DON’T FORGET THE DIRT!
LEASING AND REAL PROPERTY ISSUES NOT TO BE MISSED IN CORPORATE TRANSACTIONS

By: Amol Pachnanda, Edward Goodman & Neal Weinstein

December 3, 2014
PERMITTED (NO CONSENT) TRANSACTIONS AND ISSUES TO CONSIDER IN CONNECTION WITH TRANSFERS

By: Amol Pachnanda

December 3, 2014
TENANT’S RIGHT TO ASSIGN OR SUBLEASE:

- The general assignment and subletting clause in a lease.
- Consent not to be unreasonably withheld or delayed.
- Certain transactions are too large or too significant to tenant.
- Landlords want creditworthy tenants.
- Balancing the competing interests of landlords and tenants.
IMPORTANCE TO CERTAIN TRANSACTIONS TO TENANT:

- Understanding the tenant’s structure and business – partnership, public, family owned, key individual, etc.

- Examples of Permitted (no consent) Transfers:
  - Mergers and Acquisitions
  - (Previously) Related Party
  - Deals involving multiple locations/stores
  - Franchisee
  - Concessionaries
TRANSACTIONS THAT DO NOT CONSTITUTE A TRANSFER:

- Dissolution of tenant and immediate reconstitution of tenant.
- Change in organizational form and/or State of organization.
- Addition, death, retirement, withdrawal of partners.
- Pledge of interests in tenant.
- Ongoing business relationship.
LANDLORD’S LEASE CLAUSE WITH RESPECT TO PERMITTED TRANSFERS:

- Landlord to receive prior notice.
- Valid business purpose.
- Transfer documents must be acceptable to landlord.
- Reputable entity of good character.
- Financial condition (i.e., net worth, gross annual income).
- Same trade name.
MERGERS AND ACQUISITIONS:

- Generally accepted
- Same trade name/use clause
- Prior notice requirement.
- Meaning of “reputable” and “good character”.
- Financial strength of transferee.
- The “Two-Step” issue.
(PREVIOUSLY) RELATED ENTITY:

- Generally accepted.
- Reason may be tax or corporate convenience.
- Meaning of “reputable” and “good character”.
- Definition of “Affiliate”.
- Spun-off entity.
- Same trade name/use clause
(PREVIOUSLY) RELATED ENTITY:

- Parent entity is likely being replaced with a subsidiary.
- Financial test – assignor not released from liability.
- “So long as Affiliate remains an Affiliate”
MULTIPLE LOCATIONS/STORES, FRANCHISES, AND CONCESSIONARIES:

- Multiple Locations/Stores:
  - Number of stores/geographic area.
  - Net worth.

- Franchisee
  - No change in trade name.
  - Guaranty of franchisee’s obligations.

- Concessionaries
  - Amount of space / number of concessions.
ADDITIONAL CONSIDERATIONS:

- Recapture.
- Profit Sharing.
- Guaranty:
  - Personal
  - Good guy
  - Replacement guarantor
- Security Deposit.
OVERLOOKED LEASE ISSUES WHEN CONSIDERING A CORPORATE ACQUISITION

By: Edward Goodman

December 3, 2014
INTRODUCTION:

- Preliminary Due Diligence – Financial
- Reviewing Legal Documents
- Basic due diligence with respect to Leases, Subleases, etc. (lease term, rent, rent increases over the term, renewal options, etc.)
LEASE PROVISIONS OF WHICH AN ACQUIRER SHOULD BE COGNIZANT:

- Expansion, Termination and Renewal Rights available only to the initial tenant:

- In some cases, the landlord is relying upon the financials and reputation of the tenant in entering into a lease and may not want to extend expansion rights, termination rights or renewal rights to unknown entities that may later take an assignment of the lease (even if the landlord has consented to the assignment of the lease to the successor tenant).
In order to protect itself, the landlord may **limit the right to exercise these rights only to the initial tenant, and not permit the assignee of the initial tenant to exercise such rights.**

In an acquisition transaction involving the assignment and assumption of the target company’s lease, the acquirer may assume, unless otherwise advised, that it will have the right to exercise the target company’s renewal, termination or expansion options as part of the acquirer’s business plan.
The failure of the acquirer to take into account this limitation (or, if possible, to obtain the landlord’s agreement to delete this limitation with respect to the assignee of the lease) may threaten the anticipated success of the acquisition.

This restriction may not be expressly set forth in these sections but may be in the miscellaneous section of the lease, or somewhere less prominent.
- **Abandonment or Vacancy Default:**

  - In a transaction involving the acquisition of a target company having many different offices, the acquirer may be planning to consolidate its operations with the operations of the target entity and to move the target entity’s employees from the target entity’s offices to office premises leased by the acquirer.

  - The acquirer may further anticipate that it will sublet the target entity’s premises or further assign the target entity’s lease, which could take several months.
The less considered risk faced in this situation is the possibility that upon the relocation of the target entity’s employees and office equipment from its premises an abandonment may have occurred and the landlord may be entitled to terminate the lease pursuant to the default provisions of the lease.

If it is seen by the landlord as an advantage, it might jump at the opportunity to terminate the lease in question and collect the damages that it may be entitled to under the applicable lease, or perhaps to relet the premises at a much higher rent and take for itself the potential profits from a sublease or further assignment which otherwise might be realized by the acquirer.
With the right advance planning it may be possible to minimize the risk of the lease being terminated by reason of vacancy or abandonment.

**Restoration of Premises at End of Term:**

Leases will usually contain an “End of Term” Provision or other lease provision requiring the leased premises to be surrendered in a certain condition.

Unless this point has been previously negotiated, many leases will require the tenant, at the landlord’s option, to restore the leased premises to its condition on the commencement date of the lease.
Depending on what kind of installation and improvements had been installed in the premises by the initial tenant following the lease commencement date, the restoration cost may be prohibitive.

The acquirer assuming all obligations under a lease pursuant to a lease assignment needs to consider the potential costs of restoring the leased premises at the end of the term of the lease as part of its analysis of the acquisition cost and future costs.
Relocation of Tenant:

- In order to permit the landlord to accommodate the future needs of a significant existing or potential tenant, the landlord may try to preserve its flexibility in deciding to provide this accommodation by retaining a right to relocate a tenant to another location in the building.

- If the landlord exercises a right to relocate the tenant, an acquirer is likely to suffer a loss of productivity and business.

- Another concern may be that the space to which the acquirer is in a less desirable location.
Use Restrictions:

- An office lease will typically regulate the permitted use of the leased premises.

- If general and executive office use is permitted without further limitation, then no problem.

- If only a specific type of office use is permitted, such as “general and executive office use in connection with Tenant’s business as an architectural firm” this may be a problem in the case where the acquiring company has different divisions and needs to have the flexibility, after the lease is assigned, to have one of its divisions operate a business in the space in question that is different from the acquired company’s business.
In addition, leases occasionally limit uses to accommodate a large tenant in the building wanting to avoid competition, by granting that tenant the exclusive right to use its space for a particular purpose.

**Assignment and Subletting Issues:**

With respect to the Assignment and Subletting sections of the lease, these are the sometimes overlooked sections that attention should be focused upon:
A. Consent/Recapture:

- Many leases give the landlord the right, when the tenant requests the consent of the landlord to an assignment of the lease, to take back the space either by termination of the lease or by requiring the tenant to assign the lease back to the landlord. In either case if the landlord exercises such right, the acquiring entity will no longer be able to use the space after the closing.

- This may be important if there is an expectation that the space will be available and needed for the acquiring company’s use or if following the closing of the acquisition the acquiring company hopes to sublet or further assign the lease in order to realize a profit.
B. **Allocation of Purchase Price:**

- Many leases also contain a lease provision that requires the tenant to share with the landlord all or a portion of the profits that the tenant realizes from an assignment or sublease transaction. In a lease assignment not related to an acquisition, the consideration paid by the assignee for the lease assignment is usually deemed to be the “profit” which is to be shared with or taken by the landlord.

- Where a lease is assigned as part of (and often only incidental to) an acquisition transaction, the situation becomes more complicated because the landlord may see an opportunity to claim that the profits realized by the acquired tenant from the sale transaction includes the consideration paid for the lease assignment and demand a share thereof.
The landlord may demand to review the applicable asset purchase agreement and/or any related documents or financial information on the basis that the information is necessary to facilitate the landlord’s analysis of the “profit.” Such a demand will often raise confidentiality issues.

Alternatively, the landlord may want the assignee and assignor to certify that no consideration is being paid for the lease assignment.

SUGGESTION: Add a provision to the asset purchase agreement to the effect that “no portion of the Purchase Price is allocated to the lease assignment(s).”
- **Financial Statements:**

  - Another lease provision to be aware of is the one requiring the tenant to provide financial statements to the landlord. Many privately held entities prefer not to disclose their financials and the possibility of being required to do so should be made known to the acquiring entity.

