

**ASSIGNMENT AND SUBLETTING -
BALANCING LANDLORD AND TENANT DESIRES
(With Forms and Sample Provisions)**

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State Bar of Texas
20th ANNUAL
ADVANCED REAL ESTATE DRAFTING COURSE
March 5-6, 2009
Houston

CHAPTER 25

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ASSIGNMENT AND SUBLETTING ISSUES – BALANCING LANDLORD AND TENANT DESIRES

I. INTRODUCTION.

The current softness in the commercial property leasing market has created a renewed interest among tenants in protecting themselves against the possibility that they may not require all or a portion of their leased space for the entire duration of their lease term. Likewise, many landlords have been burned recently by not paying close attention to intricacies of the assignment and subletting provisions contained in their leases. These factors have caused both landlords and tenants to more closely scrutinize the assignment and subletting provisions of their leases in an effort to minimize their respective exposure.

The objective of this paper is to address a variety of issues encountered by landlords and tenants in negotiating the assignment and subletting provisions of their leases and to attempt to balance the competing interests in a manner which is acceptable to both parties. In that regard, this paper will first discuss the distinction between an assignment and a sublease¹ and will then proceed to discuss the various issues surrounding the assignment and subletting provisions of the lease. The focus of the paper will then turn to the actual assignment and sublease documentation, with consideration given to the position of all parties involved in the transaction, including the landlord, the assignor/sublessor and the assignee/sublessee. The paper will conclude with sample assignment and subletting provisions for incorporation into a lease, as well as form documents designed to effect such transfers.

II. DISTINCTION BETWEEN AN ASSIGNMENT AND A SUBLEASE.²

A. Common Law Distinction.

Prior to examining the intricacies of the transfer provisions, one should understand the difference between an assignment and a sublease. An assignment is a conveyance of the entire estate in question, whereas a sublease is a conveyance of anything less than the entire estate. In other words, an

assignment conveys to the assignee the entirety of the unexpired term, leaving no reversionary estate in the assignor; if there remains a reversionary interest in the estate conveyed, the instrument is a sublease. *Davis v. Vidal*, 151 S.W. 290, 291 (Tex. 1912). In *Davis*, the Supreme Court of Texas stated as follows:

As a general proposition, if the instrument executed by the lessee conveys the entire term and thereby parts with all of the reversionary estate in the property, the instrument will be construed to be an assignment; but, if there remains a reversionary interest in the estate conveyed, the instrument is a sublease. The relation of landlord and tenant is created alone by the existence of a reversionary interest in the landlord.

Id. The Court further provided that the word "term" means "something more than the mere time for which the lease is given, and the instrument must convey not only the entire time for which the lease runs, but the entire estate or interest conveyed by the lease." *Id.* at 292. The *Davis* Court and subsequent courts have held that if an assignor reserves the right to re-enter the premises or terminate the assignment upon a default by the assignee, then such right constitutes a contingent reversionary interest, thereby rendering the instrument a sublease. *Id.* at 291-92; *Novosad v. Clary*, 431 S.W.2d 422, 426 (Tex. Civ. App.--Houston [1st District] 1968, writ dismissed).

B. Privity.

To fully understand the legal significance of the distinction between assignments and subleases, one must first appreciate the legal concept of privity. If a person is in privity with another, that person is entitled to enforce the other's promises. Privity can arise in one of two ways (or both ways): privity of contract (which is a relationship derived from contract law) and privity of estate (which is a relationship derived from real property law). MARK A. SENN, COMMERCIAL REAL ESTATE LEASES: PREPARATION AND NEGOTIATION § 12.3 (2nd ed. 1990). While privity of contract allows enforcement of all of the contractual lease provisions, privity of estate allows enforcement only of those promises that run with the land.³

1. Assignment.

An assignment creates a landlord/tenant relationship between the landlord and the assignee, in

¹ Although the distinction between an assignment and a sublease is an important one which will be discussed in Section II of this paper, when the distinction is not material, this paper will refer to an assignment or sublease simply as a "transfer".

² For a more detailed discussion concerning the distinction between assignments and subleases, see Robert Harms Bliss, *Drafting Disasters Case Study #1: Lease Assignments* in 13th ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE, at Ch. 3 (2002).

³ For a more detailed discussion on the concept of privity as it relates to leases, See MARK A. SENN, COMMERCIAL REAL ESTATE LEASES: PREPARATION AND NEGOTIATION §§ 12.3-.4 (2nd ed. 1990).

which there is not only privity of estate, but also privity of contract. The assignee "steps into the shoes" of the assignor and is bound by the terms and conditions of the lease as was the assignor. Likewise, the landlord remains bound by the terms of the lease to the new tenant/assignee, as if the new tenant/assignee were the original tenant under the lease.

However, at least some courts have held that unless the assignee specifically assumes the obligations of the original tenant, privity of contract will not exist between the assignee and the landlord, and the assignee's liability to the landlord will therefore be limited. *First American National Bank of Nashville v. Chicken System of America*, 616 S.W.2d 156, rehearing denied (1980), cert. denied (1981). Therefore, the landlord should always ensure that the assignment document contains appropriate assumption language.

2. Sublease.

A sublease creates a landlord/tenant relationship between the tenant/sublessor and the sublessee. While privity of contract exists between the sublessor and the sublessee, unlike the assignment, there is no privity of contract between the sublessee and the landlord. Therefore, absent an express assumption of obligations, the sublessee will not be liable to the landlord for any breach of the obligations of the tenant/sublessor under the lease, unless the obligation in question constitutes a covenant running with the land. RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 16.1; *See Davis v. Vidal*, 151 S.W. 290, 293-94 (Tex. 1912); *Novosad v. Clary*, 431 S.W.2d 422, 426 (Tex. Civ. App.--Houston [1st District] 1968, writ dismissed).

C. **Relevance of Distinction.**

While the distinction between an assignment and a sublease may seem to be a distinction without importance, it does become extremely important in determining to whom the landlord looks for performance of the obligations under the lease and to whom the assignee/sublessee looks in connection with a breach by the landlord of the lease. This distinction becomes particularly poignant when one potential defendant is financially solvent and the other is not. Consider, for example, if a tenant assigns its lease to an assignee, but remains liable to the landlord under the terms of the lease. If the original tenant becomes insolvent, and the assignee/sublessee fails to pay rent, the landlord will want to sue the assignee/sublessee for past due rent under the lease. However, in the assignment document, if the tenant reserved the right to pay rent to the landlord if the assignee failed to do so and/or reserved the right of re-entry into the

Premises upon a default by the assignee under the assignment document as was the case in *Davis*, the result will be that the original tenant is the only party liable to the landlord for the rent. In *Davis*, the Supreme Court of Texas held that, because the original tenant had a contingent or reversionary interest, the purported "assignment" was actually a sublease. Therefore, there was no privity of contract between the landlord and assignee/sublessee and the assignee/sublessee was not liable for the rent to the landlord.

III. REASONS FOR ASSIGNMENT AND SUBLETTING.

The reasons that a tenant might need to exercise its right to assign the lease or sublet all or a portion of the premises during the course of a lease are quite varied. For example, the tenant may need to exit the lease or downsize because of a change in the tenant's financial circumstances, a change in the ownership of tenant (including a merger or acquisition involving the tenant) or a change in the overall business climate in which the tenant participates. The tenant's space needs also may change due to an expansion or contraction of its workforce. In the retail context, the tenant's business simply may not be profitable in that particular location. In the case of a small business, the owner may wish to retire and sell its business. In each of these contexts, it is important that the tenant have a prenegotiated transfer right as one of its strategies for exiting the lease (or at least minimizing its exposure under the lease). However, landlords are understandably concerned about who is occupying their space and, therefore, will be reluctant to grant the tenant broad transfer rights. These competing interests are the primary reason that the assignment and subletting provisions are often some of the most hotly contested provisions in any lease.

IV. THE RIGHT TO TRANSFER.

A. **Generally.**

As a general rule, an assignment or sublease is permitted unless expressly prohibited by the lease document. MARK A. SENN, COMMERCIAL REAL ESTATE LEASES: PREPARATION AND NEGOTIATION § 12.5 (2nd ed. 1990). Therefore, in most jurisdictions, if the lease is silent, the tenant may assign the lease or sublet the premises without the landlord's prior consent. However, such is not the case in Texas. Under Texas law, if the lease does not provide otherwise, an assignment or sublease always requires the prior consent of the landlord. TEX. PROP. CODE § 91.005 (West 2006). In any event, it is extremely important that the tenant pay attention to the transfer provisions of the lease during the lease negotiation process because most landlord-form leases strictly

prohibit assignment and/or subletting by the tenant. Since the negotiation process usually begins at a point of prohibiting transfers, the tenant is starting from a disadvantage in the negotiating process.

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

In the retail context, when negotiating any transfers in which the landlord may not have preapproval of such transfer (such as pursuant to a permitted transfer or absolute right to transfer, as contemplated below), the landlord should consider if any such transfer would cause the landlord to be in violation of any co-tenancy or similar requirements with respect to the overall retail project. For example, if one tenant's lease includes a co-tenancy provision which requires the other tenant to be operating in the center, an assignment or subletting of such second tenant's lease and/or premises could inadvertently cause a default by landlord under the first tenant's lease. Similarly, in the retail context, the landlord should also consider if any such permitted transfer should specifically restrict any change in the use of the premises, as any such change in the use may cause violations of exclusive use rights and/or prohibited uses granted under other leases or agreements, as discussed further below.

In any event, the lease should address who is responsible for the costs incurred by landlord in connection with any requested transfer. The landlord will want the lease to provide that the tenant will reimburse landlord for all costs and expenses incurred by landlord in connection with any proposed transfer. The tenant should attempt to restrict this reimbursement obligation to actual and reasonable expenses incurred by landlord, with a cap placed on such reimbursement amounts; however, the landlord should ensure that such cap is high enough to cover a reasonable amount of such costs and may also want to provide for additional reimbursement considerations in the event the tenant requests consent to a particularly unusual or complicated transfer. Lastly, these provisions should also address how often the tenant may make a transfer request, so that the landlord is not burdened with continuous transfer

requests from a tenant simply attempting to get out of its lease by any means possible.

B. Permitted Transfers.

Those circumstances in which the tenant typically requires a right to transfer without the landlord's consent include (i) transfers to "affiliated" entities (such as corporate affiliates, parents or subsidiaries of the tenant), and (ii) transfers which are incidental to a sale of the tenant's business or other corporate transaction (such as the sale of all or substantially all of the tenant's stock or other equity interests, the sale of all or substantially all of the tenant's assets, a merger, consolidation, initial public offering, or similar transaction). While each of these two circumstances arise out of legitimate concerns on the part of the tenant, if not carefully drafted, the resulting provisions could create unintentional loopholes which might be disastrous for the landlord.

1. Transfer to Affiliates.

If the lease permits the tenant to assign its interest or sublet the premises to an affiliated entity, nothing may prevent the affiliated assignee or sublessee from then assigning or subletting, without the landlord's consent, to a party that is wholly unaffiliated with the original tenant. This clearly would allow the tenant to subvert the intent of the parties by accomplishing in a two-step process precisely what the landlord is attempting to prevent by prohibiting a transfer to an unaffiliated party. This issue could be resolved by a provision that gives the tenant, its assignees and sublessees the right to assign the lease or sublet the premises to an affiliate without the landlord's consent, but only to an affiliate of the original tenant. Alternatively, the lease could specifically provide that the tenant may not use this two-step process as a means of subverting the prohibition against transfers to unaffiliated parties.

2. Corporate Transactions.

A transfer which is incidental to a sale of the tenant's business or other corporate transaction likewise may present a problem for the landlord. Such a transaction creates a loophole which might permit a disingenuous tenant to effectively circumvent the prohibition against transfers by manipulating the ownership of the parties involved. For example, a corporate tenant could assign its lease to a shell subsidiary (which would be permitted under the affiliate transfer provision discussed above) and then sell its stock in the subsidiary to an unrelated third party, thereby effectively accomplishing an assignment of the lease to an unrelated party. Once again, this loophole could be plugged by specifically prohibiting any transaction used in order to transfer

the lease or by including a provision which provides that any transfer to an affiliate is allowed so long as the affiliate remains affiliated with the tenant. MARK A. SENN, COMMERCIAL REAL ESTATE LEASES: PREPARATION AND NEGOTIATION § 12.9 (2nd ed. 1990).

Another concern landlords may have in connection with a corporate transaction such as a merger, consolidation, acquisition or the like involves the creditworthiness of the surviving entity. The issue revolves around the landlord's concern that a corporate transaction may leave the landlord with a tenant that is much less creditworthy than the original tenant. Some landlords attempt to resolve this issue by placing a net worth or other financial requirement on the surviving entity in order to ensure that the surviving entity provides approximately the same amount of credit risk as the original tenant. While this solution on the surface may appear to satisfy the landlord's concern, unless it is accompanied by a net worth *maintenance* requirement (which is unlikely), it does not completely resolve the issue because the landlord has no guarantee that the successor tenant will maintain its net worth at the established level. Negotiating the inclusion of such a maintenance requirement may be difficult, however, if no such maintenance requirement exists with respect to the original tenant, as is often the case. Nevertheless, requiring the surviving entity to have a particular net worth initially provides the landlord some comfort that the tenant is not entering into the corporate transaction solely for the purpose of circumventing the prohibition against assignments under the lease.

C. Leasehold Mortgages.

In many jurisdictions, a leasehold mortgage is considered an assignment, and, depending upon the jurisdiction in question, might be prohibited under the lease unless the lease specifically allows such a transaction. Landlords are understandably reluctant to allow tenants the right to grant leasehold mortgages for the same reason they are reluctant to allow tenants the unfettered right to sublet or assign – the landlord wants some form of control over whom is occupying the premises. On the other hand, many tenants' lenders require a lien on the leasehold estate as a condition to the financing, so the parties are often forced to deal with the issue. While the analysis surrounding leasehold mortgages is outside the scope of this article, the parties should at least recognize the effect that the transfer provisions of the lease have on the tenant's ability to grant a leasehold mortgage.

D. Absolute Right to Transfer.

Depending on its bargaining power, the tenant might also consider pressing for the absolute right to

transfer to another party so long as the proposed transferee satisfies a net worth requirement and the transfer is subject to other appropriate restrictions. These restrictions generally relate to the financial responsibility, character, and operating history of the proposed assignee or sublessee and the proposed use of the premises by the proposed transferee. In the retail context, the restriction also might relate to the number of stores then being operated by the transferee. These requirements should be objective and quantifiable, so that no dispute will arise in the future as to whether the requirements have been satisfied. The tenant should therefore attempt to avoid requirements that the proposed transferee be "creditworthy" or that the tenant fit in with the "tenant mix" of the shopping center. Instead, the tenant should require that the landlord define what type of tenant the transferee must be (such as a certain type of retailer), or focus on those prohibited uses of which such transferee must not violate. However, the tenant's success in this negotiation will be directly proportionate to its bargaining power relative to the landlord.

V. COMMON LEASE ISSUES RELATING TO ASSIGNMENT AND SUBLETTING.

This section of the paper will analyze various issues relating to assignment and subletting which are often discussed during the lease negotiation process. These issues are analyzed with a view toward standard multi-tenant office and/or retail leases. The analysis may be different when dealing with other types of leases, such as ground leases, single-tenant leases, and built-to-suit leases. Nevertheless, the following analysis should apply to most leases that the real estate practitioner might encounter.

A. Landlord's Consent.

1. Generally.

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

2. Reasonableness Standard.

If the landlord agrees to a "reasonableness" standard with respect to its consent, it should understand that courts have attempted to define certain criteria to be used in determining whether the landlord acted reasonably. Some factors which have been used by

courts in making their determination include: (i) the financial responsibility of the proposed assignee or sublessee; (ii) the identity or business character of the proposed assignee or sublessee; (iii) the legality of the proposed use; (iv) the nature of the proposed use and occupancy; (v) the overall impact of the assignee or sublessee on common facilities, other tenants in the building or adjacent property of landlord; and (vi) in the case of retail leases, the anticipated volume of business of the assignee or tenant and the resulting tenant mix.

