34 If this Sublease is being used in a State that has its own special rules regarding waivers by sureties, be sure to implement those rules here.

35 This is a reasonable 50-50 sharing of any net profit Subtenant makes on a sub-sublease or assignment. It allows Subtenant to recoup its out-of-pocket expenses before sharing any "profit" with Sublandlord.

36 This shortened notice and cure period provision is fairly sweeping and unsophisticated. The parties may wish to distinguish between monetary and nonmonetary defaults or between defaults with short cure periods and defaults with longer cure periods in the Prime Lease.

12. Services.

Where services, repairs or rights are to be provided by Prime Landlord under the terms of the Prime Lease, Subtenant agrees to look solely to Prime Landlord for the performance of such services, repairs or rights, it being understood that Sublandlord will not provide and does not have any liability for or guarantee the performance of any such services, repairs or rights.³⁷ Subtenant shall arrange for and pay for its own utilities to the extent the same are not provided by Prime Landlord.

13. Brokerage.

Sublandlord shall pay a commission to _____ as Sublandlord's broker upon execution of this Sublease as outlined in a separate agreement, and said Sublandlord's broker shall pay a commission to _____ as Subtenant's broker pursuant to a separate agreement between them.³⁸

Subtenant and Sublandlord each represent and warrant to the other that it has not engaged any broker, agent or finder in connection with this Sublease [except for the broker(s) identified above], and each party shall defend, indemnify and hold the other harmless from and against any claim, demand, action, suit, proceeding, damage, liability, loss, cost or expense (including, without limitation, reasonable attorneys fees) incurred by such other party as a result of any claim made by any other broker, agent or finder (other than any named above) claiming by or through the indemnifying party.

14. Prime Lease.³⁹

This Sublease is and shall remain in all respects subject and subordinate to the Prime Lease.⁴⁰ This Sublease constitutes a grant to Subtenant to use the common areas of the Building for access, subject to the terms and conditions of the Prime Lease. Notwithstanding anything to the contrary in this Sublease, Subtenant will occupy the Demised Premises and use the Building in accordance with the terms of the Prime Lease and will not do or suffer to be done any act, or omit to do any act, which might result in a violation of or default under the Prime Lease or render Sublandlord liable for any cost or expense thereunder. Except as directly or impliedly modified or as may be provided in this Sublease to the contrary, it is agreed that the terms and conditions of the Prime Lease are incorporated into this Sublease as if the defined term "Landlord" in the Prime Lease means "Sublandlord" hereunder, "Tenant" in the Prime Lease means "Subtenant" hereunder, and ["Premises"⁴¹] in the Prime Lease means "Demised Premises" hereunder, and wherever a consent of "Landlord" or a waiver or indemnity is granted to "Landlord" in the Prime Lease, such right of consent or the benefit of such waiver or indemnity shall apply to both Prime Landlord and Sublandlord. Subtenant assumes and shall perform the obligations of Sublandlord under the Prime Lease with respect to the Demised Premises. [The following provisions of the Prime Lease are not incorporated into this Sublease: _____.] If this Sublease contains a more restrictive provision than does the Prime Lease, then the more restrictive provision of this Sublease shall control as between Sublandlord and

37 A subtenant may want the sublandlord to covenant to enforce its rights, or use "diligent" or "reasonable" efforts to enforce its rights against the prime landlord for the benefit of the subtenant. A subtenant should be prepared to pay the costs of such enforcement. A sublandlord may not agree to any such clause if doing so might cause problems under a materially larger prime lease relationship.

38 Obviously, if Sublandlord has a direct agreement with Subtenant's broker, or if Sublandlord or Subtenant doesn't have a broker, this needs to be revised.

39 This Section does not address the concepts of creating direct privity between the subtenant and the prime landlord or of having the landlord grant nondisturbance rights to the subtenant should the prime tenant default under the prime lease and the prime lease be terminated. The rate of success for subtenants on those concepts is so small, and the successes so fact-sensitive, that they could not be addressed effectively in a sample form. But the concepts are much debated by practitioners and a subtenant may want to investigate them.

40 If Subtenant is to get any approval rights over future amendment of the Prime Lease -- which is rare but entirely negotiable and more likely to be appropriate the more space Subtenant subleases and the longer its term -- such approval rights should be inserted into this Section.