- **Reasonableness of the Tenant’s Remedies against the Landlord:**

  - An important part of the lease from the tenant’s perspective is the ability of the tenant to exercise self-help and/or abatement remedies if its business is impacted by a failure of the landlord to provide services or the occurrence of a casualty.
MOVING THE DIRT: SPOTTING AND ADDRESSING REAL PROPERTY ISSUES WHEN SELLING OR ACQUIRING COMPANIES

By: Neal Weinstein

December 3, 2014
BUY THE STOCK OR THE PROPERTY?:

- Do you just want the land and the equipment?
- Just take the deed.
- Consider the transfer of the company.
- Now get to your accountant.
KEY TAX ISSUES CONCERNING REAL PROPERTY:

- Transfer Tax Concerns – Transfer on the Sale of Real Property or Upon the Transfer of a Controlling Interest. Jurisdictional Concerns.

- Bulk Sales Tax Concerns – Timing / Clearance Certificates

- Section 1031 Exchange
TRANSFER TAX:

- Check State Requirements as to payment of transfer tax.

- New York: A “conveyance” for the purposes of transfer tax is “the transfer or transfers of any interest in real property by any method including……[the] transfer or acquisition of a controlling interest in any entity with an interest in real property.” NY Tax Law Section 14.01
## TRANSFER TAX – “CONTROLLING INTEREST”:

<table>
<thead>
<tr>
<th>Corporation</th>
<th>50% or more of the total combined voting power of all classes of stock of the corporation, or 50% or more of the capital, profits or beneficial interest in such voting stock</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partnership, Association, Trust or other Entity</td>
<td>50% or more of the capital profits or beneficial interest in such partnership, association, trust or other entity.</td>
</tr>
</tbody>
</table>
TRANSFER TAXES – CONSIDERATION:

➢ For the transfer of a controlling interest in any entity that owns real property, consideration is “the fair market value of the real property or interest therein, apportioned based on the percentage of the ownership interest transferred or acquired in the entity.” NY Tax Law Section 14.01
**BULK SALES:**

The sale, transfer, or assignment of business assets, in whole or in part.

- “Business assets” are generally any assets directly related to the conduct of a business, including: tangible personal property, real property and intangibles such as goodwill.

- In New York and many jurisdictions, a purchaser is not to pay a seller without following the applicable pre-closing requirements and receiving the requisite clearance certificates (or notice of a tax claim). Failure to follow the procedure will leave a purchaser liable for a seller’s sales and use taxes.

- Again, check your state requirements.
1031 EXCHANGE:

- Under Section 1031 of the Internal Revenue Code: An owner of investment or business assets can defer the payment of gains tax by using the proceeds to acquire Replacement Property which is “like kind” to the property being disposed of.

- Both the Relinquished Property and the Replacement Property must be held by the taxpayer for investment purposes or for the use in a trade or business:

  I. The property must be “like kind.” It applies to real property but not stock, securities, partnerships or membership interests or other beneficial interests.

  II. The Replacement Property being acquired must be of equal or greater value to get the full benefit.

  III. Most exchanges are handled through a Qualified Intermediary, a third party that holds funds between closings.
ANALYSIS /DUE DILIGENCE:

- Three lines of defense (or attack):
  - Due Diligence Investigation
  - Contract Representations and Covenants
  - Post-Closing Liability
DUE DILIGENCE INVESTIGATION:

- Title and Survey
- UCC, Bankruptcy, Lien and Judgment Searches
- Zoning and Legal Compliance
- Permit and Licenses
- Existing Loan Documents
- Environmental Reports and Engineering
- Service Contracts
- Existing Leases / Subleases
- Personal Property Inventory
- Utility Accounts
- Websites / URL’s / Hardware / Software / Loose Technology (Contracts)
- Insurance
CONTRACT REPRESENTATIONS:

- Always Tailor to the Type of Property you are Buying:
  - Good Standing and Authority
  - Title / No Right of First Refusal or Other Third Party Interests
  - Title to Appurtenant Personal Property / Affix Inventory
  - No Leases or Affix Rent Roll and Representations as to Same.
  - No Mortgage or Certify Basic Mortgage Information.
  - No Litigation Pending or Threatened (or Schedule a List).
  - No Employees or Certification as to Employees and Benefits.
  - Service Contracts
  - Certificate of Occupancy / Permits
  - Property Condition
  - Agreements with Governmental Authorities / Compliance with Legal Requirements.
  - No Condemnation
  - No Special Assessments
  - No Amounts Owed to Contractors
  - No bankruptcy
  - OFAC
COVENANTS:

- Operate and Maintain in the Ordinary Course
- No new agreements
- No material work
- Keep Insured
- Don’t pick it clean
THANK YOU!

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PERMITTED (NO CONSENT) TRANSACTIONS AND ISSUES TO CONSIDER IN CONNECTION WITH TRANSFERS

A. PERMITTED (NO CONSENT) TRANSACTIONS.

I. The general assignment and subletting clause in a lease is very restrictive – it does not permit any assignment, sublease, mortgage, or encumbrance without the landlord’s prior consent. The REBNY form provides, in part:

    Tenant, for itself, its heirs, distributes, executors, administrators, legal representative, successor and assigns, expressly covenants that it shall not assign, mortgage or encumber this agreement, nor underlet, or suffer or permit the demised premises or any part thereof to be used by others, without the prior written consent of Owners in each instance. Transfer of the majority of the stock of a corporate tenant or the majority of the partnership interest of a partnership Tenant shall be deemed an assignment.

II. While the above provision is the general rule, most leases will provide that the landlord will not unreasonably withhold, condition or delay its consent provided that:

    (A) in landlord’s reasonable judgment, the transferee is engaged in a business or activity, and the premises will be used in a manner, which is in keeping with the then standards of the building;

    (B) the transferee is reputable with sufficient financial means to perform all of its obligations under the lease or the sublease, as the case may be;

    (C) if landlord has, or reasonably expects to have within 6 months thereafter, space available in building, neither the transferee nor any affiliate of the transferee is then an occupant of the building;

    (D) there shall be not more than 2 subtenants in each floor of the premises;

    (E) tenant shall not list the premises to be sublet or assigned with a broker, agent or other entity or otherwise offer the premises for subletting at a rental rate less than the rental rate that landlord is offering to lease other space in the Building;

    (F) tenant will reimburse landlord for its actual and reasonable out-of-pocket costs and expenses in connection with such request for consent, whether or not consent is given; and

    (G) the transferee shall not be entitled to diplomatic or sovereign immunity.
III. The next carve-out from the general rule are those transactions that are too significant to the well-being of the tenant that the tenant does not want the landlord to be able to interfere with the transactions. While it may be argued that these transactions are more important to the tenant than to the landlord, the landlord cannot be expected to (and WILL NOT) bless these transactions without being satisfied that it still has a creditworthy entity as the tenant.

These types of permitted (no consent) transfers are summarized as follows:

1) Successors (Mergers, Consolidations and Acquisitions) – case of the tenant merging, consolidating or being acquired.

2) Related Party – can be broken down into 2 categories: (a) Affiliate and (b) Previously Related Party. How you define the term Affiliate is very important. Two examples:

   a. Affiliate (definition 1): The term “Affiliate” shall mean a person or entity that (1) Controls, (2) is under the Control of, or (3) is under common Control with, the person or entity in question. The word “Control” shall mean direct or indirect ownership of fifty percent (50%) or more of the outstanding voting stock of a corporation or other majority equity interest if not a corporation and the possession of power to direct or cause the direction of the management and policy of such corporation or other entity, whether through the ownership of voting securities, by statute, by contract or otherwise.

   b. Affiliate (definition 2): The term “Affiliate” shall mean, with respect to any person or entity, any other person or entity that, directly or indirectly (through one or more intermediaries), Controls, is Controlled by, or is under common Control with, such first person or entity. The term “Control” shall mean the ownership, directly or indirectly, of more than 50% of the voting stock of a corporation, or in the case of any person or entity that is not a corporation, the ownership, directly or indirectly, of more than 50% of the beneficial ownership interests in such person or entity, or in the case of any such person or entity, the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such person or entity.

   c. The term “Previously Related Entity” means a person or entity that was previously a business division, parent or affiliate of tenant but is no longer controlling, controlled by or under common control with tenant [and which is still primarily engaged in the same business as when such person or entity was a business division, parent or affiliate of tenant.]

3) Multi Location/Stores – a tenant with multiple locations transferring either a
certain number of locations (instead of all the locations) or locations within a
particular geographic boundary.

4) Franchisee – THE BURGER KING transferring the lease to Burger King of
Eighth Avenue.

5) Concessionaries – Occupants of portions of the demised premises. This is
what you see at Bloomingdales or Saks (assuming that they did not own their
locations).