Hoping that courts will give effect to the intent of the parties, many landlords have attempted to define similar standards in the lease document itself as a means of maintaining control over the standard of reasonableness. An example of such a provision is included in Appendix A hereto. The tenant should be careful to ensure that any attempt to define the "reasonableness" standard in the lease document does not lead to a more subjective standard on the part of the landlord. However, from the landlord's perspective, it may be beneficial to have these requirements remain more subjective, if the landlord is confident it will be able to back up its determination on the applicable requirement at the time. For example, it may benefit the landlord to have a requirement that the proposed transferee be "creditworthy", with no further definition of what would be deemed "creditworthy", if the landlord wants the flexibility of determining what it deems "creditworthy" at the applicable time of the requested transfer; however, in such situation the landlord should be prepared to show how it made such a determination and that it was reasonable in doing so (for example, if the landlord is confident it will assess a proposed transferee based on reasonable credit standards actually used by the landlord for all potential tenants at the applicable time, this may be an appropriate standard to use).

3. Limitation of Remedies.

If the landlord agrees to a reasonableness standard in granting its consent to an assignment or sublease, the landlord may attempt to limit the tenant's remedies in the event of a finding that the landlord acted unreasonably in refusing to grant its consent. This is a result of the finding by certain courts that landlords tortiously interfered with the tenants' contracts with the assignees or sublessees by unreasonably withholding their consent. See *Richardson v. La Rancherita La Jolla, Inc.* 98 Cal. App. 3d 73 (1979) *Sade Shoe Co. v. Oschin & Snyder*, 162 Cal. App. 3d 1174 (1984). In view of these cases, landlords may request a lease provision which exonerates the landlord from monetary damages if the landlord is found to have acted

unreasonably. This provision effectively leaves the tenant with the sole remedy of obtaining a court order compelling the landlord to give its consent. However, from the tenant's standpoint, this provision reduces any incentive to the landlord to act reasonably, because the landlord will not be penalized for acting unreasonably.

As a practical matter, few assignees or sublessees will be willing or able to wait for the outcome of the litigation between the landlord and tenant, thereby causing the tenant to lose a prospective transaction, with no real recourse against the landlord. Therefore, the tenant will want to ensure that the remedies available to the tenant are strong enough to provide some incentive to the landlord to act reasonably. If the landlord refuses to budge, one possible solution is to submit the matter to an expedited binding arbitration proceeding which might allow the tenant to obtain a ruling prior to losing its prospective sublessee/assignee.

4. No Specified Standard.

If the lease fails to provide a standard for the landlord's discretion in providing its consent, courts are split as to whether a standard is implied. In certain states, courts will imply a reasonableness standard to the landlord's consent obligation. MILTON R. FRIEDMAN, *FRIEDMAN ON LEASES* § 7.304a (4th ed. 1997). In other states, including Texas, courts have held that there is no implied reasonableness standard with regard to the landlord's consent. See *Reynolds v. McCullough*, 739 S.W.2d 424, 429 (Tex. App.—San Antonio 1987, writ denied). Given the split of authority, it is therefore in both the landlord's and the tenant's best interest for the contract to clearly specify the standard to which the landlord will be held.

In addition, many states, including Texas, have adopted the contract law rules that a landlord must mitigate its damages. This raises the interesting issue of whether a landlord may unreasonably withhold its consent to a proposed assignment or sublease if the result will likely be a default by the tenant. In other words, it would not make sense to require mitigation upon a default, but not to require conduct that would avoid a default.⁴

B. Landlord Recognition and Non-disturbance.

A tenant with strong bargaining power may not be satisfied with simply obtaining the landlord's consent to a proposed sublease. Such tenants may demand a lease provision in which the landlord promises to sign a recognition and nondisturbance agreement, whereby the landlord agrees that it will

⁴ MARK A. SENN, *COMMERCIAL REAL ESTATE LEASES: PREPARATION AND NEGOTIATION* § 12.11 (2nd ed. 1990).

allow the sublessee to remain in the sublet space if the primary lease between the landlord and the tenant/sublessor terminates for any reason.

While the landlord may have to include such a provision in the lease in order to land a desirable tenant, it should nevertheless protect itself as much as possible from the risks which are inherent in such a provision. As long as the landlord has the right to approve every sublease, it can protect itself against such risks within the confines of the recognition and nondisturbance agreement itself. However, it is much more difficult to draft a lease provision which effectively "preapproves" a potential sublease and sublessee for purposes of providing a recognition and nondisturbance agreement.

If the landlord must agree in the lease to provide a recognition and nondisturbance agreement, the lease should set certain conditions that the sublessee and the sublease must meet at the time the primary lease terminates for the sublease to qualify for such treatment. For example, the landlord should require that the sublessee have a certain net worth (with a requirement to maintain such net worth, if possible) and, in the retail context, a certain level of operating experience. If the sublessee sublets only a portion of the tenant's premises, the size, configuration and location of the sublet space should be subject to the landlord's approval in order to ensure that the remainder of the tenant's space left vacant after a lease termination is marketable.

Finally, the landlord should understand that once the recognition and nondisturbance agreement goes into effect, the sublessee will be bound by the terms of the sublease, not the primary lease. Therefore, if the landlord wants any changes to the sublease terms, it must spell them out. For example, many landlords will require that the recognition and nondisturbance agreement provide that the rent to be paid by the sublessee may not be lower than the per-square-foot than the tenant was paying under the lease.

For a comprehensive lease provision covering all of the landlord's potential concerns relating to the recognition and nondisturbance agreement, please see Appendix A. In addition, for a more detailed discussion of the Recognition and Nondisturbance Agreement itself, please see Section VI.C of this paper.

C. Continuing Liability of Tenant.

In most cases, the landlord will require that the tenant continue to remain liable on the lease after an assignment or sublease, even if the landlord consented to such transfer and even if the assignee or sublessee expressly assumes the tenant's obligations under the lease. However, in certain circumstances where the transferee is as financially strong as or stronger than

the transferor, the landlord may agree to release the tenant from liability under the lease. Under Texas law, if the lease is silent on the issue, the assignor/sublessor will remain liable on the lease. See *Martinez v. Ball*, 721 S.W.2d 580, 581 (Tex. App.—Corpus Christi 1986, no writ).

D. Bonus Value or Profit.

1. Who Should Profit?

Another issue that often arises during the negotiation of the assignment and subletting provision is the determination of how much, if any, of the bonus value of the lease the landlord is entitled to receive with respect to an assignment or sublease. A landlord will argue that it leased the space to the tenant for the tenant to use during the term and that the tenant should not "profit" from the landlord's real estate. The tenant, on the other hand, will argue that the tenant bears the risk of a market decline during the lease and it should also enjoy the benefit of an upswing should it desire to assign the lease or sublet the premises. Since both parties have compelling arguments, this issue is often the subject of a compromise, whereby the parties agree to share in any excess rents paid by the transferee. This solution makes sense from both parties' standpoint because if the tenant does not at least share in some portion of the profit from the sublease, the tenant will have no incentive to sublet the premises at the highest rate possible. The landlord, on the other hand, will want the tenant to sublet at the highest possible rate so as to maintain the market rental rate at the highest possible level.

2. Definition of "Bonus Value".

If the parties agree upon sharing the profit, or bonus value, if any, payable under the sublease or assignment, the next level of inquiry concerns the definition of "bonus value". While most people equate "bonus value" with the excess rent paid by the sublessee/assignee to the sublessor/ assignor under the sublease or the assignment document, as the case may be, such may not necessarily be the case. Many bonus value clauses are drafted quite broadly, such that *any* consideration received by the assignor/ sublessor would be calculated in determining the excess rent paid by the transferee. This type of provision particularly poses a problem in the case of an assignment which is incidental to the sale of a tenant's business, in which event the consideration paid by the assignee to the assignor might include items such as furniture equipment, business opportunity, goodwill, and other assets not related to the real estate. The result of this could be an unintended but significant windfall to the landlord. In determining how to craft this provision consider that, on one hand, the landlord will want to ensure that the tenant does not inflate the

value of the foregoing items in an effort to decrease the rent paid under the sublease or assignment and accordingly reduce the landlord's share of the profit under the sublease or assignment. On the other hand, however, from the tenant's perspective, the tenant will want to be able to sell the furniture and fixtures in the premises to a sublessee/assignee in connection with certain transactions relating to the assignment or sublease of the premises, and will want to ensure that the tenant receives the full amount of consideration paid for such personal property, as the landlord has no legitimate interest in these items. Therefore, both parties should take great care in defining the consideration paid under the assignment or sublease document for purposes of determining the bonus value.

3. Recovery of Costs.

In addition to carefully defining the components used to calculate the bonus value, the tenant should also ensure that it recovers all costs associated with the transfer prior to calculating the bonus value. These costs typically include: (i) any construction cost or tenant improvement allowance granted to the transferee; (ii) the brokerage fees incurred by the tenant in making the transfer; and (iii) reasonable legal fees paid by the tenant in connection with the transfer. Other costs which a tenant may attempt to recover include: (a) any tenant improvement allowance or other economic concession paid by the tenant to the sublessee or assignee; (b) any lease takeover payments; (c) the costs of advertising the space for sublease or assignment; and (d) any other costs actually paid in assigning or subletting the premises or in negotiating or effectuating the assignment or sublease.

E. **Landlord's Recapture Right.**

Many landlords will reserve the right to recapture the premises if the tenant attempts to assign the lease or sublet the premises. While at first blush this may appear to be an insignificant issue to the tenant (since the tenant is attempting to exit the lease anyway), it can quickly become problematic for the tenant. For example, the tenant may be experiencing a temporary contraction in its workforce, and may want to sublet a portion of its premises for a short period of time until it needs the space again. In such a scenario, a landlord recapture right would prevent the tenant from generating additional revenue from the empty space in its premises through subletting. In addition, a recapture right affects the ability of the tenant to market the premises for assignment or sublease. If a prospective sublessee or assignee knows that the lease contains a recapture right, it may be less willing to spend the time and effort needed to negotiate an

assignment or sublease with the tenant. Finally, the recapture right could effectively undermine the agreement between the landlord and the tenant relating to the sharing of the bonus value of the lease, because the landlord could potentially exercise its recapture right and immediately relet the premises to the prospective transferee that the tenant secured. In essence, this results in the tenant becoming the landlord's marketing department.

On the other hand, if the tenant is truly looking to exit the lease on a permanent basis, a recapture right may be preferable for the tenant, since the tenant will be released from its obligations under the lease with respect to the space recaptured. Therefore, most tenants will accept a recapture right subject to certain limitations which are intended to address the concerns referenced in the preceding paragraph. First, the recapture right should not apply to transfers to affiliated entities or the types of corporate transfers discussed in Section IV.B.2 above. In addition, the lease should provide that the tenant can void the landlord's recapture right by withdrawing its request for consent. This allows the tenant to maintain the flexibility it may need with respect to future space needs. In order to keep the landlord honest, the tenant may require that the lease provide that if the landlord waives or is deemed to have waived its right to recapture, the landlord is not entitled to share in any profits or excess rent. Finally, the recapture provision should provide that the tenant is not required to disclose to the landlord the terms of the proposed assignment or sublease. This protects the tenant from becoming the landlord's "marketing department" by forcing the landlord to decide whether to recapture based on the qualities of the proposed transferee alone, not on the deal being negotiated between the transferee and the tenant. Alternatively, the tenant might attempt to get the landlord to agree that if the landlord elects to exercise its recapture right, the landlord cannot turn around and relet the premises to the proposed transferee offered by the tenant.

F. **Other Lease Provisions.**

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

1. Permitted Use.

From the tenant's perspective, the permitted use provision should be as broad as possible to allow for another tenant to assume the lease. Ideally, the

provision would allow tenant to use the premises for any lawful purpose. That way the tenant would not be limited in which types of sublessees or assignees it could approach and potentially assign or sublet to. However, most landlords will require that the tenant lease the premises subject to a more narrow permitted use. This is especially true in the retail context, where subtle differences in a tenant's use can affect the tenant mix of the shopping center. Also in the retail context, the landlord should consider if any potential change in the use may cause a conflict with any co-tenancy requirements, exclusive use rights and/or prohibited uses with respect to the premises or retail project in which it is located. In any event, both the tenant and the landlord should negotiate the permitted use clause with a view towards a possible future assignment or sublease.

2. Signage.

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

3. Option Rights.

Many landlord form leases provide that any renewal rights or other options granted to the tenant are personal to the tenant and will not be applicable to any sublessee or assignee. The landlord's rationale for such a provision is that the landlord granted such rights with the understanding that the tenant was going to occupy the space and if the tenant does not continue to occupy the space, the landlord would prefer to choose who does. However, these rights become valuable to the tenant, particularly if the tenant needs to assign the lease or sublet the premises late in its initial term. Most assignees or sublessees will not spend the money necessary to finish the space for their use if only a couple of years remain on the lease. Therefore, the space may become unmarketable for assignment or sublease purposes if the renewal rights or options are not attached.

If the landlord intends to restrict the right of a sublessee or assignee from exercising an option, it should be aware of a potential loophole in its lease language which might allow the sublessee or assignee to avoid this restriction. Even if the lease prohibits the tenant from transferring its options to a sublessee or assignee, it may not prohibit the tenant from exercising the option on behalf of the sublessee or assignee. In order to avoid this unintended consequence, the lease could provide that any such options automatically terminate and become null and void upon an assignment or sublease.

Additionally, problems could arise if a sublessee occupying only a portion of the premises has the right to exercise a renewal right or other option. Such sublessee could, for example, exercise a right to renew the term of the lease, but such renewal would be applicable only to the portion of the space sublet by the sublessee; in such an event, if the tenant did not similarly exercise such renewal right with respect to the remainder of the premises, then the term with respect to the remainder of the premises would expire, while the term for the sublet premises would continue. This issue can be avoided by specifying either that such renewal or other rights cannot be exercised by any assignee or sublessee, or that such renewal or other rights can only be exercised by any assignee receiving an assignment of all of the original tenant's rights and interests in and to the premises and in and to the lease, to ensure that such a conflict with an original tenant with continued interests in the premises or lease does not occur.

4. Alterations.

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

VI. DOCUMENTING THE ASSIGNMENT OR SUBLEASE TRANSACTION

This section of the paper will shift the focus from the transfer provisions of the lease to the actual documentation of the assignment or sublease transaction. Certain drafting considerations with respect to the documents will be examined, and sample documents (with related drafting tips) have been attached to illustrate some of the concepts that have been addressed.

A. Landlord Consent.5

1. Landlord's Concerns.

As previously discussed, in most cases the landlord's consent will be required for an assignment or sublease. Unfortunately, this consent is typically evidenced by placing a signature block on the transfer document itself simply evidencing the landlord's consent to the transaction. This approach can lead to significant problems for the landlord which could otherwise be avoided with a well-drafted consent document. The consent document should clearly set forth the terms and conditions upon which the landlord's consent is being granted and should be executed by the landlord, the sublessor/assignor and the sublessee/ assignee. Appendix B-2 provides basic drafting tips for the landlord to consider when preparing the consent document.

2. Sublessee/Assignee's Concerns.

While the landlord consent document is primarily a document required to evidence the landlord's consent to a proposed assignment or sublease, this document often contains provisions which could prove to be harmful to the sublessee/assignee. While obtaining the primary landlord's consent to the proposed sublease or assignment is the highest obstacle to overcome, a sublessee/assignee must be certain that it also obtains the primary landlord's consent to everything it needs to operate its business, and that it has not waived any of the rights it expects to receive.⁶ In that regard, Appendix B-3 sets forth certain items which should be considered by the sublessee/assignee when negotiating the landlord consent document.