41 Insert the appropriate defined term from the Prime Lease.

Subtenant. The rights of Sublandlord against Subtenant under this Sublease shall correspond, insofar as may be applicable, to the rights of Prime Landlord against Sublandlord under the Prime Lease.⁴² Subtenant's insurance to be maintained under Paragraph ____ of the Prime Lease shall also name Sublandlord as an additional insured.⁴³

15. Notices.

Any notice which either party may desire to give to the other party shall be given in writing addressed to such other party at the address set forth below (or at such other address in the United States as a party may give notice of from time to time), and such notice shall be effective when the same is received by the addressee (refusal to accept delivery, or inability to make delivery because the intended recipient has provided an incorrect or out-of-date address, shall be deemed to be receipt):

Address for Sublandlord Before Term Commencement Date:⁴⁴

Attn: _____

42 A tenant who assigns its lease may have an enforcement problem not shared by a tenant who subleases its premises. The assignor-tenant can't avail itself of summary landlord-tenant eviction procedures for the simple reason that the assignor-tenant is not a landlord, unlike the sublessor-tenant. An assignor-tenant may have to resort to traditional civil court remedies. One possible solution is to also give the assignor-tenant a leasehold mortgage against the assignee-tenant, which would enable the assignor to foreclose on the assignee, which might be a more efficient remedy than civil court. However, such a remedy requires significant additional documentation, may incur recordation taxes or transactional costs, and may run afoul of covenants in the prime lease forbidding leasehold encumbrances.

43 A subtenant may want some representations and warranties about the Prime Lease. If so, this Section may be the place for them. Label existing Section 14 as 14(a) and add something like the following as 14(b):

(b) Sublandlord represents and warrants to Subtenant as follows:

(i) The Prime Lease is in full force and effect.

(ii) The copy of the Prime Lease attached to this Sublease is a true, correct and complete copy of the Prime Lease.

(iii) Sublandlord has neither given or received any notice of default (that has not been cured) under the Prime Lease, and to Sublandlord's knowledge, no default or situation that could, with the giving of notice or the passage of time, or both, constitute a default under the Prime Lease exists on the part of either Sublandlord or Prime Landlord.

(iv) To Sublandlord's knowledge, there are no pending or threatened actions, suits or proceedings against Sublandlord before any court, administrative agency or arbitration tribunal that could, singly or in the aggregate, materially adversely affect the Demised Premises or the ability of Sublandlord to perform its obligation under this Sublease.

(v) Except for obtaining any consent of Prime Landlord under the Prime Lease, Sublandlord is not aware of any consent necessary to effectuate this Sublease and Sublandlord has the power and authority to enter into this Sublease."

Of course, any representations and warranties should be carefully customized to fit the actual facts.

44 There are two addresses, before and after, for each party because this clause assumes that these premises are and will be each party's primary address so that the addresses change as Sublandlord moves out and Subtenant moves in. Obviously, if a party has an independent address that isn't affected, customize this clause.

Address for Sublandlord After Term Commencement Date:

Attn:

Address for Subtenant Before Term Commencement Date:

Attn:

Address for Subtenant After Term Commencement Date:

Attn:

As between Sublandlord and Subtenant, the preceding provisions supersede Paragraph ____⁴⁵ of the Prime Lease.

16. Successors and Assigns.

The covenants, conditions and agreements contained in this Sublease shall bind and inure to the benefit of Sublandlord and Subtenant and their respective successors and permitted assigns.

17. No Personal Liability.

Notwithstanding anything to the contrary provided by this Sublease, by the Prime Lease or by applicable law, in no event whatsoever shall any partner, member, shareholder, other principal, director, trustee, officer or employee of Sublandlord have or incur any personal liability under this Sublease, and no such personal liability shall be sought, obtained or enforced.⁴⁶

⁴⁵ Insert a cross-reference to the notice clause in the Prime Lease.

⁴⁶ Such clauses protecting against personal liability typically benefit landlords, so one has been inserted here to benefit Sublandlord. If that is not "the deal," then delete this Section. Conversely, if Subtenant also is entitled to such protection of its principals, revise this Section appropriately.