IV. Finally, there are transactions that don’t change the face of the tenant. These transactions
are happening behind the scene and should have no impact on the continued success of
the tenant entity. Examples of these types of transactions include:

1) Dissolution of tenant and immediate reconstitution of tenant into a new or
reconstituted legal entity, provided that the new or reconstituted legal entity is
obligated for all of tenant’s obligations under the lease;

2) Any change of the organizational form of Tenant (e.g. from a limited liability
company partnership to a limited liability company) and/or any change in the
state of organization of tenant;

3) Any addition, death, retirement, dismissal of withdrawal of any partners,
principals, members, etc. or the reallocation of equity, ownership, voting or
other interests in tenant between or among partners, principals, members, etc.
of tenant;

4) Any transfer, assignment or pledge of interests in tenant;

5) Any grant of permission to occupy portions of the premises on a demised
basis to person or entities with whom tenant has an ongoing business
relationship.

V. How does a landlord get comfortable? You can’t blame the landlord for wanting to know
who is the tenant (or, more appropriately, who is behind the tenant), and wanting to have
a creditworthy entity on the lease instead of a shell entity. However, every landlord
knows that change is guaranteed and most organizations will go through corporate
changes during their existence. A way that landlords have gotten comfortable is by using
some of the protections mentioned in Clause II above but with a twist. Consider the
following language, some iteration of which you will find in most negotiated leases:

Notwithstanding anything to the contrary in this Lease, upon at
least thirty (30) days’ prior written notice to Landlord, but without
the need for Landlord’s prior consent, Tenant shall have the right
to: (A) sublease the Premises or any portion thereof or assign this
Lease to any successor (a “Successor”) to Tenant by virtue of
merger, consolidation, sale of all or substantially all of Tenant’s
assets or stock, provided that (i) the Successor assumes by written
instrument reasonably satisfactory to Landlord all of Tenant’s obligations under this Lease, (ii) such transfer is for a valid business purpose and not for the purposes of avoiding any obligations under this Lease, (iii) the Premises shall continue to be used for the same permitted use and under the same trade name as prior to such Transfer], (iv) the Successor is a reputable entity of good character and (v) the Successor shall have a tangible net worth (with Tenant providing Landlord with such satisfactory proof as Landlord shall deem reasonable) that is at least equal to the greater of (A) the tangible net worth of Tenant as of the date of the Lease, or (B) the tangible net worth of Tenant immediately prior to the date of such transfer (such greater tangible net worth referred to as “Sufficient Net Worth”) or (B) sublease the Premises or any portion thereof or assign this Lease to any Affiliate of Tenant, provided that (i) the Affiliate assumes by written instrument reasonably satisfactory to Landlord all of Tenant’s obligations under this Lease accruing from and after the date of such transfer, (ii) such transfer is for a valid business purpose and not for the purposes of avoiding any obligations under this Lease, [(iii) the Premises shall continue to be used for the same permitted use and under the same trade name as prior to such transfer], (iv) such Affiliate is a reputable entity of good character and (v) such Affiliate shall have a Sufficient Net Worth (with Tenant providing Landlord with such satisfactory proof as Landlord shall deem reasonable). As used herein, the term “Affiliate” shall mean an entity directly or indirectly controlled by, controlling, or under common control with Tenant and the words “controlled,” “controlling,” or “control” shall mean the direct or indirect ownership of fifty percent (50%) of the entity. The provisions of the lease dealing with Landlord’s recapture right and sharing of assignment or sublease profits, as the case may be, will not apply in connection with a transfer to a Successor or an Affiliate. [Author’s Note: This last sentence is meant to address the “Two Step Problem” discussed below] Notwithstanding the foregoing, if at any time thereafter the assignee or sublessee shall cease to be an Affiliate of Tenant, then Tenant shall be required to obtain Landlord’s consent to the continuation of such assignment or subletting as provided herein.

Transfers to Successors and Affiliates will be analyzed against the framework of Clause V above. The reference to roman numerals below corresponds to the same roman numerals as above.

1) **Successor**: (i) most landlords will waive the requirement for prior notice where notice is prohibited by law or any applicable confidentiality agreement.
However, landlords do have the right to get notice of the transaction within a reasonable period of time after it is consummated; (ii) tenants should accept this; (iii) this has the potential to be problematic for tenants, especially for tenants whose parent company owns different brands. For example, a luxury fashion retailer would like and should be entitled to have flexibility in putting a tenant in the space with a different trade name but of equal quality (so, you can put Prada where you had Gucci, but not Carhartt); (iv) very vague from a tenant’s point of view, but landlords have a legitimate concern [Query: do the other lease provisions (e.g., standard/manner of operation, no unreasonable interference with other tenants, no unusual burden on building systems, etc.) cover what the landlord is trying to protect against?]; and (v) while it is reasonable for the landlord to have some creditworthiness test, the “greater of” test can be problematic for tenants. Acquiring companies may actually take on more debt and thus have less net worth [Query: Is net worth the appropriate test for all types of businesses? Should the test be an annual income test for a service industry tenant? If it is net worth, should be it tangible net worth or tangible plus intangible net worth?]. A preferred test may be some multiple of the annual rental obligations or language which provides “sufficient net worth to meet the rental obligations under the lease”.

2) **Affiliate:** In general, the same analysis as above, except that prior notice (clause (i)) is likely not problematic since these types of transactions are planned because they may be undertaken for tax reasons. With respect to net worth (clause (v)), the test should be deleted from a tenant’s point of view for various reasons, among them, that in these types of transactions the “parent” entity is transferring to a “subsidiary” – the subsidiary will have a lower net worth in all circumstances. In addition, the parent entity continues to remain liable under the lease. From the landlord’s point of view, evicting an entity with no credit can be harder than evicting a tenant with credit.

**The Two Step Problem:**

The “Two Step Problem” works this way. A tenant is able to use both an affiliate transaction and a successor transaction to circumvent the strictness of the assignment clause.

First Step: The tenant under the lease assigns to a newly formed affiliate. The affiliate’s sole asset is the lease.

Second Step: The affiliate is acquired by an unrelated third party. Now, while the name of the tenant is unchanged from what it became at the conclusion of the First Step, the entity is now controlled by a new and unknown person or entity.

“So long as an Affiliate remains an Affiliate” language in meant to prevent this type of transaction.

With respect to the other Permitted (no consent) transfers, the general concerns are:
3) **Multi Location/Stores:** This is not a successor transaction since the tenant is not selling all or substantially all of its locations. From tenant’s point of view, how many stores should the tenant be able to transfer? Is it locations/stores in a particular geographic area? Most tenants will accept some kind of net worth test.

4) **Franchisee:** As the landlord, you still want the store to be called Burger King, want to make sure that the tenant still has control under the franchise agreement and that there is a performance guaranty.

5) **Concessionaries:** As the landlord, biggest concern is the number of other operators and total area devoted to the operators.

B. **ISSUES TO CONSIDER IN CONNECTION WITH PERMITTED TRANSFERS.**

If the lease has a recapture, leaseback and/or profit sharing provision, tenant should make sure that those provisions do not apply to the Permitted Transfers. Landlord will agree to this since it is in line with the spirit of Permitted Transfers.

If there is a guaranty of the lease obligations, tenant will want to make sure that it has flexibility to replace the guarantor. For example, a good guy guaranty should only be given by an individual who has the ability to actually deliver vacant possession of the space.

Notwithstanding the foregoing provision of this article, this lease may be assigned, or the demised premises may be sublet, in whole or in part, to any corporation into or with which Tenant may be merged or consolidated or to any corporation which shall be an affiliate, subsidiary, parent or successor of Tenant, or of a corporation into or with which Tenant may be merged or consolidated, or to a partnership, the majority interest in which shall be owned by stockholders of Tenant or of any such corporation. If there shall be an assignment or subletting, in whole or in part, to a corporation or partnership, referred to in the immediately preceding sentence, the foregoing provisions of this Article _____, with respect to assignment or subletting, shall then apply to such corporation or partnership.

Landlord will not unreasonably withhold or delay its consent to an assignment or sublease to a party other than one mentioned in the preceding sentence.

If Tenant shall desire to make interior non-structural alterations in connection with an assignment or subletting which is permitted hereunder, Landlord shall not unreasonably withhold or delay its consent thereto.

For the purpose of this Article a “subsidiary” or “affiliate” or a “successor” of Tenant shall mean the following:

(a) An “affiliate” shall mean any corporation which, directly or indirectly, controls or is controlled by or is under common control with Tenant. For this purpose, “control” shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such corporation, whether through the ownership of voting securities or by contract or otherwise.
(b) A “subsidiary” shall mean any corporation not less than 50% of whose outstanding stock shall, at the time, be owned directly or indirectly by Tenant.