3. Sublessor/Assignor's Concerns.

While the consent document primarily affects the landlord and the sublessee/assignee, the sublessor/assignor should also carefully review the document to determine if it will be subject to any unusual obligations or requirements. Any such unusual obligations or requirements are more likely to occur in the context of a sublease, given the sublessor's role as an intermediary between the landlord and the sublessee.

4. Form Landlord Consent.

A form of Landlord Consent document incorporating many of the terms discussed in this paper is set forth on Appendix B-1 attached hereto.

B. Sublease Agreement.

1. Generally.

Many people (including lawyers) fail to appreciate the intricacies of a sublease relationship and, as a result, numerous subleases are drafted which do not adequately protect the interests of the parties or accurately reflect their intent. Because subleases are viewed as a vehicle by which the terms of the primary lease are merely "passed through" to the sublessee, in too many cases the result is a two page document which sets forth the basic economic terms of the transaction and then simply incorporates the rest of the terms of the primary lease by reference.

2. Incorporation by Reference.

While the "incorporation by reference" approach is practical because it eliminates the need to restate many of the basic terms of the primary lease, it can easily lead to unintended consequences for both the sublessor and the sublessee. For example, a New York district court recently held that such general incorporation language in a sublease does not apply to a provision of the primary lease in which the tenant waived its right to a jury trial. *Urban Outfitters, Inc. v. 166 Enterprise Corp. and IG Second Generation Partners, L.P.*, 136 F.Supp. 2d 273, 275 (S.D.N.Y. 2001). Therefore, the sublessee was entitled to a jury trial, notwithstanding the fact that the primary lease contained a waiver of jury trial.

Likewise, a general incorporation-by- reference provision in the sublease may cause the sublessee to assume certain obligations of the tenant/sublessor under the primary lease which the parties do not intend to pass onto the sublessee. In order to avoid these unintended consequences, both the sublessor and the sublessee should carefully review each of the provisions of the primary lease for purposes of determining which provisions should apply to the sublease transaction. In other words, incorporation by reference should not become a substitute for carefully reviewing each provision of the primary lease. This is not to say that the sublease should not incorporate the terms of the primary lease by reference; however, those provisions of the primary lease which are not applicable to the sublease should be modified or specifically excluded from such incorporation language.

⁵ For detailed discussion of issues surrounding the landlord consent document, see generally Jonathan M. Hoffman, *Protecting the Overlandlord's Interests with a Well-Prepared Consent Document*, COM. LEASING L. & STRATEGY, Oct. 2000, at 5.

⁶ See generally, Jonathan M. Hoffman, *How Assignees, Subtenants Should Deal with the Potential Pitfalls of Consent Documents*, COM. LEASING L. & STRATEGY, Nov. 2000, at 6.

3. Landlord's Concerns.

Landlords do not typically negotiate specific sublease protections for themselves in their leases, instead relying on their ability to consent to a sublease as their ultimate bargaining chip. However, in many cases when the time comes for the landlord to consent to a sublease, it does so without much, if any, input into the sublease document itself. Nevertheless, there are certain protections that a landlord should seek in any sublease which could be either incorporated into the lease transfer provisions themselves, or effected by conditioning the landlord's consent on such items being included in the sublease; and, in any event, these protections should be specified in any consent by the landlord to the applicable sublease. In that regard, the landlord should ensure that the consent document (and the sublease, if possible) provides, among other things, that: (i) the primary lease controls in the event of a conflict with the sublease; (ii) all of the terms of the primary lease are incorporated into the sublease, except for certain acceptable carve-outs; (iii) the sublessee waives any claims and the sublessee's insurer waives its right of subrogation not only against the sublessor, but also against the landlord; and (iv) any matters requiring the sublessor's approval also require the landlord's approval (e.g. alterations).

Note that, although sublessors and sublessees often request that the landlord simply draft the sublease document, perhaps in an attempt to simplify the transaction, the landlord should not draft such documentation, nor should the landlord execute the actual sublease document. This ensures the landlord is not attempting to document the agreement of the sublessor and sublessee (the intricacies of which the landlord may not be privy to), avoids potential unnecessary landlord liability and costs, and ensures that the terms of the sublease do not appear to affect the terms of the lease or change any of the rights or obligations of tenant and/or landlord thereunder. The landlord should, however, review the sublease document for accuracy and consistency with the primary lease (including whether or not the sublessee has the right to exercise any renewal, preferential or other rights of the tenant set forth in the lease), to ensure that such sublease correctly addresses the continued liability of the original tenant and any guarantors of the primary lease (and addresses the consent of any such guarantors to such sublease), and to determine whether any excess rent or bonus value is addressed thereby which the landlord may have an interest in. As noted in Appendix B-2, the consent document which landlord does execute should similarly specify that such consent is not a consent to the specific terms of the sublease, but only to the sublease itself.

4. Form Sublease Agreement.

A form of Sublease Agreement incorporating the terms discussed in this paper is set forth on Appendix C-1. In addition, Appendix C-2 and Appendix C-3 contain tips for the sublessor and sublessee, respectively, to consider when drafting and negotiating the Sublease Agreement.

C. Recognition and Nondisturbance Agreement.

1. Generally.

As previously discussed, in the context of a sublease, the landlord under the primary lease has no direct contractual obligation to the sublessee. Since the sublessor can only convey to the sublessee the rights that the sublessor possesses under the primary lease, if the primary lease terminates, the sublease will also terminate. Therefore, a sublessee who is negotiating from a position of strength may attempt to require, as a condition to the effectiveness of the sublease, a recognition agreement (sometimes also called a nondisturbance agreement) from the landlord under the primary lease. This recognition agreement becomes particularly important if the sublessee is expending a significant amount of money on its own leasehold improvements.

2. Elements.

The recognition agreement is an agreement primarily between the landlord and the sublessee (although the sublessor may also join) which provides that upon the termination of the primary lease for any reason: (i) the landlord will not disturb the sublessee's right to use and occupy the premises; (ii) the landlord will recognize the sublease as a direct lease between the landlord and the sublessee (thereby creating the necessary privity of contact); and (iii) the sublessee will attorn to the landlord as its landlord under the sublease. With this basic agreement in place, the sublessee will have the comfort of knowing that, as long as the sublessee performs its obligations under the sublease, nothing can happen which is outside of the sublessee's control which could cause the sublessee to lose its right to occupy the premises.

3. Relationship to Landlord Consent Document.

Often the recognition agreement becomes part of the landlord consent document. However, many sublessees mistakenly believe that merely obtaining the landlord's consent to the sublease provides them the necessary protection of the recognition agreement. This is not necessarily the case. Regardless of whether the recognition agreement is contained in the landlord consent document or consists of a separate document, the language should contain the elements set forth above in order to insure that the sublessee is obtaining the protection it needs.

4. Involvement of Landlord.

If a recognition agreement is required, the parties are best served to involve the landlord at the earliest possible stage in order to determine if obtaining it from the landlord will be problem. As a matter of fact, a prudent sublessor will require that the landlord agree in the primary lease to execute a recognition agreement on behalf of a sublessee which satisfies certain minimum requirements.

5. Form Recognition and Nondisturbance Agreement.

A form Recognition and Nondisturbance Agreement is set forth on Appendix D-1 attached hereto. In addition, Appendix D-2 and Appendix D-3 contain tips for the landlord and the sublessee, respectively, to consider when drafting and negotiating the agreement.

D. Assignment of Lease.

1. Generally.

Because an assignment of lease creates direct privity of contract between the landlord and the assignee, many of the complexities discussed in Sections VI.B and VI.C of this paper relating to subleases do not exist with respect to assignments. As a result, the preparation of the assignment documentation typically requires much less negotiation than the preparation of a sublease. Because the intermediary (i.e., the sublessor) is generally eliminated from the equation, there is no intervening document (i.e., the sublease) governing the parties' continued relationships with respect to the lease and/or premises. The lease, as assigned, is the only document governing the relationship between the landlord and assignee.

The assignment documentation remains important, however, as it should address the continuation, or elimination, as applicable, of any liabilities, indemnities, rights or obligations of the assignor. The landlord should ensure that the assignor at the very least remains liable for any such liabilities, indemnities or obligations arising prior to the date of the assignment (even if the assignee has also agreed to be liable therefor), and the assignment should also clearly address whether or not the assignor will remain liable for the obligations of the tenant under the lease even after such assignment (which will often be required by the landlord). Additionally, despite the fact that the assignor may not have any continuing right or interest with respect to the premises as if it were the tenant under the lease, the assignor may wish to retain certain rights with respect thereto that would be documented by the assignment documentation. For example, the assignor may wish to retain a right to regain possession of the premises upon a default of the

assignee; however, provisions such as these may render the "assignment" to instead be a sublease.

2. Simplicity in Enforcement.

An assignment also simplifies enforcement of the obligations of the parties under the lease. For example, if the landlord defaults on its maintenance obligations under the lease, the assignee does not have to seek enforcement from the assignor who, in turn, would have to look to the landlord. The obligation of the landlord runs directly to the assignee and the assignee can directly enforce such obligation against the landlord. Similarly, if the assignee fails to perform any of its obligations under the lease, the landlord has direct recourse against the assignee.

3. Form Assignment of Lease.

A form of Assignment of Lease is set forth on Appendix E-1 attached hereto. In addition, the Appendix E-2, Appendix E-3 and Appendix E-4 provide basic tips for the landlord, the assignor and the assignee, respectively, to consider when drafting and negotiating the assignment document.

4. Sublease or Assignment: Which is the Preferred Vehicle?

The factors discussed in Section VI.D above have led at least one commentator to conclude that, whenever possible, the parties should opt for an assignment rather than a sublease.⁷ While the assignment does create direct privity of contract between the landlord and the assignee and simplifies the enforcement of the obligations of the parties under the lease, it has the negative effect of stripping the assignor of the benefits of the primary lease, while in most cases retaining liability for the obligations of the tenant under the lease. This can become important if the assignee defaults under the lease, because the assignor is left with no recourse other than to sue the assignee. In the case of a sublease, the sublessor is vested with all of the landlord's possessory remedies, including eviction of the sublessee.

Many sublessors elect to structure the transaction as a sublease if they expect to receive a profit from the sublease rent. Even if the sublessor expects to profit from the sublease, the transaction could still be structured as an assignment either by requiring the sublessee/assignee to make a separate payment to the sublessor/assignor or by requiring the landlord to

⁷ For a detailed discussion of the advantages of an assignment over a sublease, see generally Steven J. Roberts & Kevin M. Walsh, *Reasons Why It Is Preferable to Take an Assignment of a Lease Rather Than a Sublease*, Com. Leasing L. & Strategy, Dec. 2001, at 4.

make a payment to the sublessor/assignor upon receipt of the higher amount from the sublessee/assignee.

In most cases, the form of transaction (i.e., assignment or sublease) will be dictated by the facts surrounding the transaction. However, one should always thoughtfully consider the form of transaction prior to moving forward in order to determine the most advantageous structure for the client.

VII. CONCLUSION.

As is obvious from the analysis set forth in this paper, the relationships established between the parties to a sublease and an assignment can be complicated and are often misunderstood. While the ability to assign the lease or sublet the premises can be a valuable tool for the tenant, the interest of the landlord in protecting its investment by choosing its occupants is equally compelling. Generally, a balance can be struck which provides the tenant the flexibility it needs without exposing the landlord to unreasonable risk.

While the need to assign or sublet may not be apparent at the lease negotiation stage, both parties should recognize that circumstances may change during the course of the lease which make the need to assign the lease or sublet the premises necessary. With careful attention given to the negotiation of the lease provisions relating to these issues, the parties can assure themselves that if the need arises at some point in the future, their respective interests will be adequately protected. Similarly, when the time comes to negotiate the transfer documents themselves, the process will run much more smoothly if the lease document clearly establishes the framework upon which the parties can build.

*We would like to thank T. Andrew Dow, of Winstead PC, for his substantial contributions to this paper and presentation.

INTRODUCTION TO APPENDICES

The following appendices provide sample lease provisions and form documents which are illustrative of the types of provisions and documents which may be negotiated by various parties. The provisions and forms do not necessarily contain all of the language or provisions discussed in this paper, nor are they appropriate in every situation. Rather, they are merely examples of lease provisions and documents which might be used in a given transaction. These provisions should obviously be very carefully and thoroughly reviewed in any instance where utilized and additional or alternative provisions and/or revisions should be considered in order to address the specific terms and circumstances of each particular transaction.

APPENDIX A

SAMPLE LEASE PROVISIONS

**BASIC ASSIGNMENT/SUBLETTING PROVISION
A BALANCED APPROACH**

Section _____. Transfers.

(a) Transfers by Tenant.

(i) Tenant may not assign this Lease or sublease the Demised Premises or any part thereof (any such assignment or sublease by Tenant is referred to in this Section as a "Transfer") without the prior written consent of Landlord, which consent will not be unreasonably withheld, conditioned or delayed. Without limiting the foregoing, Landlord and Tenant acknowledge that it would be reasonable for Landlord to withhold its consent in any of the following instances: (1) the net worth of the proposed assignee or subtenant is less than that of the Tenant both as of the Effective Date of this Lease and at the time of the Transfer; (2) the proposed assignee or sublessee is a governmental agency; (3) in Landlord's reasonable judgment, the use of the premises by the proposed assignee or sublessee would entail alterations which would reduce the value of the leasehold improvements in the Premises, or would require increased services by Landlord; (4) Landlord has received from any prior landlord to the proposed assignee or sublessee a materially negative report concerning such prior landlord's experience with the proposed assignee or sublessee; (5) Landlord has experienced previous defaults by or is in litigation with the proposed assignee or sublessee; (6) the proposed assignee or sublessee's anticipated use of the Demised Premises involves the generation, storage, use, treatment or disposal of Hazardous Substances; (7) the proposed sublessee or assignee is a current tenant of the Building or an entity with whom Landlord is negotiation to lease space in the Building; (8) the proposed assignment or sublease would cause a violation of another lease for space in the Building or would give an occupant of the Building a right to terminate or cancel its lease; (9) the Landlord's mortgagee does not consent to the Transfer for any reason; or (10) either an "Event of Default" exists under this Lease or there exists an event or circumstance which with the passage of time or the giving of notice would constitute an "Event of Default" under this Lease. **[Landlord will have no liability for damages to Tenant or to any proposed transferee, and Tenant will have no right to terminate this Lease, if it is adjudicated that Landlord's consent to a proposed Transfer has been unreasonably withheld, and such unreasonable withholding of consent constitutes a breach of this Lease or other duty to Tenant, the proposed transferee or any other person on the part of Landlord. In such event, Tenant's sole remedy will be an action to enforce such provision through specific performance or declaratory judgment.]**

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

(ii) To make a Transfer, Tenant must request in writing Landlord's consent at least thirty (30) days in advance of the date on which Tenant desires to make a Transfer and pay to landlord a \$500.00 fee for reviewing the request, plus any charges that may be assessed for such Transfer by Landlord's mortgagee (the "Review Fee"). The request must include the name of the proposed transferee, the nature of the business to be conducted by the proposed Transferee, current financial information on the proposed transferee, the terms and provisions of the proposed Transfer (including a copy of the proposed documentation pertaining to the proposed Transfer), and, if the Transfer pertains to only a portion of the Demised Premises, information regarding access or construction issues that must be addressed to facilitate the Transfer. Landlord will, within fifteen (15) days following receipt of such request, notify Tenant in writing that Landlord elects (a) to terminate this Lease as to the space so affected as of the date so specified by Tenant, in which event Tenant will be relieved of all further obligations hereunder as to such space, (b) to permit Tenant to assign or sublet such space in accordance with the terms provided to Landlord, or (c) to refuse consent to Tenant's requested Transfer and to continue this Lease in full force and effect as to the entire Demised Premises. If Landlord elects to terminate the Lease in accordance with option (a) above, Tenant may withdraw its request for the transfer, within five (5) days following receipt of Landlord's notice, thereby rendering Landlord's termination of the

Lease null and void. If Landlord elects to refuse consent to Tenant's request to Transfer pursuant to option (c) above, Landlord must provide specific reasons for such refusal. If Landlord fails to notify Tenant in writing of such election within the 15-day period, Landlord will be deemed to have elected option (c) above.