18. Miscellaneous.

This Sublease contains the complete and integrated agreement of the parties and supersedes all other oral or written agreements, proposals, promises, representations, discussions and correspondence. This Sublease may not be amended except by a written instrument signed by the party to be bound thereby. This Sublease shall be governed by the laws of the _____⁴⁷ without regard to conflicts of laws.

19. Prime Landlord's Consent.

This Sublease shall be effective upon obtaining the written consent of Prime Landlord. If Prime Landlord's consent to this Sublease is not obtained within one (1) month after the date hereof,⁴⁸ or such later date as Sublandlord and Subtenant may agree in writing, this Sublease shall become void and of no further force or effect. Sublandlord agrees to use reasonable efforts to obtain Prime Landlord's consent to this Sublease but shall not be required to pay Prime Landlord any sum for that purpose not already called for in the Prime Lease. Subtenant shall execute and deliver any documents reasonably required by Prime Landlord in connection with Prime Landlord's consent. It is hereby acknowledged by Sublandlord and Subtenant that Prime Landlord's consent to this Sublease shall not make Prime Landlord or its agents a party to this Sublease, and shall not create any contractual liability or duty on the part of Prime Landlord or its agent to Subtenant, and shall not in any manner increase, decrease or otherwise affect the rights and obligations of Prime Landlord and Sublandlord, as the landlord and the tenant under the Prime Lease, with respect to the Demised Premises.

20. Recording⁴⁹.

Neither this Sublease nor any short form or memorandum of this Sublease shall be recorded.

IN WITNESS WHEREOF, Sublandlord and Subtenant have executed and delivered this Sublease as an instrument under seal as of the date first above written.

SUBLANDLORD:

WITNESS:

By: _____

Name:

Title:

SUBTENANT:

WITNESS:

By: _____

Name:

Title:

⁴⁷ Presumably, the governing law will be whatever State (or State-equivalent, such as the District of Columbia or a U.S. Territory) the Building is located in. It is a rare lease or sublease that is governed by a different State's law.

⁴⁸ This one month deadline is completely arbitrary. Customize it as appropriate.

⁴⁹ Many subtenants want their sublease recorded in the land records, perhaps out of some sense that it will shield them against a sublandlord who goes out of business. But subleases are rarely recorded. They are rarely in recordable form (no jurat), there may be significant recordation tax consequences to recording, and, in any event, the tenant itself usually has no record interest of its own against which to record the sublease (unless, of course, the prime lease is of record). Finally, the prime landlord would prefer that its own title not be encumbered by a sublease. And, in reality, recording actually does not afford a subtenant much protection against a sublandlord who goes out of business or against the landlord to such a sublandlord.

CONSENT OF PRIME LANDLORD⁵⁰

This Sublease is consented to by Prime Landlord upon the terms acknowledged by Sublandlord and Subtenant in the paragraph of this Sublease entitled "Prime Landlord's Consent".

By: _____

Name:

Title:

50 This Consent of Prime Landlord assumes that (i) the Prime Lease already sets forth fairly extensively just what the prime landlord's position on a sublease is and what its consent means, (ii) the Prime Landlord is aware of that, and (iii) the Prime Landlord is therefore capable of just saying "yes" without further ado. Some prime leases don't fit clause (i) and most prime landlords probably don't fit one or the other (or both) of clauses (ii) and (iii). Therefore most prime landlords will want a more extensive consent document than this. The trick for Sublandlord and Subtenant is to then avoid getting stuck with a multi-page "consent" that is inconsistent with (and thus a de facto amendment of) the existing Prime Lease.

JOINDER OF BROKER⁵¹

The undersigned represents and warrants that it is licensed as a real estate broker in the State of _____, that it has not engaged, used or dealt with any other broker or finder in connection with this Sublease, and that it does not have any knowledge of any other person or entity who has acted or who claims to have acted as a broker, finder or other procuring cause representing _____⁵² in the transaction contemplated by this Sublease. The undersigned agrees that the sum set forth as payable to it in Section 13 above is its sole and exclusive compensation due and owing the undersigned relating to or arising out of this Sublease. This Joinder does not make the undersigned a party to this Sublease, and this Sublease may be amended, supplemented, terminated or otherwise modified without notice to or the consent of the undersigned as long as the undersigned's entitlement to the stated payment is not thereby affected.