(c) A “successor” of Tenant shall mean:

(i) A corporation in which or with which Tenant, its corporate successors or assigns, is merged or consolidated, in accordance with applicable statutory provisions for merger or consolidation of corporation, provided that by operation of law or by effective provisions contained in the instruments of merger or consolidation, the liabilities of the corporations participating in such merger or consolidation are assumed by the corporation surviving such merger or created by such consolidation, or

(ii) A corporation acquiring this lease and the term hereby demised and a substantial portion of the property and assets of Tenant, its corporate successors or assigns, or

(iii) Any corporate successor to a successor corporation becoming such by either of the methods described in (i) or (ii), provided that on the completion of such merger, consolidation, acquisition, or assumption, the successor shall have a net worth of no less than Tenant’s net worth immediately prior to such merger, consolidation, acquisition or assumption.

Acquisition by Tenant, its corporate successors or of a substantial portion of the assets, together with the assumption of all or substantially all of the obligations and liabilities of any corporation, shall be deemed a merger of such corporation into Tenant for purpose of this Article.

2. Exempt Transfers and Permitted Transfers Clause for a Limited Liability Partnership Tenant:

(i) **Transactions Not Constituting Transfers Hereunder.** Notwithstanding anything to the contrary contained in the Lease, the following shall be permitted under the Lease without requiring Landlord’s consent or any notice to Landlord, it being agreed that none of the following shall be deemed to constitute a “transfer” for purposes of this Lease:

(1) any dissolution of Tenant and immediate reconstitution of Tenant into a new or reconstituted legal entity,
provided that the new or reconstituted legal entity is obligated for all Tenant's obligations under this Lease;

(2) any change of the organizational form of Tenant (e.g., from a limited liability partnership to a limited liability company) and/or any change in the State of organization of Tenant;

(3) any addition, death, retirement, dismissal or withdrawal of any partners, principals, members, shareholders and/or other owners of equity interests in Tenant (as Tenant is now, or may hereafter be, constituted) or the individual persons who, directly or indirectly, own an interest in any such partner that is a legal entity (individually, a “Partner” and collectively, “Partners”), or the reallocation of equity, ownership, voting or other interests in Tenant between or among Partners of Tenant;

(4) any transfer, assignment or pledge of interests in Tenant (or any of its Affiliates) and/or any merger, reorganization or consolidation involving Tenant (or any of its Affiliates); and

(5) any sublease, license or other grant of permission to occupy portions of the Premises to persons or entities: (A) which are clients or customers of Tenant, (B) with whom Tenant has an ongoing business relationship, or (C) which provide services to Tenant, in each case, in a manner that does not involve separately demising portions of the Premises.

(ii) Exempt Transfers. Notwithstanding anything to the contrary contained in this Lease, the following shall be permitted under this Lease without requiring Landlord's consent (provided, however, without a reasonable period of time following such Transfer, Tenant will provide notice thereof to Landlord):

(1) any assignment of this Lease to any successor of Tenant (A) into which or with which Tenant is merged or consolidated, (B) arising from the assignment or transfer of Tenant's interest under this Lease made in conjunction with the transfer of a majority of the assets and liabilities of Tenant in ________[Insert geographic locations], (C) to all of the assets and liabilities with respect to Tenant's operations in the Premises, or (D) arising from the acquisition of the assets and liabilities of another company or entity by Tenant, provided that (in each case) such successor is obligated for all Tenant's obligations under this Lease;
(2) any sublease of all or any portion of the Premises to any person or entity described in clause (1) above, provided that Tenant remains obligated for all of its obligations under this Lease despite such sublease; and

(3) any assignment of this Lease or the sublease of any portion of the Premises to (A) an Affiliate of Tenant or a business division of Tenant or an Affiliate of Tenant, or (B) a person or entity that was, at any time prior to such assignment or sublease, previously an Affiliate of Tenant or business division of Tenant or an Affiliate of Tenant (including any such entity "spun-off" from Tenant or any Affiliate of Tenant, or any entity created by virtue of any such “spin-off”); provided that (in each case) Tenant remains liable for all Tenant's obligations under this Lease despite such assignment or sublease.

"Affiliate" shall mean any person or entity controlling, controlled by, or under common control with another person or entity. As used in this Lease, the terms "control", "controlled" or "controlling" shall mean either the possession, directly or indirectly, of either the power to direct or cause the direction of the management and policies of the entity or the distribution of its profits, whether by the ownership of voting securities, partnership shares, by contract or otherwise, or the ownership, directly or indirectly, of not less than fifty percent (50%) of the then outstanding stock, if the entity is a corporation, or of not less than fifty percent (50%) of the partnership interests, membership interests, other equity interests or profit interests, if the entity is a partnership, a limited liability company or other entity.

3. **Permitted Transfers Clause for a Closely Held Limited Liability Company Tenant:**

Notwithstanding anything to the contrary in this Paragraph ___, if the original Tenant under the Lease is a corporation, partnership or other entity, a change or series of changes in ownership of stock or other ownership interests which would result in direct or indirect change in ownership of less than fifty percent (50%) of the outstanding stock of or other ownership interests in such Tenant as of the date of the execution and delivery of this Lease shall not be considered a change of control. As long as ___________ is the Tenant hereunder, (w) the person responsible for the management of Tenant under its organizational documents and the Premises shall remain unchanged, (x) the proposed transferee shall deliver such documents as Landlord shall reasonably require in connection therewith, (y) the Tenant Ownership Group (defined below) has the power to direct or cause the direction of the management and
policies of Tenant, whether directly or through one or more intermediaries, and (z) the Tenant Ownership Group owns, directly or indirectly, more than 51% of the beneficial interests in Tenant, the following transactions may be undertaken upon thirty (30) days’ prior written notice to Landlord but shall not require Landlord’s consent (and shall not be subject to Landlord’s rights to recapture and without Landlord having the right to any subleasing profit or assignment profit): (i) changes in Tenant’s direct or indirect equity holders as the result of the withdrawal, retirement or death of existing equity holders or the admission of new equity holders or the reallocation of equity interests among the equity holders of Tenant, (ii) direct or indirect transfers of Tenant’s equity interests by gift, bequest or devise, (iii) direct or indirect transfers of Tenant’s equity interests to or among immediate family members of Tenant’s equity holders or to trusts for the benefit of any such parties, or to entities owned or controlled by such parties, or (iv) direct or indirect transfers of Tenant’s equity interests to or among members of the Tenant Ownership Group. With respect to each instance referred to in clause (i) in this Paragraph, such exception is conditioned upon the same being for a reasonable and valid business purpose of Tenant in normal course and not for a principal purpose of circumventing the restrictions on assignment set forth in this Lease. With respect to each instance referred to in clauses (ii) and (iii) in this Paragraph, such exception is conditioned upon the same being for a reasonable and valid estate or financial planning purpose of Tenant’s equity holders and not for a principal purpose of circumventing the restrictions on assignment set forth in this Lease. With respect to each instance referred to in clause (iv) in this Paragraph, such exception is conditioned upon the same being not for a principal purpose of circumventing the restrictions on assignment set forth in this Lease. “Tenant Ownership Group” shall mean descendants of __________ or trusts for the benefit of any of them or any of their immediate family members. For the purposes hereof, an immediate family member shall be deemed to be a spouse; a brother or sister of the whole or half-blood of such individual or his or her spouse; a lineal descendant or ancestor (including an individual related by or through legal adoption) of any of the foregoing; or a trust for the benefit of any of the foregoing. (References to “spouse” herein shall be deemed to include domestic partners living together for at least 10 years.).

4. **Permitted Transfers Clause for a Tenant with a “Key Principal”:**
Notwithstanding the foregoing with respect to an Equity Transfer, (i) a transfer for estate-planning purposes by the sole shareholder (the “Key Principal”) of his ownership interest in Tenant, or in any shareholder of Tenant, to members of Key Principal’s immediate family or to an entity wholly controlled, legally or beneficially, by Key Principal or by members of Key Principal’s immediate family, or (ii) an involuntary transfer caused by the death of the Key Principal, shall not be deemed to be a violation of the restrictions in this Section ____, provided (i) prior written notice of any proposed transfer under clause (i) shall have been received by Landlord, and (ii) the proposed transferee shall deliver such documents as Landlord shall reasonably require in connection therewith.

The term “Equity Transfer” shall mean the sale or transfer of the stock or other equity interests in Tenant that results in the direct or indirect transfer of control of Tenant, regardless of whether such sale or transfer is made by one or more transactions, or whether one or more persons or entities hold the controlling interest prior to the sale or transfer or afterward, shall be deemed an assignment for purposes of this Article ___.