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

(iv) **OPTION 1:** As used herein, the term "Transfer" includes any merger, consolidation, reorganization, sale of assets, sale of a controlling interest in stock, or other Transfer by like manner or by operation of law.

OPTION 2: The prohibition against a Transfer contained in this Section ____, will not be construed to include a prohibition against any transfer by bona fide merger, sale of assets, sale of a controlling interest in stock or other ownership interest or by like manner or operation of law, so long as **[the guarantor remains liable under the Guaranty] [the surviving entity maintains a net worth of at least \$_____]**. However, Tenant may not manipulate the ownership interests of Tenant as a means to subvert the general prohibition against Transfers set forth in Section ____ (a)(i) above.

OPTION 3: Tenant may assign its entire interest under this Lease to a successor to Tenant by purchase, merger, consolidation or reorganization without the consent of Landlord provided that all of the following conditions are satisfied: (a) no Event of Default exists under this Lease; (b) Tenant's successor will own all or substantially all of the assets of Tenant; (c) Tenant's successor will have a net worth which is at least equal to the greater of Tenant's net worth as of the Effective Date of this Lease or Tenant's net worth as of the day prior to the proposed purchase, merger, consolidation or reorganization; (d) the permitted use does not allow the Premises to be used for _____ purposes; and (e) Tenant gives Landlord written notice at least thirty (30) days prior to the Effective Date of the proposed purchase, merger, consolidation or reorganization. Tenant's notice to Landlord must include information and documentation showing that each of the above conditions has been satisfied. If requested by Landlord, Tenant's successor must sign a commercially reasonable form of assumption agreement.

(b) **Affiliate Transfers.** Tenant has the right, subject to Section ____ (c), without Landlord's consent, to assign this Lease or sublet all or any portion of the Demised Premises to any person or entity who controls, is controlled by, or is under common control with the original Tenant named in this Lease (an "Affiliate Transfer"). The term "control" means, with respect to a corporation, the right to exercise, directly or indirectly, more than 50% of the voting rights attributable to the shares of the controlled corporation, and, with respect to a person or entity that is not a corporation, the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of the controlled person or entity. Notwithstanding the foregoing, the sale of shares of equity of any affiliate or subsidiary to which this Lease has been assigned or transferred other than to another parent, subsidiary or affiliate of the original Tenant named hereunder will be deemed an assignment requiring the Landlord's consent hereunder. Tenant must provide Landlord with written notice of any Affiliate Transfer within ten (10) days after the effective date of such Affiliate Transfer.

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

(i) The Transfer must be evidenced by a written document approved by Landlord and, in the case of an assignment, Tenant must cause the assignee to expressly assume and agree to perform all of the covenants, duties and obligations of Tenant under this Lease. The

assignee will be jointly and severally liable under the Lease along with the Tenant.

(ii) Except in the case of a Affiliate Transfer, if the rent or other consideration payable by a sublessee or assignee under any such permitted sublease or assignment exceeds the Rent for the portion of the Demised Premises so transferred, Tenant must pay to Landlord, as additional Rent, 50% of all such excess rental and other consideration, immediately upon receipt thereof by Tenant. Tenant may deduct from the excess all reasonable and customary expenses directly incurred by Tenant attributable to the transfer, including brokerage commissions, legal fees and any construction costs of Tenant or tenant improvement allowance granted to the transferee.

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

(iv) Tenant will remain directly and primarily liable for the performance of all the covenants, duties and obligations of Tenant under this Lease (including, without limitation, the obligation to pay Rent). Landlord will be permitted to enforce the provisions of this Lease against the undersigned Tenant or any transferee, or both, without demand upon or proceeding in any way against the other persons.

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

SUBLEASE RECOGNITION PROVISION
(Only for use if the Tenant requires the Landlord to agree in
the Lease to provide a Recognition Agreement to the Sublessee)

() If Tenant enters into a sublease as permitted by Section () of this Lease (a "Permitted Sublease"), Landlord agrees to recognize such Permitted Sublease notwithstanding the termination of this Lease due to a default by Tenant ("Termination") and not to disturb such subtenant's possession of the subleased premises during the (*insert primary term of the Lease/the term of the Permitted Sublease*) so long as:

(i) such sublessee, at the time of the Termination, meets or exceeds the minimum net worth and experience standards set forth in Section () above for a Permitted Transferee;

(ii) such sublessee is not then in default under the Permitted Sublease;

(iii) such sublessee is not an affiliate of Tenant;

(iv) the rent per square foot to be paid by such sublessee under the Permitted Sublease and all other charges on a per square foot basis equals or exceeds the rent per square foot to be paid by Tenant hereunder;

(v) Landlord is not bound to any provision in the Permitted Sublease that creates any rights or remedies in the sublessee that are greater than the rights of Tenant under this Lease;

(vi) Landlord is not bound to any provision in the Permitted Sublease that creates obligations (on a proportionate basis, if appropriate) on the Landlord that are greater than Landlord's obligations under the Lease;

(vii) such Permitted Sublease demises either (1) in excess of square feet and less than square feet or (2) 100% of the square footage of the Premises;

(viii) the remaining space, if any, within the Premises remains a commercially reasonable leaseable space within the Project with entrances, frontage and other characteristics acceptable to Landlord in its sole discretion;

(ix) Tenant remains primarily liable for any new lease with such sublessee and any amendment, addition, assignment, sublease, transfer, renewal, extension or other modification of the Permitted Sublease so long as (1) Tenant has been notified of same and (2) either (a) Tenant's liability is limited to the rent and other charges under the Lease for a period of time not to exceed the expiration of the primary term of the Lease or (b) Tenant has been notified of the same and shall have consented thereto (which consent shall not be unreasonably withheld or delayed);

(x) this right to recognition of a Permitted Sublease is personal to _____ (*insert the name of Tenant where in this form "Named Tenant" is used*) and does not extend to any assignee or sublessee of Named Tenant;

(xi) Landlord is not obligated to recognize or provide such agreements evidencing and agreeing to the foregoing for more than two (2) subtenants of Named Tenant at any one time;

(xii) Landlord's mortgagee has approved the Permitted Sublease;

(xiii) Landlord has the right to directly enforce all of the obligations of Tenant hereunder against such sublessee, with respect to such portion of the Premises subleased by such sublessee; and

(xiv) such sublessee is obligated under and must perform all obligations of Tenant under the Lease; provided, however, such sublessee will shall have no rights under Section(s) _____ of the Lease (i.e., renewal, expansion, self-insurance, etc.), and such sublessee is responsible to comply with the Americans With Disabilities Act, and any other law as relates to the portion of the Premises subleased, notwithstanding anything in the Lease to the contrary.

This Section (____) will survive the expiration or Termination of the Lease.

Landlord must, upon request, execute such agreements evidencing and agreeing to the foregoing in such form as May be acceptable to Landlord in Landlord's reasonable discretion.

SAMPLE #3:

ALTERNATIVE SUBLETTING REQUIREMENTS

If Landlord consents to any sublease of the Premises by Tenant to an approved sublessee ("Sublessee"), every sublease transaction ("Transaction") must be evidenced by a written sublease between Tenant and Sublessee (the "Sublease"). The Sublease must comply with the following requirements:

- a. Landlord Approval. The form of the Sublease, and the terms and conditions thereof, must be subject to landlord's approval, which May (*insert standard used in the rest of the lease's assignment/subletting section, e.g., be in landlord's sole and absolute discretion or not be unreasonably withheld*).
- b. Sublease Subject to Lease. The Sublease must be subject to, and must incorporate by reference, all of the terms and conditions of this Lease, except those terms and conditions relating to Rent, Additional Rent, and any other amount due under this Lease. Sublessee must acknowledge that it has reviewed and agreed to all of the terms and conditions of this Lease. Sublessee must agree in the Sublease not to do, or fail to do, anything that would cause Tenant to violate any of its obligations under this Lease.
- c. No Exercise of Options. The Sublease must require that:
 - (i) Sublessee has no right to exercise any option or right granted to Tenant in Clauses (*insert appropriate clause #s, e.g., the number of the right of first refusal clause*) of this Lease; and
 - (ii) Tenant must agree that it shall neither exercise on behalf of, nor assign to, Subtenant any such option or right.
- d. Use Restrictions. The Sublease must contain, in full, any use restrictions or other provisions

of this Lease that affect the use of the Premises, including, without limitation, any continuous operation provisions, radius restrictions, or other provisions that prohibit competing businesses, and any other provisions that Landlord otherwise requires be contained in the Sublease.

- e. Waiver of Subrogation. The Sublease must contain a waiver of subrogation against landlord and must require Sublessee's insurance policies to acknowledge such a waiver of subrogation.
- f. Further Sublets/Assignments. The Sublease must prohibit a sub-sublet of the Premises or the assignment of the Sublease by Sublessee, without first obtaining Landlord's consent, which consent may be granted or withheld in Landlord's sole and absolute discretion.
- g. Alterations. The Sublease must require Sublessee, acting through Tenant, to obtain Landlord's prior written approval, which May *(insert standard used for alterations in the lease, e.g., be in Landlord's sole and absolute discretion or not be unreasonable withheld)*, to any alterations to the Premises to the extent Tenant is required by this lease to obtain such consent.
- h. Notices. The Sublease must require:
 - (i) Sublessee to send Landlord copies of any and all notices concerning the Premises that Sublessee is obligated to provide to Tenant; and
 - (ii) Tenant to send Landlord copies of any and all notices concerning the Premises that Tenant is obligated to provide to Sublessee.
- i. Termination of Lease. The Sublease must provide that, at Landlord's option, the Sublease shall not terminate in the event that this Lease terminates. The Sublease must require Sublessee to execute an attornment agreement, if Landlord, in its sole and absolute discretion, elects to have the Sublease continue beyond the date of termination of this Lease. Such attornment agreement must be in form and content acceptable to Landlord pursuant to which Sublessee confirms it is in direct privity of contract with landlord and that all obligations owed to Tenant under the Sublease will become obligations owed to Landlord for the balance of the term of the Sublease.
- j. No Privity. The Sublease will provide that unless and until such time as an attornment agreement is executed by Tenant pursuant to the terms and conditions of Paragraph i hereof, nothing contain in the Sublease will create or will be construed or deemed to create privity of contract or privity of estate between landlord and Sublessee.
- k. No Liability. The Sublease must provide that Sublessee has no right (and waives any rights it may have) to hold Landlord responsible for any liability in connection with the Premises, including, without limitation, any liability arising from the noncompliance with any federal, state, or local laws applicable to the Premises.
- l. No Amendment. The Sublease must provide that:
 - (i) Nothing in the Sublease will amend or shall be construed or deemed to amend this Lease; and
 - (ii) Tenant and Sublessee may not amend the Sublease.
- m. Other Terms. The Sublease must contain such other terms as Landlord may require, *(insert standard used in the rest of the lease's assignment/subletting clause, e.g., in Landlord's sole and absolute discretion, in Landlord's reasonable discretion)*.

APPENDIX B-1

FORM OF LANDLORD CONSENT
(With No Recognition Agreement)

CONSENT TO SUBLEASE

THIS CONSENT TO SUBLEASE (this "Consent") is made and entered into effective as of _____, 200____, by and among _____, a _____ ("Landlord"), _____, a _____ ("Sublessor"), and _____, a _____ ("Sublessee").

RECITALS:

A. Landlord and Sublessor entered into that certain Lease Agreement (the "Primary Lease") dated _____, _____, whereby Sublessor leased from Landlord those premises described in the Primary Lease (the "Premises").

B. Sublessor desires to sublet to Sublessee **[the entire Premises] [a portion of the Premises]** (hereinafter referred to as the "Sublease Premises") as provided in the Sublease Agreement dated _____, 200____ (the "Sublease Agreement").

C. The Primary Lease requires that Sublessor receive the prior written consent of Landlord to any subletting of the Premises or any part thereof, and Landlord has agreed to consent to the Sublease Agreement upon the terms set forth herein.

AGREEMENT:

NOW THEREFORE, in consideration of the premises contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Landlord hereby consents to the sublease of the Sublease Premises in accordance with the Sublease Agreement upon the following terms and conditions:

1. Sublease Materials. Sublessor and Sublessee warrant and represent that they have provided Landlord with true, correct, and complete copies of the Sublease Agreement, including all exhibits, riders, and schedules, along with all other relevant documents and materials regarding the sublease. A copy of the Sublease Agreement, including such exhibits, riders, schedules, and other relevant documents and materials, is attached to this Consent as Exhibit "A".

2. Nature of Consent. Landlord's execution of this Consent is limited to Landlord's consent to the sublease itself as contemplated by the Sublease Agreement, and does not constitute (i) Landlord's consent to any of the particular terms and conditions contained in the Sublease Agreement, (ii) a ratification of any of the terms of the Sublease Agreement, (iii) a representation or warranty as to any of the matters contained in the Sublease Agreement, (iv) Landlord's agreement or consent to be bound or estopped by any provisions of the Sublease Agreement, or (v) an assumption by Landlord of any of Sublessor's obligations under the Sublease Agreement. The parties further agree that Landlord is not a party to the Sublease Agreement, nor will Landlord be deemed a party to the Sublease Agreement by granting its consent thereto. Nothing in this Consent constitutes a consent to any future or additional sublease of the Premises, and this Consent is not assignable by any of the parties hereto.

3. No Modification. Except as otherwise provided in this Consent, all other terms of the Primary Lease and all obligations of Sublessor under the Primary Lease will remain in full force and effect and will not be modified hereby or by the Sublease Agreement. In addition, Sublessor and Sublessee agree not to modify or amend the terms of the Sublease Agreement without Landlord's prior written consent. The Sublease Agreement will be subordinate to the Primary Lease in all respects, and in the event of any conflict between the Sublease Agreement and the Primary Lease, the terms of the Primary Lease will prevail (except with respect to matters which only affect the Sublessor and Sublessee). Landlord is not responsible for the performance of any

of Sublessor's obligations under the Sublease Agreement.

4. Primary Lease Terms. Sublessee agrees to be bound by the terms and provisions of the Primary Lease. Sublessee's use and occupancy of the Premises will, except as otherwise provided in this Consent, be subject to all terms and conditions of the Primary Lease. Any violation by Sublessee of the terms and conditions of the Primary Lease will constitute a default under the Primary Lease and under this Consent, for which Sublessee and Sublessor will be jointly and severally liable. **[Landlord expressly consents to Sublessee's use of the Sublease Premises as a _____, and for no other purpose.]**

5. Termination of Primary Lease. If the term of the Primary Lease naturally expires or if the Primary Lease is otherwise terminated by either party for any reason prior to the expiration of the term of the Sublease Agreement, then the Sublease Agreement will terminate automatically.

6. Termination of Sublease Agreement. If the term of the Sublease Agreement naturally expires or is otherwise terminated by either party prior to the expiration of the term of the Primary Lease, then, at Landlord's sole option, Sublessee will continue to lease the Sublease Premises as a direct lease with Landlord and will attorn and recognize Landlord as its direct Landlord under the terms of the Sublease Agreement.

7. Sublessor Default. In the event of a default under the Primary Lease by Sublessor, Landlord may, at Landlord's sole option and upon reasonable notice to Sublessee, collect rent due under the Sublease Agreement directly from Sublessee. In no event will Landlord's collection of rent directly from Sublessee create a direct landlord-tenant relationship between Landlord and Sublessee.

8. Commissions; Transfer Taxes. Landlord is not liable for any real estate transfer taxes or any leasing commission or other amounts which may be due to a broker or agent with respect to the Sublease Agreement. **Sublessor and Sublessee hereby jointly and severally indemnify Landlord against any claims for such transfer taxes or brokerage or leasing commission which may be due as a result of the transaction which is the subject of this consent.**

9. Primary Lease Rights. In no event will Sublessee have the right to exercise any expansion, renewal, or purchase rights (including, without limitation, rights of first offer or rights of first refusal) granted to Sublessor under the Primary Lease.