By: _____

Name:

Title:

51 This Joinder assumes that, notwithstanding Section 13 to the contrary, there is no written commission agreement with a particular broker. In that case, this Joinder may fill the void (and Section 13 should be conformed). If all brokers already have separate written agreements, don't use this Joinder.

52 Insert the broker's client, either "Sublandlord" or "Subtenant," in this blank.

EXHIBIT A: THE DEMISED PREMISES

GUARANTY OF LEASE

The following model document is provided with no warranty whatsoever and does not define a “minimum standard of practice.” The advice of competent counsel, with expertise in both the subject matter and local law, customs and practices, is recommended. Consent is granted to modify and adapt this document for specific transactions but not for actual or de facto resale. This consent does not extend to reproducing this document in whole or in substantial part in seminar materials, presentations, articles, books, other model forms, or other publications, in any format, whether for-profit or not-for-profit.

GUARANTY OF LEASE

by

as Guarantor

in favor of

as Beneficiary

_____, 20____

GUARANTY OF LEASE

THIS GUARANTY OF LEASE (“**Guaranty**”), is made as of the ____ day of _____, 20____ by [Mr./Ms.] _____ [a _____ corporation/limited liability company/general partnership/limited partnership]¹ (hereinafter [collectively, jointly and severally²] referred to as “**Guarantor**”), in favor of _____, its successors and assigns (“**Beneficiary**”).

WITNESSETH:

WHEREAS, _____ (“**Tenant**”) is entering into that certain lease, of even or approximate date herewith (as it may hereafter be amended from time to time,³ the “**Lease**”), with Beneficiary for [office] [retail][warehouse] space in the building known by street address as _____.

WHEREAS, Guarantor is [the owner] [a subsidiary] [an affiliate]⁴ of Tenant and it is a material inducement and condition precedent⁵ to Beneficiary’s entering into the Lease that Guarantor guarantee Tenant’s obligations under the Lease.

NOW, THEREFORE, in consideration of the foregoing, One Dollar (\$1.00), the terms hereinafter set forth, and other good and valuable consideration, Guarantor agrees as follows:

1. Guarantor hereby absolutely, unconditionally and irrevocably guarantees to Beneficiary the full and punctual payment and performance and observance of all⁶ the monetary and nonmonetary covenants, conditions and agreements in the Lease provided to be performed and observed by Tenant, its successors and assigns,⁷ for the entire term of the Lease, as it may be extended.⁸
2. Guarantor’s liability under this Guaranty shall be primary and direct. This is a guaranty of payment and not just a guaranty of collection.⁹ In any right or action which shall accrue to Beneficiary under the Lease, Beneficiary may, at its option, proceed against Guarantor without having commenced any action, exhausted other remedies, or having obtained any judgment, against Tenant, or having proceeded against Tenant or any collateral posted as security under the Lease.

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- 1 It is recommended that the correct legal name and organizational status of the guarantor be verified with the relevant State’s Secretary of State or equivalent.
 - 2 This bracketed language should be used if there is more than one Guarantor.
 - 3 It is critical to the Beneficiary that the Guaranty apply to future amendments to the extent possible. However, as will be noted in Section 4 below, it is not clear that a guaranty will be enforced if the underlying lease transaction has been amended without the guarantor’s consent.
 - 4 The Guarantor must have some relationship to Tenant that conveys some benefit to the Guarantor from the Lease so that legal “consideration” exists. A “downstream” guaranty by a parent of a subsidiary’s obligation usually satisfies this test. There is less certainty about “upstream” guaranties by subsidiaries of a parent’s obligation or cross-guaranties by affiliates but the modern trend seems to be increasing liberality.
 - 5 A guaranty should be signed contemporaneously with the lease (or a subsequent lease amendment). Otherwise, the guaranty arguably lacks legal “consideration.”
 - 6 If less than “all” of the tenant’s obligations are guaranteed, the landlord should be very careful to clarify that the guarantor’s liability applies to the last dollars payable, not to the first dollars payable. Also, if the guaranty decreases its coverage over time, the decrease should not be effective if there was any default at that scheduled time, unless and until that default is cured.
 - 7 Remember that the original Tenant’s obligations continue even after an assignment, and the Guarantor’s obligations should also continue.
 - 8 Section 1 is, in a sense, the only substantive provision in this document. Everything that follows is highly technical and legalistic. However, because State laws governing guaranties are highly technical and legalistic, and usually strongly favor the guarantor, it is recommended that the creditor thoroughly cover technical and legal issues. Not every provision that follows may be needed in every circumstance, but care should be taken.
 - 9 The legal distinction between a “guaranty of payment” and a “guaranty of collection,” as further explained in this Section, is important to the efficacy of enforcement.