5. **Negotiated Permitted Transfers Clause for an Affiliate of a Publicly Traded Company** (NOTE: Changes are shown to the provisions in one of the Landlord’s drafts):

10.07. **(a)** Anything to the contrary contained herein, the prior written consent of Landlord shall not be required in order for Tenant to enter into and perform its obligations under any of the following transfers (each a "Permitted Transfer"; a transferee pursuant to a Permitted Transfer is referred to herein as a “Permitted Transferee”):

(i) the assignment of this Lease or the sublease of the demised premises or any portion thereof to any successor (a “Successor”) to the business of Tenant by virtue of a merger, reorganization, consolidation, sale of all or substantially all of Tenant's assets or stock, provided that (a) Landlord shall be given written notice of any such Permitted Transfer under this clause (i) within twenty (20) days after the occurrence thereof but any failure by Tenant to do so shall not make such transfer void or ineffective further provided that this foregoing agreement of Landlord shall not be deemed a waiver of any rights of Landlord against Tenant because of the lack of knowledge of such assignment, (b) the Successor assumes by
written instrument reasonably satisfactory to Landlord all of Tenant’s obligations under this Lease. (c) pursuant to an instrument reasonably acceptable to Landlord and Tenant, (x) such Permitted Transfer is for a valid business purpose and not to avoid any obligations under this Lease, and (d) the Successor is a reputable entity of good character and shall have, immediately after giving effect to such Permitted Transfer, an aggregate net worth (computed in accordance with GAAP) at least equal to $450,000,000; provided, that if the Successor is a Service Industry Transferee, in lieu of such required minimum net worth, the financial condition of such company shall be reasonably satisfactory to Landlord.

(ii) the assignment of this Lease or the sublease of the demised premises or any portion hereof to any "affiliate" of Tenant. For purposes of this Lease, whenever used, the term "affiliate" is defined as any corporation, partnership or other entity directly or indirectly controlled by, controlling, or under common control with Tenant and the word "control" shall mean (i) in the case of a corporation shall mean direct or indirect ownership of more than fifty (50%) percent of the outstanding capital stock of that corporation, (ii) in the case of a general or limited liability partnership, shall mean the possession of, directly or indirectly, more than fifty (50%) percent of the general partnership or membership interests of the partnership, (iii) in the case of a limited partnership, shall mean the possession of, directly or indirectly, more than fifty (50%) percent of the general partnership interests of such limited partnership, and (iv) in the case of a limited liability company, shall mean the possession of, directly or indirectly, more than fifty (50%) percent of the membership interests of such limited liability company. In the case of a Permitted Transfer pursuant to this clause (ii), any subsequent transaction whereby such affiliate of Tenant shall cease to be an affiliate of Tenant shall, unless in connection with another Permitted Transfer, constitute an assignment requiring Landlord's prior written consent pursuant to this Article 10.

(b) Notwithstanding anything to the contrary contained in this Lease, the following shall be permitted under this Lease without requiring Landlord’s consent, it being agreed that none of the
following shall be deemed to constitute an assignment or other transfer for purposes of this Lease:

(i) the dissolution of Tenant and immediate reconstitution of Tenant into a new or reconstituted legal entity having the same assets of the dissolved entity, provided that such transaction shall be for a bona fide business purpose and not for the purposes of avoiding the restrictions against subletting or assignment provided in this Lease, and that the new or reconstituted legal entity is obligated for all Tenant's obligations under this Lease;

(ii) the mere change of the organizational form of Tenant (e.g., from a corporation to another form of entity) and/or any change in the State of organization of Tenant whereby the reorganized entity has the same assets as the entity immediately prior to such reorganization, provided that such transaction shall be for a bona fide business purpose and not for the purposes of avoiding the restrictions against subletting or assignment provided in this Lease;

(iii) the pledge of interests in Tenant which does not involve or could not result in an assignment of this Lease;

(iv) the series of transactions whereby Tenant becomes a publicly traded company (i.e., a company the shares of which are publicly traded on a recognized stock exchange); and

(v) any addition, death, or withdrawal of any principals in Tenant (as Tenant is now, or may hereafter be, constituted).

(c) In connection with any transaction that is permitted under this Section 10.07 without requiring Landlord’s consent, Tenant shall deliver to Landlord a ratification of guaranty, if applicable, in form and substance reasonably acceptable to Landlord within ten (10) days following Landlord’s request therefor.
OVERLOOKED LEASE ISSUES WHEN CONSIDERING A CORPORATE ACQUISITION

By Edward Goodman

Prior to reaching a decision on whether it should acquire a company (a “target company”), a potential acquirer will typically request its attorneys and accountants to conduct “due diligence” with respect to the target company, which entails the investigation of the target company’s legal obligations and financial status, as well as a number of other factors which affect the value of the target company.

Among the documentation that is reviewed in the course of due diligence are the leases, subleases, licenses and/or other occupancy agreements (collectively, “leases”) which relate to the locations in which the target company operates its business or businesses. Basic due diligence will involve a review of the lease term, rent, rent increases over the term, renewal options, etc. While it is often a normal part of the process to review real estate documents for the purpose of determining the rent and other payment obligations of the target company as a tenant, not enough attention may be paid to certain other important provisions of the leases that may adversely impact upon the benefits realized from the acquisition.

The attorney for the acquiring company needs to focus on specific, less obvious, lease provisions to which the target company may be subject and of which the acquirer needs to be conscious before it makes the ultimate decision to acquire a company. These are some of the relevant provisions:

**Expansion, Termination and Renewal Rights available only to the initial tenant**

Before a landlord enters into a lease with a particular tenant it is safe to assume that the landlord will have made some inquiries into, or investigations of, the business, finances and reputation of that tenant. Because the landlord is relying upon the financials and reputation of the tenant, the landlord may not want to extend expansion rights, termination rights or renewal rights to unknown entities that may later take an assignment of the lease (even if the landlord has consented to the assignment of the lease to the successor tenant). Therefore, in order to protect itself, the landlord may limit the right to exercise these rights only to the initial tenant, and not permit the assignee of the initial tenant to exercise such rights.

In the acquisition of the assets of a target company (which will typically involve an assignment and assumption of the target company’s lease), the acquirer may assume, unless otherwise advised, that it will have the right to exercise the target company’s renewal, termination or expansion options as part of the acquirer’s business plan. The failure of the acquirer to take into account this limitation (or, if possible, to obtain the landlord’s agreement to delete this limitation with respect to the assignee of the lease) may threaten the anticipated success of the acquisition.

Often enough it will be easy to spot these restrictions because they will appear in the affected sections, such as the renewal sections, expansion sections, etc. However, the attorney must be conscious of the possibility that this restriction will not be expressly set forth in these
sections but may be in the miscellaneous section of the lease, or somewhere less prominent, and expressed in a simple sentence such as: “All option rights granted to Tenant under this lease are personal to the tenant named herein and may be exercised only by such tenant.” It is important to become aware of these types of restrictions in the interest of knowing what rights your company will or will not have after the closing of the acquisition.

**Abandonment or Vacancy**

In a transaction involving the acquisition of a target company having many different offices, the acquirer may be planning to consolidate its operations with the operations of the target entity and to move the target entity’s employees from the target entity’s offices to office premises leased by the acquirer. The acquirer may further anticipate that it will sublet the target entity’s premises or further assign the target entity’s lease so as to recover some of the rent and other charges under the lease of the vacated premises of the target entity for which the acquirer continues to be liable.

Of course, a prudent attorney understanding the intentions of the acquirer will review the assignment and subletting provisions of the lease to ensure that the acquirer will have some flexibility in effecting a sublease or assignment after the acquisition has been completed.

The less considered risk faced in this situation is the possibility that upon the relocation of the target entity’s employees and office equipment from its premises the landlord will be entitled to terminate the lease pursuant to the default provisions of the lease.

Some leases contain a provision that allow the landlord to terminate a lease without notice to the tenant, or any opportunity to cure, if the tenant abandons or vacates the premises. The problem is that, in most cases, procuring a subtenant or assignee and negotiating a sublease and/or assignment following the consummation of the acquisition will take some time, in the interim leaving the premises vacant or in a condition that the landlord may argue amounts to abandonment.

If it is seen by the landlord as an advantage, it might jump at the opportunity to terminate the lease in question and collect the damages that it may be entitled to under the applicable lease, or perhaps to relit the premises at a much higher rent and take for itself the potential profits from a sublease or further assignment which otherwise might be realized by the acquirer.

With the right advance planning it may be possible to minimize the risk of the lease being terminated by reason of vacancy or abandonment, by keeping some furniture, equipment and employees in the space even after the completion of the relocation. Whether this will be successful in preventing the landlord’s exercise of its rights under the applicable default clause will depend upon the particular facts and the laws of the jurisdiction in which the premises are located.

Attached as Appendix A is an example of a lease provision containing the abandonment “default” language.