10. No Default. Sublessor agrees that, as of the date of this Consent, Landlord is not in default under the Primary Lease and Sublessor has no outstanding claims against Landlord.

11. Conflicts. In the event of any conflict between the Sublease Agreement and this Consent, the terms of this Consent will prevail.

12. Future Amendments. No change, amendment, or surrender of the Sublease Agreement will be effective unless agreed to in writing by Landlord.

13. Notices. The proper addresses of the parties to which notices should be sent (in accordance with the notice provisions of the Primary Lease and Sublease Agreement, as applicable) are as follows:

With Respect to Landlord:

Attn: _____
Telephone: _____
Fax: _____

With Respect to Sublessor:

Attn: _____
Telephone: _____
Fax: _____

With Respect to Sublessee:

Attn: _____
Telephone: _____
Fax: _____

[The Remainder of this Page Has Been Intentionally Left Blank]

EXECUTED as of the date set forth above:

LANDLORD:

_____,
a _____

By: _____
Name: _____
Title: _____

SUBLESSOR:

_____,
a _____

By: _____

Name: _____

Title: _____

SUBLESSEE:

_____,

a _____

By: _____

Name: _____

Title: _____

The undersigned consent to the terms of this Consent:

GUARANTOR UNDER THE PRIMARY LEASE:

_____,

a _____

By: _____

Name: _____

Title: _____

GUARANTOR UNDER THE SUBLEASE AGREEMENT:

_____,

a _____

By: _____

Name: _____

Title: _____

APPENDIX B-2

LANDLORD CONSENT DRAFTING TIPS FOR LANDLORDS

- The consent document should provide that landlord's consent to the transfer should not constitute consent to the particular terms of the transfer document, nor ratification of any of the terms of the transfer document.
- The consent document should contain a representation from the sublessor/assignor and the sublessee/assignee that they have provided landlord with true, correct and complete copies of the transfer document, along with all other relevant documents and materials.
- The consent document should contain a covenant on the part of the sublessor/assignor and the sublessee/assignee that they will not modify the transfer document without the landlord's prior written consent.
- The landlord might wish to consider a provision which provides that the transferee, at the option of the landlord, will attorn to the landlord and recognize it as its direct landlord in the event of a termination of the transfer document. While the assumption of the lease by an assignee creates this direct obligation by the assignee to the landlord, no such obligation exists with respect to the sublessee under a sublease. Sublessees will often request that the landlord obligate itself to recognize the sublease as a direct lease following such termination and, if landlords are unwilling to provide such a recognition agreement, it may be difficult for the landlord to persuade a sublessee to agree to an attornment provision. Nevertheless, if the landlord is able to include an attornment provision in the consent document, the provision should specifically state that the landlord is not liable for existing defaults on the part of the sublessor, or any offsets, claims, defenses, abatements, or other concessions to which the sublessee may be entitled against the sublessor under the sublease.
- The assignor/sublessor and the assignee/sublessee should be jointly liable for the obligations and indemnifications set forth in the consent document and for all the obligations under the primary lease (except for primary lease obligations which are not assumed by a sublessee (e.g., the payment of rent)). This creates privity of contract between the sublessee/assignee and the landlord, which otherwise would not exist.
- The consent document should give the landlord the right to collect rent directly from the sublessee following default by the sublessor under the primary lease.
- The consummation of an assignment or subletting transaction might give rise to liability for brokerage commissions and, in some jurisdictions, real estate transfer taxes. The consent document should specifically provide that the primary landlord is not liable for such amounts.
- If the obligations of the tenant under the primary lease are guaranteed by a guarantor, then the guarantor should join in the execution of the consent document.
- The consent document should clearly provide that the consent is not assignable and is applicable only to the particular transaction for which the consent is sought.
- The consent document should include the current addresses for each of the parties for notice purposes because the assignor/sublessor may be vacating the very premises to which the primary lease requires notices be sent.

APPENDIX B-3

LANDLORD CONSENT
DRAFTING TIPS FOR SUBLESSEES/ASSIGNEES

- In connection with the sublease, the sublessee would ideally receive a recognition or nondisturbance agreement from the landlord to protect its interest should sublessor default under the primary lease. However, if the landlord is unwilling to grant recognition and nondisturbance rights to the sublessee, the sublessee should at least require notice and opportunity to cure the default by the sublessor under the primary lease.
- Just as the landlord wants to ensure that it has seen the complete transfer document prior to consenting to such document, the sublessee/assignee of a lease wants to be sure of the terms of the document it is assuming or agreeing to be bound by. Therefore, the sublessee/assignee ideally will receive an acknowledgement from the landlord that the documents it has reviewed constitute all of the documents which comprise the primary lease.
- In some cases, consent documents contain provisions which duplicate or reiterate provisions contained in the primary lease. Assignees/sublessees should take care to reject such provisions if they limit the rights otherwise contained in the primary lease. For example, the consent document may contain a prohibition against further assignment or subletting which is more restrictive than the assignment and subletting provisions contained in the primary lease.
- In the case of an assignment, the assignee should protect itself from assuming pre-existing obligations by either (i) limiting its assumption of the primary lease to prospective obligations only, or (ii) obtaining an estoppel from the landlord stating that there are no existing defaults or accrued obligations. In addition, the assignee should obtain an indemnification from the assignor for any such obligations.
- If the use to be made of the premises is different than the use being made by the sublessor/assignor under the terms of the primary lease, the sublessee/assignee should specifically obtain the landlord's consent to the sublessee/assignee's proposed use.

APPENDIX C-1

FORM OF SUBLEASE AGREEMENT

SUBLEASE AGREEMENT

THIS SUBLEASE AGREEMENT ("Sublease") is made and entered into effective as of the ____ day of _____, ____ (the "Effective Date"), by and between _____, a _____ ("Sublessor"), and _____, a _____ ("Sublessee").

RECITALS:

A. _____ ("Landlord"), as landlord, and Sublessor, as tenant, have made and entered into that certain [**Lease Agreement**] dated as of _____ (said Lease Agreement, together with all amendments thereto, if any, being hereinafter referred to as the "Primary Lease"), which Primary Lease provides for the lease and demise by Landlord to Sublessor of those certain premises more particularly described in the Primary Lease, but which are generally described as consisting of Suite ____ in the [**shopping center**] [**office building**] commonly known and referred to as _____, located at _____ in _____, _____ County, _____ (the "Primary Lease Premises").

B. A true and correct copy of the Primary Lease (with confidential portions redacted) is attached hereto as Exhibit "A" and made a part hereof for all purposes.

C. Sublessor desires to sublease to Sublessee the below-described portion of the Primary Lease Premises, and Sublessee desires to accept and sublease the same, all upon and subject to the terms and conditions set forth hereinbelow.

AGREEMENT:

NOW, THEREFORE, for and in consideration of the above and foregoing premises and in consideration of the mutual terms, conditions, covenants and agreements herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by each of the parties hereto, Sublessor and Sublessee hereby covenant and agree as follows:

1. Demise and Description of Property. Sublessor hereby subleases to Sublessee, and Sublessee hereby subleases from Sublessor, upon and subject to the terms, limitations and conditions set forth herein and in the Primary Lease, [**the Primary Lease Premises (hereinafter referred to as the "Premises").**] [**that portion (the "Premises") of the Primary Lease Premises consisting of approximately _____ square feet of [rentable area] [gross leasable area], which Premises is more particularly described on Exhibit "B" attached hereto and made a part hereof for all purposes.**]

2. Term; Surrender.

A. Term. The term ("Term") of this Sublease is ____ () years **[(subject to extension as provided in Exhibit " " attached hereto and made a part hereof for all purposes)]**, commencing on the earlier to occur of (i) the date on which Sublessee opens for conduct of business in the Premises, or (ii) 6:00 p.m. on _____ (the first to occur of such dates being hereinafter referred to as the "Sublease Commencement Date") and ending at 11:59 p.m. ([city, state] time) on _____ (the "Expiration Date"), or at such earlier date as this Sublease may be terminated pursuant to the terms of this Sublease. Notwithstanding the preceding sentence, this Sublease will automatically terminate upon the expiration or termination for any reason of the Primary Lease.

B. End of Term. Upon the expiration or termination of this Sublease, Sublessee must: (i) surrender to Sublessor any keys, electronic ID cards, and other access devices to the Premises at the place then fixed hereunder for payment of rent and other charges hereunder to Sublessor; (ii) remove all of Sublessee's trade fixtures and other personal property from the Premises; (iii) surrender the Premises in "broom clean" condition and in compliance with the terms

and conditions of the Primary Lease pertaining to surrender of the Premises; (iv) except for reasonable wear and tear resulting from normal use, surrender the Premises and fixtures in the same condition in which Sublessee received them; and (v) deliver the Premises to Sublessor free and clear of any and all hazardous materials and substances so that the condition of the Premises conforms at such time with all applicable environmental laws, ordinances, rules and regulations.

3. Sublease Rent. For the Term of this Sublease, Sublessee must pay to Sublessor as base rent (the "Sublease Rent") for the Premises [the sum of \$_____ per year, payable in monthly installments of \$_____.] [the following sums during the respective periods set forth below:

Sublease Commencement Date - _____: \$_____ per month
_____ - _____: \$_____ per month
_____ - _____: \$_____ per month]

The Sublease Rent must be paid in advance at least five (5) days prior to the first day of each calendar month during the Term, commencing on _____. The Sublease Rent must be paid to Sublessor at Sublessor's address as provided on the signature page of this Sublease or to such other person or at such other address as Sublessor may from time to time designate in writing. Sublessor may, at its option, bill Sublessee for Sublease Rent, but no delay or failure by Sublessor in providing such a bill will relieve Sublessee from the obligation to pay the Sublease Rent on the first day of each month as provided herein. All payments must be in the form of a check unless otherwise agreed by Sublessor, except that payment by check will not be deemed made if the check is not duly honored with good funds. If any such check is ever returned for lack of sufficient funds or is otherwise not duly honored with good funds, then Sublessor may thereafter require, upon written notice thereof to Sublessee, that all future payments of Sublease Rent or other charges under this Sublease be made in cash or cash equivalent mode. In addition to the Sublease Rent and any other sums or amounts required to be paid by Sublessee to Sublessor pursuant to this Sublease, Sublessee must also pay to Sublessor, concurrently with the payments of such Sublease Rent or other charges, the amount of any applicable sales, use or excise tax, rent tax or other tax with respect thereto (other than any general income tax payable by Sublessor with respect thereto) as the same may be levied, imposed or assessed by any federal, state, county or municipal government entity or agency. If the Term of this Sublease commences or ends at any time other than the first day of a calendar year, then Sublease Rent will be prorated for such year according to the number of days of the Term in such year.

4. Additional Rent. In addition to the Sublease Rent provided in Paragraph 3 of this Sublease, Sublessee must also reimburse to Sublessor [all "additional rent" (as provided in Paragraph(s) ____ of the Primary Lease) payable by Sublessor pursuant to the Primary Lease] [all such other sums of money becoming due and payable by Sublessor to Landlord under the Primary Lease and relating to the Premises] ("Additional Rent"). Sublease Rent and all Additional Rent are sometimes collectively referred to in this Sublease as "Rent." All Rent must be paid without notice, demand, abatement, deduction or setoff, except as otherwise expressly provided in this Sublease.

5. Security Deposit. Contemporaneously with the delivery by Sublessee to Sublessor of this Sublease, Sublessee must deliver to Sublessor a cash security deposit in the amount of _____ and ___/100 Dollars (\$_____) (the "Security Deposit"). The Security Deposit will be held by Sublessor, without liability for interest, as security for the performance by Sublessee of Sublessee's covenants and obligations under this Sublease, it being expressly understood that the Security Deposit will not be considered an advance payment of Rent or a measure of Sublessee's liability for damages in the event of a default by Sublessee. Sublessor may, from time to time, without prejudice to any other remedy, use the Security Deposit to the extent necessary to make good any arrearages of Rent or to satisfy any other covenant or obligation of Sublessee under this Sublease. Following any such application of the Security Deposit, Sublessee must pay to Sublessor on demand the amount so applied in order to restore the Security Deposit to its original amount. If Sublessee is not in default at the termination of this Sublease, the balance of the Security Deposit remaining after any such application must be returned by Sublessor to Sublessee within thirty (30) days following the termination of this Sublease. If Sublessor transfers its interest in the Lease, Sublessor may assign the Security Deposit to the transferee and upon assumption by such transferee of liability for the Security

Deposit, Sublessor will have no further liability for the return of such Security Deposit.

6. Acceptance and Use of the Premises.

A. Acceptance of Premises. Sublessee accepts the Premises in its present, "**AS-IS, WHERE IS**" condition and with all faults. By occupying the Premises, Sublessee: (a) acknowledges that Sublessee has had full opportunity to examine the Premises and is fully informed, independently of Sublessor or any employee, agent, representative, shareholder, officer or director of Sublessor, as to the character, construction and structure of the Premises; (b) acknowledges that neither Sublessor nor any of Sublessor's employees, agents, representatives, shareholders, officers or directors, has made any representations, warranties or promises with respect to the Premises, including without limitation any representation or warranty as to fitness thereof for any purpose; (c) accepts the Premises in an "**AS-IS, WHERE IS**" condition and acknowledges that the Premises comply with all requirements imposed upon Sublessor under this Sublease; and (d) acknowledges and agrees that the Premises are subject to the limitations, encumbrances, and other matters described in the Primary Lease. **TO THE EXTENT ALLOWED BY LAW, SUBLESSEE HEREBY WAIVES ANY AND ALL RIGHTS AND PROTECTIONS WHICH MIGHT OTHERWISE BE AFFORDED SUBLESSEE AT LAW OR OTHERWISE CONCERNING HABITABILITY OR SUITABILITY OF THE PREMISES OR THE CONDITION OF THE PREMISES (INCLUDING ANY BUILDINGS OR IMPROVEMENTS).**

B. Maintenance of Premises. Sublessee must maintain the Premises in good condition and repair and in all respects in compliance with all obligations of Sublessor as tenant under the Primary Lease.

C. Use of Premises. The Premises may be used by Sublessee only for the uses and purposes permitted under the Primary Lease and for no other use or purpose.

D. Ownership of Improvements. Sublessee hereby acknowledges and agrees that Sublessor will be and remain the owner of all improvements constructed upon the Premises, as the same may be altered, expanded and/or improved from time to time, during the term of this Sublease and thereafter (subject only to the terms of the Primary Lease). Sublessor will retain and have all rights to depreciation deductions and tax credits arising from Sublessor's ownership of the Improvements. Upon expiration or earlier termination of this Sublease, Sublessee will have no further rights with respect to the improvements or interest therein.

7. Relationship to Primary Lease.

A. Obligations Under Primary Lease. Sublessee hereby assumes and agrees to perform all obligations of Sublessor as tenant under the Primary Lease relating to the Premises, and Sublessee agrees to abide by and comply with all of the provisions of the Primary Lease during the term of this Sublease, except that: (i) the payment of rent and other charges by Sublessee will be replaced by the provisions of Paragraphs 3 and 4 of this Sublease; (ii) Sublessee will have no option to renew or extend the term hereof (notwithstanding the availability of any renewal or extension options under the Primary Lease), and **[(iii) the following provisions of the Primary Lease will not be applicable to Sublessee: Sections __, __, __ and __]**. Sublessee hereby acknowledges that Sublessee has read and is familiar with the terms and conditions of the Primary Lease, and Sublessee further hereby acknowledges and agrees that, except as otherwise set forth in this Sublease, (a) this Sublease is and shall be and remain expressly subject to all of the terms and conditions of the Primary Lease, and (b) except as otherwise specifically set forth in this Sublease, Sublessor expressly retains and reserves all rights and benefits applicable to Sublessor as tenant under the Primary Lease.