3. The validity of this Guaranty and the obligations of Guarantor hereunder shall not be terminated, or in any way affected or impaired, by reason of the assertion by Beneficiary against Tenant of any of the rights or remedies reserved to Beneficiary pursuant to the provisions of the Lease (whether in full or in part), or by reason of the waiver by Beneficiary of, or the failure of Beneficiary to enforce, any of the terms, covenants, or conditions of the Lease, or by the granting of any indulgence or extension to Tenant, or by the release of any other guarantor (or surety) or any other security or collateral granted for the performance of the obligations hereby guaranteed, or any dealings or course of conduct between Tenant and Beneficiary, all of which may be given or done without notice to or the consent of Guarantor. Guarantor waives notice of non-payment of rent or any other amounts to be paid by Tenant under the Lease, waives counterclaim, setoff, deduction, diminution, abatement, recoupment, suspension, deferment, reduction or other defense, waives notice of default or non performance of any of Tenant's other covenants, conditions and agreements contained in the Lease, waives any rights which may accrue to it should Tenant be involved in any bankruptcy, insolvency, or reorganization proceeding, and waives notice of acceptance of this Guaranty or any other notice or demand to which Guarantor might otherwise be entitled.
4. No assignment, transfer, sublet, renewal, extension or amendment of the Lease, whether with or without notice to or the consent of Guarantor, shall operate to extinguish or diminish the liability of Guarantor under this Guaranty even if the obligations of Guarantor are increased thereby.¹⁰ Guarantor waives any right to notices of, or to consent to, any assignment, transfer, sublet, renewal, extension or amendment of the Lease.
5. Guarantor represents and warrants that (a) Guarantor has the right, power and authority (without the consent of any other person, entity or governmental authority) to enter into, and to perform its obligations under, this Guaranty (and that, if Guarantor is a partnership, limited liability company, corporation or other entity, Guarantor has taken all requisite action to approve the execution, delivery and performance of this Guaranty, that the person signing on behalf of Guarantor is authorized and empowered to do so, and that the execution and delivery of this Guaranty are not in contravention of its charter, by-laws or other governing documents, and have been authorized by its partners, members and/or its board of directors), (b) this Guaranty constitutes a valid and binding obligation of Guarantor, enforceable in accordance with its terms, (c) the statements set forth in the "Whereas" clauses of this Guaranty are true and correct and are incorporated into the text of this Guaranty by this reference, (d) Guarantor is not in default under any agreement to which it is a party or by which it is bound, or bound by any decree, ruling, judgment, order or injunction which (together or singly) would materially and adversely affect its ability to perform under this Guaranty, and there is no action, proceeding or investigation pending or threatened against Guarantor which (together or singly) could materially and adversely affect its ability to perform under this Guaranty, (e) neither the execution and delivery of this Guaranty nor its performance hereunder shall result in a breach of or default under any agreement, decree, ruling, judgment, order or injunction to which Guarantor is a party or by which it may be bound, (f) Guarantor is not insolvent nor will it, as a result of this Guaranty, be rendered insolvent, (g) Guarantor is not undercapitalized and will not become undercapitalized as a result of this Guaranty, and (h) Guarantor has not incurred and does not intend to incur debts beyond its ability to pay as its debts mature and, in fact, all accounts payable are current and not overdue.¹¹

10 It is unlikely that this will be enforced against a guarantor, particularly if the guaranteed obligations are in any way increased or made more likely to occur. Suretyship law is strongly pro-guarantor and any change in the underlying obligation is looked upon askance. It is recommended that the guarantor be asked to confirm its guaranty as part of any change in the underlying lease.