**Restoration of Premises at End of Term**
The acquirer assuming all obligations under a lease pursuant to a lease assignment also needs to consider the potential costs of restoring the leased premises at the end of the term of the lease. Commercial leases commonly contain a provision that requires the tenant, at the landlord’s option, to restore the leased premises to its condition on the commencement date of the lease. Depending on what kind of installation and improvements had been installed in the premises by the initial tenant following the lease commencement date, the cost may be prohibitive. As part of its analysis of the acquisition and future costs, the acquirer should make sure that it becomes aware of any such obligation and determines the potential costs of compliance.

Attached as Appendix B is an example of a lease provision containing such a restoration requirement.

**Relocation of Tenant**

In order to permit the landlord to accommodate the future needs of a significant existing or potential tenant, the landlord may try to preserve its flexibility to provide this accommodation by retaining a right to relocate a tenant to another location in the building. This is a risk that an acquirer should consider in terms of the loss of productivity and potential loss of business that the acquirer may suffer as a result of relocation. Another concern may be that the space to which the acquirer is in a less desirable location. An acquirer should be made aware of this risk before proceeding with its acquisition.

Attached as Appendix C is a typical “relocation” provision found in some leases.

**Use Restrictions**

A related issue may arise in the case where the acquiring company has different divisions and needs to have the flexibility, after the lease is assigned, to have one of its divisions operate a business in the space in question that is different from the acquired company’s business. In that case it is important to make sure that the intended use of the acquiring company of the space in question does not violate the permitted use clause of the lease or an exclusive use granted to a different tenant in the building.

Attached as Appendix D is an example of some use restrictions that should be reviewed carefully in the context of a corporate acquisition.

**Assignment and Subletting Issues:**

The Assignment and Subletting provisions of the lease also need to be reviewed with certain issues in mind:

(a) **Consent/Recapture**

Many leases give the landlord the right, when the tenant requests the consent of the landlord to an assignment of the lease, to take back the space either by termination of the
lease or by requiring the tenant to assign the lease back to the landlord. If following the closing of the acquisition the acquiring company will have a need for the space or even intends to sublet or further assign the lease after the closing (hoping to realize a profit), the landlord’s right to take back the space will obviously present an obstacle.

Attached as Appendix E is an example of a typical “recapture provision.”

(b) Allocation of Purchase Price

Some landlords will require the tenant to share with the landlord all or a portion of the profits that the tenant realizes from an assignment or sublease transaction. Pursuant to many of these provisions, in the case of a single lease assignment not related to an acquisition, the consideration paid by the assignee for the lease assignment is deemed to be the “profit” which is to be shared with or taken by the landlord. Attached as Appendix F is an excerpt from a lease containing this kind of “profit-sharing” provision.

Where a lease is assigned as part of (and often only incidental to) an acquisition transaction, the situation becomes more complicated.

In connection with an acquisition transaction, confidentiality is almost always a concern. The last thing an acquirer or target entity wants to deal with in an acquisition is for the landlord to start fishing around for profits with a claim that the profits realized by the acquired tenant are part of the profits from the sale transaction. This could be manifested by the landlord demanding to review the applicable asset purchase agreement and/or any related documents or financial information on the basis that the information is necessary to facilitate the landlord’s analysis of the “profit.”

Assuming that the parties to the transaction can reasonably reach the conclusion that no portion of the purchase price being paid by the acquirer should be allocated to the applicable lease assignment(s), one way to minimize the need to disclose to the landlord any agreements and information relating to the acquisition (which may be confidential, and which will unnecessarily involve the landlord in financial aspects of the acquisition) is to add a provision to the asset purchase agreement to the effect that “no portion of the Purchase Price is allocated to the lease assignment(s).” By including this provision the tenant can truthfully advise or certify to the landlord that pursuant to the acquisition documents the lease obligations are being assumed by the assignee with no consideration paid to the assignor/tenant therefor, and thereby (hopefully) avoid the need to deal with this issue. And if the landlord insists upon reviewing the asset purchase agreement, it may be satisfied with the non-allocation language.

Financial Statements

Another lease provision to be aware of is the one requiring the tenant to provide financial statements to the landlord. Many privately held entities prefer not to disclose their financials and the possibility of being required to do so should be made known to the acquiring entity.

Reasonableness of the Tenant’s Remedies against the Landlord

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An important part of the lease from the tenant’s perspective is the ability of the tenant to exercise self-help and/or abatement remedies if its business is impacted by a failure of the landlord to provide services.

Attached as Appendix G is an example of a self-help/abatement provision that will be helpful to an acquiring company if it needs to exercise rights against the landlord arising out of the landlord’s failure to perform its obligations under the lease. If no such remedies are available to the tenant, the acquiring entity can be advised of potential risks to the acquiring entity arising out of the landlord’s failure to provide services as required by the lease.

Some of the foregoing issues may be of greater or lesser concern to an acquirer in an acquisition transaction, depending upon the type and size of the business being acquired. The point is that a potential acquirer of a business should be aware that the lease of the target entity must be carefully reviewed above and beyond the monetary obligations of the tenant being acquired, including a review of the issues raised above, as the consequences of a failure to consider these issues may be to wake up with regrets after the acquisition has been completed.

EDWARD GOODMAN is a member of the Real Estate Group at the New York City law firm of Ingram Yuzek Gainen Carroll & Bertolotti, LLP, where his practice includes the representation of clients in local, national and international commercial leasing transactions. He also advises clients on real estate issues in corporate merger and acquisition transactions.
APPENDICES

APPENDIX A
(Abandonment or Vacancy)

Events of Default. The occurrence of any one or more of the following events shall constitute an “event of default” or “default” (herein so called) under this Lease by Tenant: (i) Tenant shall fail to pay Rent or any other rental or sums payable by Tenant hereunder within five (5) days after Landlord notifies Tenant of such nonpayment; provided, however, Landlord shall only be obligated to provide such written notice to Tenant two (2) times within any calendar year and in the event Tenant fails to timely pay Rent or any other sums for a third time during such calendar year, then Tenant shall be in default for such late payment and Landlord shall have no obligation or duty to provide notice of such non-payment to Tenant prior to declaring an event of default under this Lease; (ii) the failure by Tenant to observe or perform any of the express or implied covenants or provisions of this Lease to be observed or performed by Tenant, other than monetary failures as specified in Paragraph 12(a)(i) above, where such failure shall continue for a period of ten (10) days after written notice thereof from Landlord to Tenant; provided, however, that if the nature of Tenant’s default is such that more than ten (10) days are reasonably required for its cure, then Tenant shall not be deemed to be in default if Tenant shall commence such cure within said ten (10) day period and thereafter diligently prosecute such cure to completion, which completion shall occur not later than one hundred and eighty (180) days from the date of such notice from Landlord; (iii) the making by Tenant of any general assignment for the benefit of creditors, (iv) the filing by or against Tenant of a petition to have Tenant adjudged a bankrupt or a petition for reorganization or arrangement under any law relating to bankruptcy (unless, in the case of a petition filed against Tenant, the same is dismissed within sixty (60) days), (v) the appointment of a trustee or receiver to take possession of substantially all of Tenant’s assets located at the Premises or of Tenant’s interest in this Lease, where possession is not restored to Tenant within sixty (60) days, (vi) the attachment, execution or other judicial seizure of substantially all of Tenant’s assets located at the Premises or of Tenant’s interest in this Lease where such seizure is not discharged within sixty (60) days; (vii) any material representation or warranty made by Tenant in this Lease or any other document delivered in connection with the execution and delivery of this Lease or pursuant to this Lease proves to be knowingly and intentionally incorrect in any material respect; (viii) Tenant shall be liquidated or dissolved or shall begin proceedings towards its liquidation or dissolution; or (ix) the vacation or abandonment of the Premises by Tenant in excess of thirty (30) days.
APPENDIX B
( Restoration of Premises at End of Term)

In Alterations Section:

All alterations, improvements and additions to the Premises, including, by way of illustration but
not by limitation, all counters, screens, grilles, plumbing fixtures, appliances, special cabinetry
work, partitions, paneling, carpeting, drapes or other window coverings, light fixtures and
telephone cabling shall be deemed a part of the real estate and the property of Landlord and shall
remain upon and be surrendered with the Premises as a part thereof without molestation,
disturbance or injury at the end of the Lease term, whether by lapse of time or otherwise, unless
Landlord, by notice given to Tenant not more than thirty (30) days prior to the end of the
Term, shall elect to have Tenant remove all or any of such alterations, improvements or
additions, and in such event, Tenant shall promptly remove, at its sole cost and expense, such
alterations, improvements and additions and restore the Premises to the condition in which the
Premises were prior to the making of the same, reasonable wear and tear and damage from
casualty excepted. Any such removal, whether required or permitted by Landlord, shall be at
Tenant's sole cost and expense, and Tenant shall restore the Premises to the condition in which
the Premises were prior to the making of the same, reasonable wear and tear and damage from
casualty excepted. All movable partitions, machines and equipment which are installed in the
Premises by or for Tenant, without expense to Landlord, and can be removed without structural
damage to or defacement of the Building or the Premises, and all furniture, furnishings and other
articles of personal property owned by Tenant and located in the Premises (all of which
herein called "Tenant's Property") shall be and remain the property of Tenant and may be
removed by it at any time during the term of this Lease. However, if any of Tenant's Property is
removed, Tenant shall repair or pay the cost of repairing any damage to the Building or the
Premises resulting from such removal.