B. Incorporation of Primary Lease. Except as specifically excluded from application to Sublessee pursuant to Paragraph 7A hereinabove, the provisions of the Primary Lease, to the extent that they do not conflict with specific provisions contained in this Sublease, are fully incorporated into this Sublease. In the event of any conflict between the provisions of the Primary Lease and the provisions contained in this Sublease, the provisions of this Sublease will be controlling as between Sublessor and Sublessee. Sublessee hereby agrees to be bound to Sublessor by, and to comply with all of the terms and conditions of, the Primary Lease and to assume toward Sublessor and perform all of the covenants, obligations and responsibilities that Sublessor by the Primary Lease assumes toward the Landlord. **SUBLESSEE HEREBY AGREES**

TO INDEMNIFY, DEFEND (WITH COUNSEL APPROVED IN ADVANCE IN WRITING BY SUBLESSOR) AND HOLD HARMLESS SUBLESSOR, AND SUBLESSOR'S AGENTS, FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITY, CAUSES OF ACTION, LOSS, DAMAGES, COSTS AND EXPENSES ARISING FROM (i) ANY BREACH, VIOLATION OR NON-PERFORMANCE BY SUBLESSEE OF ANY OF THE TERMS AND PROVISIONS OF THE PRIMARY LEASE OR THIS SUBLEASE, OR ARISING UNDER THE PRIMARY LEASE, OR RESULTING FROM SUBLESSEE'S USE OR OCCUPANCY OF THE PREMISES, OR (ii) ANY PERSONAL OR BODILY INJURY TO PERSONS OR DAMAGE TO PROPERTY TO THE EXTENT THAT SUCH DAMAGE OR INJURY WAS CAUSED, EITHER PROXIMATELY OR REMOTELY, BY ANY ACT OR OMISSION, WHETHER NEGLIGENT OR NOT, OF SUBLESSEE OR ANY OF SUBLESSEE'S AGENTS, SERVANTS, EMPLOYEES, CONTRACTORS, CUSTOMERS, GUESTS, OR INVITEES OR OF ANY OTHER PERSON ENTERING ONTO THE PREMISES UNDER OR WITH THE EXPRESS OR IMPLIED INVITATION OF SUBLESSEE. SUBLESSEE'S OBLIGATIONS OF INDEMNIFICATION PURSUANT TO THIS **SECTION 7(B)** WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS SUBLEASE.

C. Definition of Landlord. With respect to this Sublease, Sublessee hereby agrees that all references to "Landlord" in the Primary Lease are deemed to be references to the Primary Landlord for purposes of: (i) any provisions dealing with work to be performed or services or statements to be furnished by the Landlord pursuant to the Primary Lease; **[and]** (ii) casualty restoration obligations **;** **and (iii)** _____. In addition, all references to "Landlord" in the Primary Lease are deemed to be references to both Sublessor and Landlord with respect to: (a) all provisions requiring the consent of Landlord; and (b) all provisions requiring Notice to the Landlord.

8. Services and Other Rights. Notwithstanding anything herein contained to the contrary, Sublessee hereby acknowledges and agrees that the only services or other rights that Sublessee is entitled to under this Sublease are those to which Sublessor is entitled under the Primary Lease, and Sublessee hereby agrees that Sublessee will look solely to Landlord under the Primary Lease for all such services and other rights and that Sublessor is not responsible therefor.

9. Exculpation. Sublessee hereby acknowledges and agrees that Sublessor is not responsible for any repairs to the Premises, nor will Sublessor, nor any of Sublessor's partners, officers, directors, shareholders, agents, employees or representatives, be liable for any of the following: (i) any of the Landlord's obligations under the Primary Lease; (ii) any interruption in utilities or services to the Premises; (iii) any loss of or damage to any property of Sublessee or of Sublessee's employees, agents, customers, guests or invitees (whether by theft or otherwise); (iv) the failure of Landlord to perform any obligation of Landlord under the Primary Lease; or (v) any damage or disturbance caused by others. Neither Sublessor nor any of Sublessor's partners, officers, directors, shareholders, employees, agents or representatives has any personal liability under this Sublease. The liability of Sublessor for any default by Sublessor under the terms of this Sublease will be limited to Sublessee's actual direct, but not consequential, damages therefor **[and shall be recoverable solely from the equity interest of Sublessor in and to the Premises and in, to and under the Primary Lease.]**

10. Default Under Primary Lease. No default of Landlord under the Primary Lease will affect this Sublease or waive or defer the performance of any of Sublessee's obligations hereunder. However, in the event of any such default or failure by Landlord, Sublessor agrees, upon Sublessor's receipt of written notice thereof from Sublessee, and at Sublessee's expense, to make demand upon Landlord to perform Landlord's obligations under the Primary Lease in accordance with the terms of the Primary Lease (but without obligation of Sublessor to take any other action or incur any expense to enforce Landlord's obligations under the Primary Lease). Sublessee must pay all costs and expenses, including reasonable attorneys' fees, that may be incurred by Sublessor in enforcing the provisions of this Sublease or in enforcing Landlord's obligations under the Primary Lease if requested to do so by Sublessee.

11. Insurance. Sublessee must obtain and maintain in force and effect with respect to the Premises, throughout the entire term of this Sublease, any and all insurance required to be maintained by the "tenant" pursuant to the terms of the Primary Lease. It is agreed that any and all insurance required to be maintained by Sublessee pursuant to the terms of the Primary Lease (as incorporated herein and assumed by Sublessee hereunder) must: (i) name Sublessor, each leasehold mortgagee holding a leasehold mortgage on this Sublease or the Premises or any part

thereof, and Landlord as additional loss payees with respect to all property insurance; (ii) contain waivers of subrogation applicable to each of Sublessor, each aforesaid leasehold mortgagee and Landlord; (iii) include a standard mortgage clause in favor of each aforesaid leasehold mortgagee; (iv) name Sublessor, each aforesaid leasehold mortgagee and Landlord as additional insureds with respect to liability insurance; and (v) require at least thirty (30) days' advance written notice to Sublessor, Landlord and any applicable mortgagee prior to the cancellation or modification of any such insurance. All insurance policies required to be maintained by Sublessee hereunder must be written by insurance companies reasonably satisfactory to Sublessor and Landlord. True, correct and complete copies of all such insurance policies (or certificates thereof in form and content reasonably satisfactory to Sublessor and Landlord), evidencing that all such insurance policies required to be obtained and maintained by Sublessee hereunder have been obtained and paid for, must be provided to Sublessor, Landlord and any applicable mortgagees concurrently with the execution of this Sublease and thereafter at least thirty (30) days prior to the expiration date of any then-existing policies.

12. **Sale of Personal Property.** In connection with this Sublease, Sublessor hereby agrees to sell to Sublessee the personal property (the "**Personal Property**") listed on **Exhibit " "** attached hereto and made a part hereof for all purposes. The purchase price for the Personal Property will be the sum of \$ _____ (the "**Personal Property Purchase Price**"), which Personal Property Purchase Price will be allocated among the individual items of Personal Property as provided on **Exhibit " "**. Sublessee hereby acknowledges that Sublessor makes no representations, warranties or promises with respect to the Personal Property, including, without limitation, any representation or warranty as to the condition thereof or the fitness thereof for any purposes, and Sublessor accepts the Personal Property in its "AS-IS, WHERE-IS" condition. Sublessee must pay the Personal Property Purchase Price to Sublessor on or before _____.]

13. **Limitation of Liability.** Notwithstanding any provision of the Primary Lease to the contrary, neither Landlord nor Sublessor, nor any of Sublessor's partners, officers, directors, shareholders, agents, employees or representatives, shall be liable to Sublessee, or any of Sublessee's agents, employees, servants, customers, guests or invitees, for any damage to persons or property due to the condition, design, or any defect in the Premises or its mechanical systems that may exist on the Sublease Commencement Date or that may subsequently occur. Sublessee, with respect to itself and its agents, employees, servants, customers, guests and invitees, hereby expressly assumes all risks of damage to persons and property, either proximate or remote, by reason of the present or future condition of the Premises.

14. **Assignment and Subletting.** Except upon the prior written consent of Sublessor and Landlord, which consent may be granted or withheld in the sole discretion of Landlord as provided under the Primary Lease and/or in the sole discretion of Sublessor, Sublessee will not voluntarily or involuntarily transfer, convey, assign, mortgage or pledge this Sublease or any right or interest of Sublessee hereunder, nor sublet any part of the Premises, nor permit the use or occupancy of any portion of the Premises by anyone other than Sublessee.

15. **Parking.** Provided that, and for so long as, no Event of Default has occurred and is continuing under this Sublease, Sublessee will have a nonexclusive right to use _____ unreserved parking spaces located within the Parking Areas during the Term of this Sublease at no charge to Sublessee. Sublessee's use of such parking spaces is subject to the terms and conditions of the Primary Lease.

16. **Brokers.** Sublessor and Sublessee agree and represent to one another that no finder or broker has been involved in the procurement, negotiation or execution of this Sublease, except for _____ ("**Broker**", whether one or more), and that Broker is the only broker entitled to a fee or commission for the procurement, negotiation or execution of this Sublease (which Broker's commission will be paid by _____ pursuant to a separate commission agreement). **SUBLESSOR AND SUBLESSEE HEREBY AGREE TO DEFEND, INDEMNIFY AND HOLD EACH OTHER HARMLESS AGAINST ANY LOSS, CLAIM, EXPENSE OR LIABILITY WITH RESPECT TO ANY COMMISSIONS OR BROKERAGE FEES (EXCEPT AS OTHERWISE SET FORTH IN THE IMMEDIATELY PRECEDING SENTENCE) CLAIMED ON ACCOUNT OF THE EXECUTION AND/OR RENEWAL OF THIS SUBLEASE OR THE EXPANSION OF THE PREMISES DUE TO ANY ACTION OF THE INDEMNIFYING PARTY. THE OBLIGATIONS OF INDEMNITY SET FORTH IN THIS PARAGRAPH 11 WILL SURVIVE**

THE EXPIRATION OR EARLIER TERMINATION OF THIS SUBLEASE.

17. Sublessee Improvements. Sublessee will be responsible for the construction of all improvements (the "Sublease Improvements") to be made to the Premises in accordance with Exhibit "___" attached hereto and made a part hereof for all purposes; provided, however, such construction will be subject to the terms and conditions of the Primary Lease (including, without limitation, Exhibit "___" attached thereto).

18. Default and Remedies.

A. Event of Default. The occurrence of any one or more of the following events will constitute an event of default ("Event of Default") by Sublessee under this Sublease:

[Note: The grace and/or cure periods for the following Events of Default should leave Sublessor enough time to cure a default under the Primary Lease.]

(i) the failure of Sublessee to pay any installment of Sublease Rent, Additional Rent or other charge or money obligation due under this Sublease, **[and such failure continues for a period of five (5) days after written notice thereof to Sublessee (provided that, if two such failures occur in any consecutive twelve (12) month period, Sublessee will not be entitled thereafter to any such notice of, or such period to cure, any subsequent failure, and any such subsequent failure will be and constitute an immediate Event of Default under this Sublease);]**

(ii) the failure of Sublessee to perform, comply with or observe any agreement, covenant or obligation of Sublessee under this Sublease other than the payment of rent or other monetary amounts, and such failure continues for a period of **[fifteen (15) days]** after written notice thereof to Sublessee;

(iii) the making by Sublessee of any assignment for the benefit of Sublessee's creditors;

(iv) the levying on or against the property of Sublessee of a writ of execution or attachment that is not released or discharged within thirty (30) days;

(v) the institution in a court of competent jurisdiction of bankruptcy proceedings against Sublessee or any of Sublessee's shareholders, or for the appointment of a receiver of the property of Sublessee, provided that such proceedings are not dismissed, and any receiver, trustee, or liquidator appointed therein is not discharged, within thirty (30) days after the institution of said proceedings;

(vi) the doing or permitting to be done by Sublessee of any act which creates a mechanics' lien or claim against the Premises; or

(vii) the occurrence of any default or Event of Default under the Primary Lease.

B. Remedies. Upon the occurrence of an Event of Default, Sublessor, in addition to any and all other rights and remedies available to Sublessor at law or in equity and in addition to all other rights or remedies reserved herein, will have the option to pursue any one or more of the following remedies without any notice or demand whatsoever and without releasing Sublessee from any obligation under this Sublease (except in the case of a termination of the Sublease):

(i) Sublessor may enter the Premises without terminating this Sublease and may perform any covenant or agreement or cure any condition creating or giving rise to a default or Event of Default under this Sublease or under the Primary Lease, and Sublessee agrees to pay to Sublessor on demand, as Additional Rent, the amount expended by Sublessor in performing such covenants or agreements or satisfying or observing such condition. Sublessor, and Sublessor's agents, representatives and employees, will have the right to enter the Premises in the exercise of such rights and such entry and such performance will not terminate this Sublease or constitute an eviction of Sublessee; or

(ii) At Sublessor's sole option, Sublessor may terminate this Sublease by written notice thereof to Sublessee or Sublessor may terminate Sublessee's right of possession to the Premises, without terminating this Sublease. In either such event, Sublessee must surrender (in accordance with the terms and conditions of this Sublease) possession of and vacate the Premises immediately and must deliver possession thereof to Sublessor, and Sublessee hereby grants to Sublessor, to the extent permitted by applicable law, full and free license to thereupon enter the Premises, in whole or in part, with or without process of law, to change any and all door locks without notice of from whom the new key may be obtained, to deny Sublessee access to the Premises and to expel or remove Sublessee and any other person, firm or corporation who may be occupying the Premises or any part thereof and remove any and all property therefrom, using such lawful force as may be necessary. Upon either Sublessor's termination of this Sublease or termination of Sublessee's right of possession to the Premises without terminating this Sublease, as provided herein, Sublessor will in either such event be entitled to recovery from Sublessee of all damages to which Sublessor may be entitled hereunder or at law by virtue thereof, including (without limitation) all costs and losses incurred by Sublessor as a result of the Event of Default by Sublessee hereunder and any expenses which Sublessor may incur in effecting compliance with Sublessee's obligations under this Sublease, all of which sums Sublessee agrees to reimburse to Sublessor on demand.

C. No Termination or Waiver. Institution of a forcible detainer action to re-enter the Premises will not be construed to be an election by Sublessor to terminate this Sublease. Sublessor may collect and receive any Rent due from Sublessee and the payment thereof shall not constitute a waiver of or affect any notice or demand given, suit instituted, or judgment obtained by Sublessor, or be held or deemed to waive or alter the rights or remedies which Sublessor may have at law or in equity or by virtue of this Sublease at the time of such payment.

D. Remedies Non-exclusive. All rights and remedies of Sublessor enumerated in this Sublease are cumulative and will not exclude any other right or remedy allowed by law. All such rights and remedies may be exercised and enforced concurrently, whenever and as often as necessary.

E. Sublessor's Contractual Security Interest and Lien. Sublessor will have a lien upon, and Sublessee hereby grants to Sublessor a security interest in, all personal property, furniture and equipment of Sublessee located in the Premises, as security for the payment of all Rent and the performance of all other obligations of Sublessee required by this Sublease. At any time after an Event of Default by Sublessee occurs hereunder, Sublessor may seize and take possession of any and all such personal property and equipment in accordance with applicable law, and Sublessor will have the right, after twenty (20) days' written notice to Sublessee, to sell such personal property and equipment so seized at public or private sale and upon such terms and conditions as to Sublessor may appear advantageous. After the payment of all charges incident to such sale, the proceeds of such sale will be applied to the payment of any and all amounts due to Sublessor pursuant to this Sublease. In the event there is any surplus remaining after the payment of all amounts due to Sublessor, such surplus will be held by Sublessor and applied in payment of future Rent as it becomes due and any surplus remaining after payment of all such Rent will be paid over to Sublessee. In its exercise of rights pursuant to this paragraph, Sublessor will have all of the rights and remedies of a secured party under the Uniform Commercial Code or other equivalent and applicable laws of the jurisdiction in which the Premises are located which relate to the grant and perfection of security interests of the nature granted pursuant to this paragraph, and, upon request by Sublessor, Sublessee must execute and deliver to Sublessor a financing statement or equivalent or similar applicable instrument in form sufficient under applicable law to perfect the security interest of Sublessor in the aforementioned personal property, furniture and equipment and all proceeds thereof. A photographic reproduction of this Sublease will be sufficient as a financing statement, but may be filed as such only if Sublessee fails to execute and deliver a financing statement requested by Sublessor hereunder within five (5) business days of such request.