11 Clause (h) is intended more to smoke out information about other creditors than to have legal effect. After all, what is the legal effect of a current representation about future intent?

6. Guarantor is liable to Beneficiary for any expenses, including reasonable attorneys' fees and court costs, incurred by Beneficiary in enforcing any obligations of Guarantor under this Guaranty.
7. All payments under this Guaranty shall be made to such account as Beneficiary may direct from time to time and, in the absence of any direction, to whichever account rent is payable under the Lease. Whenever making any payment on account of its obligations under this Guaranty, Guarantor will notify Landlord in writing that such payment is for such purpose.¹² All payments shall be made in United States Dollars. All payments shall be made without any deduction or withholding whatsoever, including for or on account of any present or future taxes, duties, fees or other charges of any kind. If Guarantor is required by law to make any deduction or withholding, then Guarantor shall deduct or withhold the minimum amount allowed by law and will pay to Beneficiary such additional amounts as will result in Beneficiary receiving the full amount Beneficiary would have otherwise received.
8. Guarantor agrees that (i) repeated and successive demands may be made and recoveries may be had hereunder as and when, from time to time, Tenant shall fail to pay or perform an obligation when due and that notwithstanding the recovery hereunder for or in respect of any given failure by Tenant under the Lease, this Guaranty shall remain in force and effect and shall apply to each and every subsequent such failure, and (ii) in the event that any obligation is paid by Tenant or Guarantor and thereafter all or any part of such payment is recovered from Beneficiary as a preferential or fraudulent transfer under the United States Federal Bankruptcy Code or state insolvency law or applicable bankruptcy laws and regulations of another jurisdiction, or any other similar United States Federal or State law now or hereafter in effect, the liability of Guarantor hereunder any respect to such obligation so paid and recovered shall continue and remain in full force and effect as if, to the extent of such recovery, such payment had not been made.¹³ (As used in this Guaranty, "State" includes the District of Columbia, the Commonwealth of Puerto Rico, any United States Territory, and any other political subdivision that is the equivalent of any of the foregoing.)
9. ¹⁴Guarantor irrevocably consents to the service of process, writs or summonses in any action or proceeding by the hand delivery or by the mailing of copies thereof by registered mail or certified mail, postage prepaid to [_____, having an address at _____], (the "**Process Agent**"), and Guarantor hereby irrevocably appoints the Process Agent as its authorized agent to accept such service and any or all such process, writs or summonses, and agrees that the failure of the Process Agent to give any notice of any such service to Guarantor shall not impair or affect the validity of such service or of any judgment based thereon. Guarantor covenants and agrees that it shall take any and all reasonable actions, including (without limitation) the execution and filing of any and all documents that may be necessary to continue the foregoing designation and appointment in full force and effect and to cause such agent to act as agent. If such agent shall cease so to act, Guarantor covenants and agrees that prior to such agent ceasing so to act Guarantor shall irrevocably designate and appoint without delay another agent satisfactory to Beneficiary. If Guarantor shall fail to so appoint such other agent, then Guarantor hereby irrevocably consents to process being served in any suit, action or proceeding of the nature referred to herein by the mailing of a copy thereof by registered or certified mail, postage prepaid, to the address of Guarantor

12 This requirement that Guarantor expressly identify its payment is rarely seen but has practical value if a guarantor has multiple payment obligations to a beneficiary and the application of payment isn't entirely clear.

13 It is critical to a creditor that an earlier payment that is set aside or refunded under bankruptcy law not be deemed to have nevertheless wiped out the earlier obligation. The earlier obligation must be reinstated.

14 If the guarantor is an entity that must be registered with the State's Secretary of State (or equivalent), the guarantor entity was probably required by law to designate an agent to receive service of process. If so, the creditor knows who to serve and this Section has little practical effect. However, if the guarantor is not such an entity, and particularly if the guarantor is a natural person, appointing a third-party agent to receive service can be a real benefit to a creditor who is trying to initiate proceedings against an elusive guarantor.

set forth herein. Guarantor irrevocably waives, to the fullest extent permitted by law, all claims of error by reason of any such service and Guarantor agrees that such service (i) shall be deemed in every respect effective service of process upon Guarantor in any such suit, action or proceeding and (ii) shall, to the fullest extent permitted by law, be taken and held to be valid personal service upon Guarantor. The foregoing shall not, however, limit the right of Beneficiary to serve process in any other manner permitted by law or to commence any suit, action or proceeding or to obtain execution of the judgment in any appropriate jurisdiction.