In End of Term Section:

At the end of the Term of this Lease, Tenant shall restore and deliver the Premises to Landlord in
the same condition as existed at the “commencement date” of this Lease, ordinary wear and tear
and damage from casualty excepted. The cost and expense of any repairs necessary to restore
the condition of the Premises shall be borne by Tenant.
APPENDIX C
(Relocation Provision)

SUBSTITUTION OF PREMISES:

Landlord reserves the right without Tenant’s consent, on thirty (30) days’ prior written notice to Tenant, to substitute other premises within the Building for the Premises. In each such case, the substituted premises shall (a) contain at least substantially the same Rentable Area as the Premises, and (b) be made available to Tenant at the rental rate for the Premises per square foot in effect under this Lease at the time of such substitution, with escalations as provided herein. Landlord’s sole liability in connection with such substitution shall be to reimburse Tenant for the actual reasonable out-of-pocket moving expenses incurred by Tenant in connection with such substitution of premises and satisfactorily evidenced to Landlord.
APPENDIX D
(Use Restrictions)

**Permitted Use.** Tenant shall use the Premises solely for general office and administrative purposes in connection with Tenant’s business as a public accounting firm, and Tenant shall not use or permit the Premises to be used for any other purpose or purposes whatsoever without the prior written consent of Landlord, which Landlord may withhold in its sole discretion.

**Prohibited Uses.** Tenant shall not use or permit the use of the Premises, or any part thereof for the following uses and/or purposes (collectively, the “Restricted Uses”): (1) for the business of photographic, multilith or multigraph reproductions or offset printing; (2) for manufacturing of any kind; (3) as a restaurant or bar or for the sale of confectionery, beverages, sandwiches, ice cream or baked goods or for the preparation, dispensing or consumption of food or beverages in any manner whatsoever; (4) as a bank or other financial services, hedge fund or investment management or investor relations firm; (5) as an employment or travel agency, labor union office, physician’s, dentist’s, medical or psychiatric office, medical or dental laboratory, dance or music studio, or health club or sports or exercise facility, subject to Section 3A; (6) as a barber shop or beauty salon; (7) as a school or training center; or (8) by any Legal Authority or instrumentality, or by any foreign or domestic governmental or quasi governmental entity entitled, directly or indirectly, to diplomatic or sovereign immunity or not subject to the service of process in, and the jurisdiction of, the courts of the State of New York.
APPENDIX E
(Assignment and Subletting – Recapture Provision)

Provided that no “Event of Default” shall then exist, Lessee may assign or sublease the within Lease to any party subject, inter alia, to the following:

In the event Lessee desires to assign this Lease or sublease all or part of the Premises to any other party, the terms and conditions of such assignment or sublease shall be communicated to the Lessor in writing no less than thirty (30) days prior to the effective date of any such sublease or assignment, and, prior to such effective date, the Lessor shall have the option, exercisable in writing to the Lessee, to: (i) sublease such space from Lessee at the lower rate of (a) the rental rate per rentable square foot of Fixed Rent and Additional Rent then payable pursuant to this Lease or (b) the terms set forth in the proposed sublease, (ii) recapture in the case of subletting, that portion of the Premises to be sublet, or all of the Premises in the case of an assignment (“Recapture Space”) so that such prospective sublessee or assignee shall then become the sole Lessee of Lessor hereunder, or (iii) recapture the Recapture Space for Lessor’s own use and the within Lessee shall be fully released from any and all obligations hereunder with respect to the Recapture Space.
APPENDIX F

(Assignment and Subletting – Profit Sharing Provision)

In the case of any assignment by Tenant under this Lease to an unrelated third-party, Tenant shall pay to Landlord, an amount equal to 50% of the amount by which (x) all sums and other consideration paid to Tenant by or on behalf of the assignee for or by reason of, or in connection with, such assignment (including sums paid for the sale or rental of Tenant’s leasehold improvements, fixtures, equipment, furniture, furnishings or other personal property, and, if such consideration is paid in installments, any interest paid on such installments) exceeds (y) the aggregate of (1) reasonable and customary brokerage commissions paid by Tenant in connection with such assignment, and (2) in the case of a sale of Tenant’s equipment, furniture, furnishings or other personal property to the assignee, the then-unamortized or undepreciated cost thereof determined on the basis of Tenant’s federal income tax returns. The amounts payable to Landlord shall be due and payable within thirty (30) days after Tenant’s receipt of payment from or on behalf of the assignee.
APPENDIX G
(Self Help/Abatement Provision)

If Landlord fails to perform any of its obligations under this Lease (a "Landlord Default"), Tenant shall give Landlord notice specifying the Landlord Default. A Landlord Default must be cured (i) within thirty (30) days after receiving notice from Tenant; or (ii) if the Landlord Default cannot be cured within thirty (30) days, within a reasonable period of time thereafter in order to cure such Landlord Default as long as Landlord has commenced and continues to prosecute a cure with due diligence after receiving notice from Tenant (the "Landlord Cure Period"). If the Landlord Default is not corrected within the Landlord Cure Period, then in addition to all rights, powers or remedies permitted by law, Tenant may (but shall not be obligated to):

i. Upon the first occurrence of any Landlord Default, correct the Landlord Default at the expense of Landlord and deduct the cost from rent and other sums payable under this Lease;

ii. Upon the second and any subsequent occurrence of any Landlord Default, withhold payment of rent and other sums payable under this Lease, if any, due to Landlord until Landlord has corrected the specified Landlord Default; and

iii. Upon the third occurrence of any Landlord Default or upon the failure of Landlord to cure any Landlord Default within ninety (90) days, Tenant shall have the right to seek the judicial remedy of specific performance and/or to terminate this Lease by providing Landlord with notice of such termination.
Don’t Forget the Dirt

Sample Real Property Representation, Covenants and Restrictions for Buyer to Require

Representations. Seller represents and warrants to, and agrees and covenants with, Buyer that:

R.1 Seller is a [State] [form of entity] duly organized and validly existing and in good standing under or by virtue of the laws of the state of its creation, has qualified as a foreign corporation in the state in which the Premises are located if such state is not the state of Seller’s formation, and has duly authorized the execution and performance of this Contract, and the execution and performance of this Contract will not violate any term of its organizational documents or any other agreement, judicial decree, statute or regulation to which it is a party or by which it may be bound or affected.

R.2 Seller is the owner of title in fee simple to the Premises, and no person (including, without limitation, any tenant) has any option to purchase or first refusal rights with respect to purchase or lease the Premises or any part thereof.

R.3 Seller is the owner of good title, free from all security interests, liens and encumbrances, other than to be satisfied at Closing, to the Personal Property.
R.4 There are no tenants or other occupants or of the Premises and there are no leases or other occupancy agreement, however entitled, affecting the Premises.

[FOR PROPERTY TO BE CONVEYED SUBJECT TO LEASES OR OCCUPANTS:

R.4 (a) All tenants and occupants of the Premises as of the Effective Date, the space leased, the lease expiration dates, the security and other deposits, any prepaid rents, and the rentals are identified on the Rent Roll annexed hereto as Schedule R.4 and the form of lease signed by all of those tenants and occupants is attached as part of Schedule R.4.

(b) No tenant has been given free rent, any concession in the payment of rent or any abatement in the payment of rent, except as may be set forth in Schedule

(c) The leases to the tenants listed on Schedule R.4 are in force, have not been cancelled or surrendered or notice given of such cancellation or surrender; Sellers have performed all of the landlord's obligations under those leases; no notice of any default of the landlord under those leases has been received or, to the knowledge of Sellers, is pending; and, to the knowledge of Sellers, no tenant is in default under its lease, except as set forth on Schedule R.4.]

R.5 There is no loan or other financing arrangement entered into, assumed or otherwise affecting the Seller or the Premises [except the documents security the Loan (the “Loan”) to Seller in the original principal amount of $_______________ of which $_______________ is outstanding as of _______________ and which will be paid in full at or prior to at Closing. No event of default exists under the documents securing the Loan or otherwise entered into the loan secured thereby, which documents are listed on Schedule R.5 (the
“Loan Documents”), and no event which, with the giving of notice or the lapse of time, or both, would constitute such event of default now exists. Seller has the right to prepay the Loan at any time after the date of this Contract and cause the release of the Premises from the Loan by payment of proceeds from the transaction contemplated by this Contract and Seller is not required to obtain the approval of any lender or third party to the purchase contemplated by this Contract.]