19. Miscellaneous Provisions.

A. Governing Law and Forum. THIS SUBLEASE WILL BE GOVERNED BY AND CONSTRUED UNDER AND IN ACCORDANCE WITH THE LAWS OF THE JURISDICTION IN WHICH THE PREMISES ARE LOCATED. BY EXECUTING THIS SUBLEASE, EACH PARTY HERETO EXPRESSLY (a) CONSENTS AND SUBMITS TO PERSONAL JURISDICTION

CONSISTENT WITH THE PREVIOUS SENTENCE, (b) WAIVES TO THE FULLEST EXTENT PERMITTED BY LAW, ANY CLAIM OR DEFENSE THAT SUCH VENUE IS NOT PROPER OR CONVENIENT AND (c) CONSENTS TO SERVICE OF PROCESS IN ANY MANNER AUTHORIZED BY _____ LAW. ANY FINAL JUDGMENT ENTERED IN AN ACTION BROUGHT HEREUNDER SHALL BE CONCLUSIVE AND BINDING UPON THE PARTIES HERETO.

B. Parties Bound. This Sublease will be binding on and inure to the benefit of each of the parties hereto and their respective successors and permitted assigns. Notwithstanding anything to the contrary set forth herein, it is hereby agreed that Sublessor has the right to assign, transfer, pledge or otherwise convey any interest of Sublessor in the Premises, the Primary Lease and/or this Sublease, and Sublessee agrees that in the event of any such transfer, Sublessor will automatically be released from all liability under this Sublease accruing from and after the date of such transfer of interest by Sublessor, and Sublessee agrees to thereupon look solely to the transferee for the performance of Sublessor's obligations hereunder accruing from and after the date of such transfer of interest by Sublessor.

C. Partial Invalidity. In case any one or more of the provisions contained in this Sublease is for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability will not affect any other provisions hereof and this Sublease will be construed as if such invalid, illegal, or unenforceable provisions had never been included herein.

D. Prior Agreements Superseded. This Sublease constitutes the sole and entire agreement of the parties with respect to the subject matter hereof and supersedes any prior understandings or written or oral agreement between the parties respecting such subject matter.

E. Disclaimer of Warranty. SUBLESSEE HEREBY EXPRESSLY DISCLAIMS ANY IMPLIED WARRANTY THAT THE PREMISES ARE SUITABLE FOR SUBLESSEE'S INTENDED PURPOSE, AND SUBLESSEE'S OBLIGATION TO PAY RENT AND OTHER CHARGES HEREUNDER IS NOT DEPENDENT UPON THE CONDITION OF THE PREMISES OR THE PERFORMANCE BY SUBLESSOR OF ANY OBLIGATIONS HEREUNDER. SUBLESSEE WILL CONTINUE TO PAY THE RENT AND OTHER CHARGES DUE AND PAYABLE BY SUBLESSEE HEREUNDER WITHOUT ABATEMENT, SET OFF OR DEDUCTION, NOTWITHSTANDING ANY BREACH OR ALLEGED BREACH BY SUBLESSOR OF SUBLESSOR'S DUTIES OR OBLIGATIONS HEREUNDER, WHETHER EXPRESS OR IMPLIED.

F. Attorneys' Fees. If any action at law or in equity, including an action for declaratory relief, is brought by other party hereto to enforce or interpret the provisions of this Sublease, the prevailing party in such action will be entitled to recover from the non-prevailing party such prevailing party's reasonable attorneys' fees and costs incurred, which fees and costs may be set by the court in the trial of such action or may be enforced in a separate action for that purpose, and which fees and costs shall be in addition to any other relief which may be awarded in such action.

G. Counterparts. To facilitate execution of this Sublease, this Sublease may be executed in one or more counterparts as may be convenient or required, and an executed copy of this Sublease delivered by facsimile will have the effect of an original, executed instrument. All counterparts of this Sublease will collectively constitute a single instrument; but, in making proof of this Sublease, it will not be necessary to produce or account for more than one such counterpart. It will not be necessary for the signature of, or on behalf of, each party hereto, or that the signature of all persons required to bind any such party, appear on each counterpart of this Sublease. Each signature page to any counterpart of this Sublease may be detached from such counterpart without impairing the legal effect of the signatures thereon and thereafter attached to another counterpart of this Sublease identical thereto except having attached to it additional signature pages.

H. No Offer. The submission of this Sublease to Sublessee should not be construed as an offer, nor will Sublessee have any rights hereunder or to the Premises, unless and until Sublessor has executed a copy of this Sublease and delivered the same to Sublessee.

I. Time of Essence. Time is of the essence in this Sublease.

J. Survival of Sublessee Obligations. Sublessee's obligations under this Sublease (including, without limitation, each indemnity agreement and hold harmless agreement of Sublessee contained herein) will survive the expiration or earlier termination of this Sublease.

K. Only Sublessor/Sublessee Relationship. Nothing contained in this Sublease will be deemed or construed by the parties hereto or by any third party to create the relationship of principal and agent, partnership, joint venture or any association between Sublessor and Sublessee, it being expressly understood and agreed that nothing contained in this Sublease will be deemed to create any relationship between Sublessor and Sublessee other than the relationship of sublessor and sublessee.

L. Headings: Miscellaneous. The captions and/or headings of the several articles, paragraphs and sections contained herein are for convenience only and do not define, limit or construe the contents of such articles, paragraphs or sections. Any reference herein to an article, paragraph or section shall mean and refer to an article, paragraph or section of this Sublease unless otherwise expressly specified herein. This Sublease may not be amended or modified by any act or conduct of the parties or by oral agreements unless reduced and agreed to in writing signed by both Sublessor and Sublessee. No waiver of any of the terms of this Sublease will be binding upon Sublessor unless reduced to writing and signed by Sublessor. Neither Sublessor's failure to enforce or require strict performance of any provision of this Sublease, nor Sublessor's acceptance of Rent or other charges with knowledge of a breach, default or Event of Default hereunder, will be a waiver of such breach, default or Event of Default or any future breach, default or Event of Default hereunder.

M. Notices. Any notice under this Sublease must be in writing, and must be given or served by (i) personal delivery via a recognized independent courier service (providing reasonable proof of such delivery), (ii) depositing the same in the United States mail, postage prepaid, certified mail, return receipt requested, in either such event addressed to the party to be notified at the address stated in this Sublease hereinbelow or such other address in the continental United States of which notice has been given to the other party in the manner provided herein, or (iii) via facsimile to the respective fax numbers of the parties hereto as set forth hereinbelow, with either electronic or telephonic verification of receipt, so long as the original of the facsimile notice is deposited in the United States mail within three (3) days thereafter. Notice by personal delivery or via courier will be effective upon receipt, notice by mail will be effective upon deposit in the United States mail in the manner described above and notice by facsimile shall be effective upon electronic or telephonic verification of receipt.

N. Interpretation. When used herein, the singular includes the plural and the plural the singular, and words importing any gender include the other gender. The terms and conditions of this Sublease represent the result of negotiations between Sublessor and Sublessee, each of which were represented and/or had the opportunity to be represented by independent counsel and neither of which has acted under compulsion or duress; consequently, the normal rule of construction that any ambiguity be resolved against the drafting party will not apply to the interpretation of this Sublease or of any exhibits, addenda or amendments hereto.

O. Exhibits. All exhibits attached to this Sublease are deemed to be incorporated in this Sublease as if fully set forth hereinabove.

P. Holidays. If the date upon which any of the duties or obligations hereunder to be performed occurs on a Saturday, Sunday or legal holiday, then, provided that performance of such obligation is not earlier required under the Primary Lease, the due date for performance of any duty or obligation will thereupon be automatically extended to the next succeeding business day.

Q. Authority. The individual executing this Sublease on behalf of Sublessee represents and warrants to Sublessor that Sublessee has full right and authority to enter into this Sublease and performance obligations hereunder.

R. Entry by Sublessor. Sublessor and its representatives will have the right, at all reasonable times, to enter upon the Premises for the purpose of examining and inspecting the

same; provided, however, this section will not be construed as imposing any obligation upon Sublessor to inspect the Premises.

S. Waiver of Jury Trial. IT IS AGREED BY AND BETWEEN SUBLESSOR AND SUBLESSEE THAT THE RESPECTIVE PARTIES HERETO WILL AND THEY HEREBY DO, TO THE EXTENT PERMITTED BY APPLICABLE LAW, WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER OF THE PARTIES HERETO AGAINST THE OTHER ON ANY MATTERS ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS SUBLEASE, THE RELATIONSHIP OF SUBLESSOR AND SUBLESSEE, OR SUBLESSEE'S USE OR OCCUPANCY OF THE PREMISES. SUBLESSEE FURTHER AGREES THAT, TO THE EXTENT PERMITTED BY APPLICABLE LAW, SUBLESSEE WILL NOT IMPOSE ANY COUNTERCLAIM IN A SUMMARY PROCEEDING OR IN ANY ACTION BASED ON NON-PAYMENT OF RENT OR ANY OTHER PAYMENT REQUIRED BY SUBLESSEE HEREUNDER.

T. Defined Terms. Unless otherwise specifically defined in this Sublease, capitalized terms utilized in this Sublease will have the meaning ascribed to such terms in the Primary Lease.

U. Termination Right. Notwithstanding anything to the contrary set forth herein, Sublessee will have the right to terminate this Sublease effective as of any time between _____ and _____ (the "Termination Period") by providing Sublessor written notice of such termination ninety (90) days prior to the effective date for such termination. For example, if Sublessee desires to terminate this Sublease effective as of _____, Sublessee would have to provide notice of such termination to Sublessor not later than _____. If Sublessee fails to timely exercise such termination right during the Termination Period as provided above, such termination right will terminate and become of no further force and effect. If Sublessee does timely notify Sublessor of its election to terminate during the Termination Period, Sublessee must pay to Sublessor concurrently with delivery of notice of such termination a Termination Fee (herein so called) in an amount equal to \$ _____. If Sublessee fails to deliver the Termination Fee with its notice of termination as provided in the immediately preceding sentence, such termination notice will be null and void and deemed ineffective until such time as a subsequent termination notice is delivered to Sublessor which is accompanied by the Termination Fee.]

V. Guaranty. The obligations of Sublessee under this Sublease are guaranteed by _____ ("Guarantor") pursuant to the terms of that certain Guaranty Agreement (the "Guaranty") in the form attached hereto as Exhibit " " and made a part hereof for all purposes, which Guaranty has been executed by Guarantor concurrently with the execution of this Lease.]

W. Landlord's Consent. Sublessor and Sublessee each hereby agree that, pursuant to the Primary Lease, Landlord must consent to this Sublease and the terms of this Sublease. Accordingly, as a condition precedent to the effectiveness of this Sublease, Landlord must execute and deliver to Sublessor within _____ () days after the Effective Date of this Sublease a Landlord's Consent to Sublease in form and substance substantially similar to that set forth on Exhibit " " attached hereto and made a part hereof for all purposes. In the event Sublessor fails to obtain the Landlord's Consent to Sublease within such _____ () day period, this Sublease will terminate and will be of no further force or effect, in which event neither party will have any further rights or obligations hereunder, except as is otherwise provided hereunder (including, for example, but without limitation, the survival, notwithstanding such termination, of any indemnity obligations which by the express terms of this Sublease survive the expiration or termination hereof).]

X. Recognition and Nondisturbance Agreement. As a condition precedent to the effectiveness of this Sublease, Sublessee has required that Landlord execute and deliver to Sublessee within thirty (30) days after the Effective Date of this Sublease a Recognition and Nondisturbance Agreement substantially in the form attached hereto as Exhibit " " and made a part hereof for all purposes. If Sublessee fails to receive the Recognition and Nondisturbance Agreement within such thirty (30) day period, Sublessee will have the right to terminate this Sublease by delivering written notice of such

election to Sublessor within five (5) days after the expiration of such thirty (30) day period, whereupon this Sublease will terminate and neither party will have any further rights or obligations with respect hereto. If Sublessee fails to deliver such termination notice to Sublessor within such five (5) day period, Sublessee's right to terminate this Sublease will terminate and become of no further force or effect and this Lease will continue in full force and effect pursuant to the terms hereof.]

IN WITNESS WHEREOF, the parties hereto have caused this Sublease to be executed by their respective duly authorized representatives, effective as of the date first hereinabove written.

SUBLESSOR:

a _____

By: _____

Name: _____

Title: _____

Address: _____

Phone No.: _____

Fax No.: _____

SUBLESSEE:

a _____

By: _____

Name: _____

Title: _____

Address: _____

Phone No.: _____

Fax No.: _____

List of Exhibits:

- | | | |
|---------------|---|--|
| Exhibit "A" | = | Copy of Primary Lease |
| Exhibit "B" | = | Description of Premises |
| Exhibit "___" | = | Renewal Option |
| Exhibit "___" | = | Sublease Improvements Agreement |
| Exhibit "___" | = | Schedule of Personal Property and Price |
| Exhibit "___" | = | Guaranty Agreement |
| Exhibit "___" | = | Landlord's Consent to Sublease |
| Exhibit "___" | = | Recognition and Nondisturbance Agreement |

APPENDIX C-2

SUBLEASE AGREEMENT
DRAFTING TIPS FOR SUBLESSORS

- The sublease should specifically provide that the sublease will automatically terminate upon the expiration or termination for any reason of the primary lease.
- The term of the sublease should not extend beyond the term of the primary lease. The sublease should provide that, at the end of the subleased term, the sublessee must surrender the premises to the sublessor in accordance with the terms of the primary lease.
- If the sublessor is relying upon the sublessee's rent payment to pay its rent under the primary lease, the timing of the sublessee's payments must be such that the sublessor has time to make the payments under the primary lease.
- The sublease should clearly explain the basis for any additional rent being passed through to the sublessee.
- The sublease should provide that the sublessee assumes and agrees to perform the obligations of the sublessor as the tenant under the primary lease as such obligations relate to the subleased premises.
- The terms of the primary lease should be incorporated into the sublease by reference, with any exceptions to such incorporation being specifically noted. Terms of the primary lease which the sublessor should specifically exclude from incorporation include: (i) landlord work requirements; (ii) tenant improvement allowances; (iii) tenant contingencies or termination rights; (iv) delivery of possession conditions relating to the initial occupancy; (v) representations relating to title; (vi) warranties relating to the initial construction work; and (vii) brokerage commissions.
- The sublease should provide that any references in the primary lease to "Landlord" are deemed to be references to the primary landlord only for purposes of: (i) any provisions dealing with work to be performed or services or statements to be furnished by the primary landlord pursuant to the primary lease; and (ii) casualty restoration obligations. The sublessor's sole obligation should be to use reasonable efforts to cause the obligations of the primary landlord to be fulfilled by the primary landlord.
- The sublease should provide that references in the primary lease to "Landlord" are deemed to be references to both sublessor and the primary landlord for purposes of: (i) all provisions requiring the consent of the landlord; (ii) all provisions requiring notice to the landlord; and (iii) all insurance provisions (including requirement of being named additional insured). However, the sublessor should avoid a broad provision which provides that all references in the primary lease to the "Landlord" are deemed to be references to the sublessor.
- The sublease should contain an exculpation of sublessor for: (i) any of the landlord's obligations under the primary lease; (ii) any interruptions in utilities or services to the premises; (iii) any loss of or damage to any property of sublessee; (iv) the failure of landlord to perform any obligation under the primary lease; or (v) any damage or disturbance caused by others.
- The sublease should provide that no default of the landlord under the primary lease will affect the sublease or waive or defer the performance of any of sublessee's obligations under the sublease.
- The sublease should specifically set forth the insurance requirements which are the responsibility of the sublessee.