10. All notices and communications under this Guaranty shall be made in writing and may be delivered by hand (including overnight courier), by telecopier, or by first-class certified or registered mail (return receipt requested)¹⁵ to the following addresses:

If to Beneficiary:¹⁶ _____

If to Guarantor: _____

Either party may change its address (or its addressee) to another address within the United States by notice to the other. All notices and communications shall be effective upon receipt (or refusal to accept delivery). All notices and communications hereunder shall be in English and the official text of this Guaranty shall be the English language text.

11. This Guaranty is a continuing Guaranty and shall (a) remain in full force and effect until all of Tenant's obligations under the Lease and all of Guarantor's obligations hereunder shall have been paid, performed or discharged in full, (b) be binding upon Guarantor and its successors and assigns, (c) inure to the benefit of and be enforceable by Beneficiary and its successors and assigns, and (d) continue to be effective or be reinstated (as the case may be) if Tenant's performance under the Lease or Guarantor's performance hereunder is rescinded or revoked in the event of insolvency, bankruptcy or reorganization. Guarantor waives any right of indemnification, subrogation or reimbursement that it may have against Tenant. Guarantor agrees that it is not made a creditor of Tenant by virtue of this Guaranty.
12. If Guarantor consist of more than one person and/or entity, their obligations shall be joint and several and each agreement, representation or warranty shall be deemed to have also been made separately on its own behalf by each person or entity comprising Guarantor.

¹⁵ It is advisable to require the same method of giving notice under the Guaranty as is used in the Lease. Inconsistent notice requirements are an unnecessary procedural complication to enforcement. So conform the notice provisions.

¹⁶ The Beneficiary should use the same address(es) in the Guaranty that it uses as landlord in the Lease.

13. The plural shall include the singular (and vice versa) and the use of any gender shall include all other genders whenever used in this Guaranty.
14. This Guaranty shall be governed by, and construed in accordance with, the laws of the _____¹⁷ without regard to conflicts of laws. At the election of Beneficiary, this Guaranty may be enforced in the local or federal courts sitting in or having jurisdiction over the political subdivision in which the building that is the subject of the Lease is located, and Guarantor hereby consents to jurisdiction and venue in those courts.
15. GUARANTOR WAIVES TRIAL BY JURY IN ANY ACTION, SUIT OR PROCEEDING RELATING TO OR ARISING UNDER THIS GUARANTY.
16. All remedies afforded to Beneficiary hereunder or under the Lease are separate and cumulative remedies and not exclusive. Beneficiary shall also have all remedies afforded by law or in equity.
17. If any provision of this Guaranty or the application of any provision shall to any extent be void, unenforceable or invalid, then such provision shall be reinterpreted to the greatest extent possible to make it enforceable and valid and the rest of this Guaranty shall be unaffected thereby and continue in full force and effect.
18. No waiver or modification of any provision of this Guaranty shall be effective unless in writing and signed by Beneficiary and no waiver by Beneficiary shall be applicable except in the specific instance for which it is given. This Guaranty is the full and complete agreement of the parties and Beneficiary has made no promises or representations to Guarantor except as set forth herein.

IN WITNESS WHEREOF, Guarantor has executed and delivered this Guaranty as an instrument under seal¹⁸ as of the date first above written.

GUARANTOR
[If Guarantor is an entity]:

WITNESS/ATTEST:

[Corporate Seal]

By: _____
Name: _____
Title: _____

WITNESS:

[If Guarantor is a person]:

_____(Seal)
Name: _____
Personally and Individually

¹⁷ The governing law will usually be the same as used in the Lease, regardless of where the Guarantor lives or is legally formed. The idea is to make enforcement of this Guaranty a natural incident to the enforcement of the Lease.

¹⁸ In some States, documents signed under seal are given longer statutes of limitations for enforceability.

NOTES



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