[AS TO MORTGAGED PROPERTY WHERE THE MORTGAGE WILL SURVIVE CLOSING: ADD

R.5 All installments of interest and principal an all other sums required to be paid under the terms of the Loan Documents have been paid. All amounts required to be reserved under the Loan Documents have been fully funded and such reserves as of the Effective Date are in the amount of $__________________________. The Loan Documents are in full force and effect. Seller has not received any written notice of default under the Loan Documents, nor does Seller have any knowledge of any event or circumstance which, with or without the giving of notice, the passage of time or both, would constitute a default under the Loan Documents. The copies of the Loan Documents which are being furnished by Seller to Purchaser in accordance which are each identified on Schedule R.5 are true, correct and complete copies of the same, have not been amended, modified or supplemented other than as set forth on R.5 and are all of the material Loan Documents.]

R.6 There is no litigation, arbitration, or administrative proceeding pending nor, to the knowledge of Seller, threatened with respect to Seller and affecting the Premises or this Contract. [IF LITIGATION EXISTS, BUYER MUST BE ABLE TO
EVALUATE SAME AND APPROPRIATE LIABILITIES NEGOTIATED. BUYER WOULD GENERALLY SEEK SELLER’S INDEMNITY AND COMFORT THAT INSURANCE IS DEFENDING.]

R.7 Seller has no employees.

[IF THERE ARE EMPLOYEES WITH RESPECT TO THE REAL PROPERTY AND IMPROVEMENTS: The positions of the persons employed by Seller in the operation of the Premises, or in matters pertaining to the operation of the Premises on a substantially full-time basis, are set forth in Schedule R.7; there are (and will be) no collective bargaining agreements or other contracts of employment fixing the wages, hours and conditions of employment of those persons; no work stoppage exists or, to the knowledge of Seller, is threatened to begin. [IF APPLICABLE, SPECIFICS OF TRANSFERRING / TERMINATING UNION AND NON-UNION EMPLOYEES TO BE ADDED.]]

R.8 All Service Contracts affecting the Premises as of the date of this Contract are identified on Schedule R.8 and have been delivered to Buyer; Seller is not in default in any Insurance Requirement or under any of those Service Contracts; Seller will not enter into any other Service Contract affecting the Premises without the prior written consent of Buyer and will terminate at or before Closing those Existing Service Contracts identified on Schedule R.8 that Seller is contractually entitled to terminate without cost and that Buyer designates on or before the [______________].
R.9 Seller has obtained and paid for all Permits required for the occupancy of the Premises for the use and the operation of the Improvements as a _________________. Those Permits are described on, or attached to, this Contract as Schedule R.9.

R.10 The Improvements will at Closing be, in good operating condition and repair, without structural or mechanical defects of any kind, subject however to normal wear and tear.

R.11 There are no agreements with or in favor of any Governmental Authority and no conditions have been imposed by any Governmental Authority (other than compliance with laws of general application) in connection with the development of the Premises and its compliance with Legal Requirements. The Improvements comply in all material respects with all Legal Requirements governing or regulating the use, construction and operation thereof and comply with all Insurance Requirements and all Permitted Encumbrances (including, but not limited to, the Americans with Disabilities Act of 1990 and the Fair Housing Act, as amended, and any rules and regulations promulgated thereunder or any successor statutes). Seller has not received any notice of violation of any Legal Requirement or Insurance Requirement.

R.12 Seller has no knowledge of any Hazardous Materials being generated, stored or released on the Premises or any contiguous lands or used in the construction of the Improvements thereon except as disclosed by [LIST THIRD PARTY
ENVIRONMENTAL REPORTS TO BE DISCLOSED]. and has not received any claims in writing from any third party including, without limitation, any Governmental Authority as to Hazardous Materials generated, stored or released on the Premises or any contiguous lands or used in the construction of the Improvements thereon. Seller has no knowledge of any wells (whether in use or shut down) or any underground storage tanks on the Premises or of the presence of radon gas or lead in the drinking water in the Improvements in amounts exceeding current Legal Requirements or guidelines of Governmental Authorities.

R.13  (a) There is no condemnation or eminent domain proceeding affecting the Premises now pending or, to the knowledge of Seller, threatened.

(b) To Seller's knowledge, except as disclosed by the Title Commitment, no special or benefit assessment has been levied or authorized for levy on the Premises on account of any public improvement in the vicinity and no such public improvement has been commenced or authorized by any Governmental Authority that could result in any special or benefit assessment on the Premises.

R.14  Seller shall have paid by the Closing all monies due and owing to all contractors, subcontractors and materialmen for labor or material performed, rendered or supplied to the Premises and will not owe any money to those persons for which they could claim a lien against the Premises. [Notwithstanding the foregoing, if as of the subject Closing Seller shall not have paid all such sums because Seller shall be engaged in a good faith dispute with such contractors, subcontractors or materialmen, the non-payment of the portion of such
sums in dispute and the existence of such disputes shall not be a reason for Buyer to refuse to close hereunder provided that Seller shall (i) disclose each such dispute in writing to Buyer at least ten (10) days prior to the Out Date (which disclosure shall include the name and address of the party claiming to be owed money, the amount of money in dispute and a description in reasonable detail of the nature of the dispute), (ii) indemnify, defend and save and hold Buyer harmless from and against any and all claims, demands, costs, expenses and liabilities (including, without limitation, attorneys' fees and disbursements) arising out of or in connection therewith and (iii) promptly remove or bond over any mechanic’s liens which may be filed against the Premises in connection therewith sufficient to cause the Title Company to issue at Closing the title policy acceptable to Buyer without any exception for such matter without special payment or premium.]
the President of the United States, and (c) not an Embargoed Person (as hereinafter defined). To Seller’s knowledge, none of the funds or other assets of Seller constitute property of, or are beneficially owned, directly or indirectly, by any Embargoed Person, and to Seller’s knowledge, no Embargoed Person has any interest of any nature whatsoever in Seller (whether directly or indirectly). The term “Embargoed Person” means any person, entity or government subject to trade restrictions under U.S. law, including but not limited to, the International Emergency Economic Powers Act, 50 U.S.C. §§1701, et seq., The Trading with the Enemy Act, 50 U.S.C. App. 1 et seq., and any Executive Orders or regulations promulgated thereunder.

The representations and warranties in this Contract shall be true and correct on the date of the Closing with the same effect as though made at such Closing, or if any change in the matters covered shall occur between the date of execution of this Contract and the date of Closing, such change shall have been disclosed to Buyer in writing and shall not materially adversely affect the condition, repair, value, expense of operation or income potential of the Premises.
Seller's Covenants. From the date of this Contract to Closing, Seller shall:

C.1 Keep the Improvements insured against loss or damage (including rental loss) by fire and all risks covered by an extended coverage endorsement on a replacement cost basis.

C.2 Perform the landlord's obligations to the tenants of the Premises and enforce the obligations of the tenants under their leases in accordance with the terms of those leases.

C.3 Permit persons designated by Buyer, including but not limited to accountants and engineers, to have access on reasonable prior notice during business hours to the Premises to make inspections of the Premises and to examine the Development and Construction Records and all records pertaining to the Premises and the operation of the Improvements.

C.4 Maintain the Improvements as a ________________ and make any necessary repairs or replacements to the Improvements required to keep the Improvements in good condition and repair, ordinary wear and tear excepted.

C.5 Pay all costs incurred or arising from the operation and maintenance of the Premises prior to Closing and pay all costs required to be paid in connection with all leases now in force or hereafter executed prior to Closing for the leasing, preparation of space, concessions and allowances to tenants, cost of moving, assumption of tenants’ liabilities under other Leases for space not located on the Premises and brokerage commissions and finders' fees incurred in entering into those leases.
C.6 Timely pay and/or perform each and every obligation to be paid or performed by it under the Mortgage Documents and agreements evidencing and/or securing any loan for the Premises.

**Seller's Negative Covenants.** From the date of this Contract to Closing, without the prior written consent of Buyer, Seller shall not:

N.1 Enter into (or extend) any lease of the Premises or any portion thereof, amend any lease, waive any default in any material obligation under any lease, cancel any lease or accept the surrender of any lease (except for default in the payment of rent or in performance of another material obligation).

N.2 Incur any obligation which will create a liability accruing after the Closing, except for obligations incurred to satisfy maintenance requirements which do not create a liability in excess of $________________, or which may be canceled on 30 days' notice without cost, or which have been approved by Buyer in writing.

N.3 Enter into any contract of sale of the Premises or any mortgage affecting the Premises or grant any liens or other rights affecting title to the Premises or execute any amendments to the Mortgage Documents.