- The sublease should specifically prohibit any additional assignment or subletting on behalf of the sublessee without the consent of the landlord and the sublessor.
- The notice and cure periods set forth in the default and remedies sections under the sublease should leave sublessor enough time to cure a default under the primary lease.
- The sublease should specifically provide that nothing contained in the sublease will be deemed or construed to create any relationship other than that of sublessor and sublessee.
- If the landlord's consent is required under the primary lease, then the sublease should provide that, as a condition precedent to the effectiveness of the sublease, the landlord must execute and deliver a landlord consent.
- If the sublessee is to make improvements to the premises, such improvements must be subject to the alteration provisions of the primary lease and the applicable provisions of the work letter relating to the primary lease.
- Incorporate the casualty provisions of the primary lease, but disclaim any obligation on the part of the sublessee to rebuild.

APPENDIX C-3

SUBLEASE AGREEMENT DRAFTING TIPS FOR SUBLESSEES

- If possible, the sublessee should require a recognition and nondisturbance agreement from the landlord, whereby the landlord agrees to recognize the sublease as a direct lease between the landlord and the sublessee in the event of a termination under the primary lease.
- The sublease should contain a representation from the sublessor that the sublessee has been provided true, correct and complete copies of the primary lease and all amendments thereto. The primary lease and all such amendments should be attached to the sublease (with confidential provisions redacted, if necessary).
- The terms of the primary lease should be incorporated into the sublease by reference on a modified basis, specifically excluding from such incorporation: (i) initial tenant built-out requirements and fixturing periods; (ii) opening covenants; (iii) brokerage commissions; (iv) obligation to restore at the end of the term (if the sublease is not coterminous with the primary lease); (v) use limitations which should not apply to the sublessee; and (vi) any landlord contingencies or termination rights (e.g. financing or zoning contingencies).
- The sublease should require the sublessor to: (i) forward all notices up to landlord on behalf of sublessee; and (ii) forward all notices received by sublessor from the landlord down to the sublessee.
- The sublease should require the sublessor to join with the sublessee in any proper action or proceeding in the name of sublessor, if necessary, to require and obtain performance by the landlord under the terms of the primary lease and/or to collect damages resulting from a breach by the landlord of its obligations under the primary lease.
- The sublease should require the sublessor to covenant to pay all rent and additional rent required under the primary lease (provided sublessee timely pays all rent and additional rent to sublessor under the sublease).
- The sublease should attempt to restrict sublessor from unreasonably withholding consent to any request that the landlord consents to.
- The sublessee should attempt to restrict the landlord from terminating the primary lease or amending the primary lease in a manner which would adversely affect sublessee's use of the subleased premises or increase its obligations or decrease its rights under the sublease.
- The sublessor should indemnify the sublessee against termination of the primary lease resulting from a default by the sublessor which is not caused by parallel default by the sublessee. (The sublessor will try to limit this indemnity solely to its unilateral nonpayment of rent under the primary lease).
- If the primary lease requires the consent of the landlord to the sublease, the sublessee must ensure that such consent is obtained.
- If the property of which the premises is a part or subject of a mortgage loan, the sublessee should ensure that either: (i) the sublessee receives a subordination, nondisturbance and attornment agreement from the landlord's lender; or (ii) it receives the benefits of any subordination, nondisturbance and attornment agreement executed by such lender and sublessor with respect to the primary lease.
- It is standard practice for a landlord to limit its liability under the lease to its equity interest in the property of which the premises are a part. In many cases, a sublessor will include a similar provision in

its sublease, attempting to likewise limit the sublessor's liability. However, unlike the landlord under a lease, the sublessor has no real equity interest in the premises and, therefore, a sublessee should never agree to this provision. The sublessee should also be careful not to unwittingly limit the sublessor's liability through careless drafting of the incorporation-by-reference language of the sublease. For example, if the sublease contains broad incorporation language and further provides, as many do, that all references in the primary lease to the "Landlord" will be deemed to mean the "sublessor," then the combination of those two provisions may result in an unintentional limitation of the sublessor's liability.

APPENDIX D-1

FORM OF RECOGNITION AND NONDISTURBANCE AGREEMENT

RECOGNITION AND NONDISTURBANCE AGREEMENT

THIS RECOGNITION AND NONDISTURBANCE AGREEMENT is made and entered into effective as of the _____ day of _____ by and among _____ ("Primary Landlord"), _____ ("Sublessor") and _____ ("Sublessee").

RECITALS:

A. Primary Landlord is the owner of premises described on Exhibit "A", attached hereto, which premises are subject to a certain lease (hereinafter referred to as the "Primary Lease") dated _____ between the Primary Landlord, as landlord, and _____, as tenant (hereinafter sometimes referred to as the "Sublessor").

B. Sublessor, as lessor, and the Sublessee, as lessee, desire to enter into a sublease (the "Sublease") of **[a portion of]** said premises (the "Subleased Premises").

C. The parties hereto desire to assure the Sublessee's possession of the premises to be sublet under the Sublease upon the terms and conditions therein mentioned, irrespective of a termination of the Primary Lease.

AGREEMENT:

NOW, THEREFORE, in consideration of the covenants hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by each of the parties hereto, the parties hereto hereby covenant and agree as follows:

1. Consent of Primary Landlord. Primary Landlord consents to the execution and delivery of the Sublease in the form attached hereto as Exhibit "B", **subject to the terms and provisions of that certain Landlord Consent, dated _____, 20____.**

2. Primary Lease Certification. Primary Landlord and Sublessor hereby certify that the Primary Lease has been fully executed and is in full force and effect, unmodified and unamended except as may be set forth on Exhibit "C" attached hereto and made a part hereof for all purposes. Primary Landlord and Sublessor further certify that, to the best of their respective knowledge, there exists no default or event of default nor any circumstance which, with the passage of time and/or the giving of appropriate notice, would constitute a default or an event of default as of the date hereof under any of the terms of the Primary Lease. Sublessee hereby agrees that so long as the Primary Lease remains in effect, the Sublease will be subordinate to the terms of the Primary Lease.

3. No Termination. Primary Landlord will not join Sublessee as a party defendant in any action or proceeding for the purpose of terminating all or any portion of Sublessee's right, title and interest in and to the Subleased Premises or Sublessee's right, title and interest in, to and under the Sublease because of any default or event of default by Sublessor under the Primary Lease as long as Sublessee is not in default (beyond any applicable notice and cure periods) in the payment of rent or additional rent or in the performance of any of the terms, covenants or conditions of Sublessee under the Sublease.

4. Nondisturbance and Attornment. If Sublessor's interest in, to or under the Primary Lease or in and to the Subleased Premises is terminated for any reason **[other than due to condemnation or casualty]** (a "Primary Lease Termination"), then **[provided Sublessee is not in default under the Sublease beyond any applicable notice and cure period,]** (a) Primary Landlord will not disturb Sublessee's right to use nor Sublessee's possession of the Subleased Premises, (b) the Sublease will continue as a direct lease between Primary Landlord and Sublessee with the same force and effect as if Primary Landlord, as lessor, and Sublessee, as lessee, had entered into a lease as of the date of termination of the Primary Lease containing the same terms, covenants and conditions as those contained in the Sublease for a term equal to the unexpired term of the Sublease and (c) Sublessee hereby agrees to attorn to Primary Landlord as its landlord under the Sublease, such attornment to be immediately effective and self-operative without the execution of any further

instruments by any party hereto. In such event, Sublessee agrees to enter into a new direct lease with Primary Landlord, if so requested by Primary Landlord, upon the same terms and conditions as the Sublease. **[Notwithstanding the foregoing, Sublessee will have no obligation to pay rent or additional rent to Primary Landlord until Sublessee receives written notice from Primary Landlord that Primary Landlord has succeeded to the interest of Sublessor under the Sublease.]** The respective rights and obligations of Sublessee and Primary Landlord upon such attornment will, for the balance of the term of the Sublease, be the same as set forth in the Sublease.

5. Rights Upon Succession. Upon a Primary Lease Termination, Primary Landlord will be bound to Sublessee under all of the terms and conditions of the Sublease, and Sublessee will, from and after the effective date of such Primary Lease Termination, have the same rights and remedies against Primary Landlord for the breach of any agreement or covenant contained in the Sublease that Sublessee might have had under the Sublease against Sublessor; provided, however, that Primary Landlord will not (a) be liable to Sublessee for any damages arising against Sublessor which accrue prior to the effective date of the Primary Lease Termination, (b) be bound by any rent which Sublessee might have paid to Sublessor more than one (1) month in advance, (c) be bound by any material amendment or modification of the Sublease made after the date hereof without Primary Landlord's consent (which consent may not be unreasonably withheld, conditioned or delayed) or (d) **[be subject to any offsets or defenses which Sublessee might have against Sublessor]**.

6. Amendments. Neither the Sublessee nor its successors or assigns may enter into any agreement which materially modifies, surrenders or merges the Sublease. Any agreement made in contravention to the provisions of this Paragraph 6 will be of no force or effect as to the Primary Landlord.

7. Liability of Primary Landlord. The term "Primary Landlord" as used in this Agreement means only the owner for the time being of the aforementioned Subleased Premises, so that in the event of any sale or other transfer of any interest therein, the Primary Landlord will be entirely freed and relieved of all covenants and obligations of the Primary Landlord hereunder from and after the date of the transfer. The provisions of this Agreement, however, will bind any subsequent owner of the Subleased Premises.

8. Notices. Any notice or other communication that is required or permitted to be given under the terms of this Agreement (each a "Notice") must be in writing and will be deemed to have been duly given (a) upon being deposited in the mail, postage prepaid via certified mail, return receipt requested, or (b) when personally delivered, or (c) when sent by overnight courier, or (d) when given by facsimile, telecopier or telex with a copy either personally delivered the next day or sent by overnight courier the same day, in each case, to the parties hereto at the following addresses or at such other address and/or such additional parties in the United States of America as any party hereto shall hereafter specify by notice given and received in the manner provided in this Paragraph 8.

If to Primary Landlord:

Attn: _____
Telephone: _____
Fax: _____

If to Sublessor:

Attn: _____
Telephone: _____
Fax: _____

If to Sublessee:

Attn: _____
Telephone: _____
Fax: _____

[The Remainder of this Page Has Been Intentionally Left Blank]

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement the day and year first above written.

[NAME OF PRIMARY LANDLORD]

By: _____
Name: _____
Title: _____

[NAME OF SUBLESSEE]

By: _____
Name: _____
Title: _____

[NAME OF SUBLESSOR]

By: _____
Name: _____
Title: _____

APPENDIX D-2

RECOGNITION AND NONDISTURBANCE AGREEMENT
DRAFTING TIPS FOR LANDLORDS

- The agreement should contain a confirmation by the sublessee of the subordination of the sublease to the primary lease.
- The agreement should provide that the sublessee will provide to the landlord notice and an opportunity to cure any defaults by sublessor under the sublease.
- The agreement should contain a standard attornment provision whereby the sublessee agrees to attorn to the landlord as its landlord under the sublease if the primary lease is terminated for any reason.
- The agreement should provide that, if requested by the landlord, the sublessee will enter into a new direct lease with the landlord upon the same terms and conditions as are contained in the sublease.
- The agreement should provide that upon the termination of the primary lease, the landlord will not: (i) be liable to the sublessee for any damages arising against the sublessor which occurred prior to the effective date of such termination; (ii) be bound by any rent which the sublessee might have paid to the sublessor more than one (1) month in advance; (iii) be bound by any material amendment or modification of the sublease made without the landlord's consent; and (iv) be subject to any offsets or defenses which the sublessee might have against the sublessor. In most cases, all of these provisions but (iv) will be acceptable to the sublessee.
- The landlord might require a provision which provides that if the rent payable under the primary lease exceeds the rent payable under the sublease, then, as a condition of the landlord's recognition agreement, the sublessee must increase its rent payable under the sublease to an amount equal to the rent payable under the primary lease for the same space.

APPENDIX D-3

RECOGNITION AND NONDISTURBANCE AGREEMENT
DRAFTING TIPS FOR SUBLESSEES

- The agreement should provide that the landlord consents to the execution and delivery of the sublease. If no separate Landlord Consent document is executed, then the sublessee should also attempt to obtain each of those provisions suggested pursuant to Appendix B-3.
- The agreement should contain a certification of landlord and the sublessor that the primary lease has been fully executed and is in full force and effect, unmodified and unamended, except as may be otherwise provided.
- The agreement should contain a certification on the part of the landlord and the sublessor that, to the best of their respective knowledge, there exists no default under the primary lease.
- The agreement should provide that the landlord will not join the sublessee as a party defendant in any action or proceeding for purposes of terminating the sublease because of any default by the sublessor under the primary lease.
- The agreement should provide the standard recognition and nondisturbance language, (see Section 4 of the form of agreement set forth on Appendix D-1).
- The agreement should provide that upon the termination of the primary lease, the primary landlord will be bound to sublessee under the terms and conditions of the sublease, subject to certain prenegotiated exceptions.

APPENDIX E-1

FORM OF ASSIGNMENT OF LEASE

ASSIGNMENT OF LEASE

This ASSIGNMENT OF LEASE ("Assignment") is made and entered into effective as of the _____ day of _____, 20____, by and between _____, a _____ ("Assignor"), _____, a _____ ("Assignee") and _____, a _____ ("Landlord").

RECITALS:

A. Landlord or its predecessor in interest, and Assignor or its predecessor in interest, have heretofore entered into that certain lease dated _____, _____, for premises (the "Premises") described as Suite(s) or Room(s) _____, initially containing approximately _____ square feet in the property (the "Property") known as _____ located at _____, which lease has heretofore been amended or assigned or the Premises subleased or the term extended by instruments dated _____ (such lease and all such amendments, prior assignments, subleases and extensions shall hereinafter be referred to collectively as the "Lease").

B. Assignor desires to assign all of its right, title and interest in the Lease to Assignee, Assignee desires to accept and assume the same, and Landlord is willing to consent to the proposed Assignment, all on the terms and conditions hereof.

AGREEMENT:

NOW THEREFORE, in consideration of the mutual terms and conditions herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. Assignment. Assignor hereby TRANSFERS, ASSIGNS, GRANTS AND CONVEYS to Assignee, all of Assignor's right, title and interest, in, to and under the Lease, including any security deposit or prepaid rent thereunder. Notwithstanding the foregoing, Assignor reserves the right to receive any refunds of overpayments from Landlord relating to the period prior to the Effective Date hereof. **[Assignor hereby agrees to remain liable for and as a guarantor of all obligations of tenant under the Lease both before and after the Effective Date of this Assignment, through the principal and any extended term. Assignor will not be released from any liability by any further assignment or subletting, whether or not Assignor has received notice or has consented to the same. Landlord will have all remedies against Assignor as are provided in the Lease in the same manner as if this Assignment had not been made. The exercise by Landlord of any remedy against Assignee will not preclude Landlord from the exercise of the same or other remedies against Assignor at the same or different times.]**

2. Acceptance. Assignee hereby accepts the Assignment granted herein, and assumes and agrees to make all payments and to perform all other obligations of Assignor as the tenant under the Lease **[accruing from and after the Effective Date of this Assignment]**. Assignee may make no further assignment of the Lease or sublease of the Premises, or any part thereof, nor may Assignee mortgage, pledge or hypothecate the Lease, without Landlord's prior written consent, which Landlord may withhold in its sole discretion, except as provided to the contrary in the Lease. **[The exercise by Landlord of any remedy against Assignor will not preclude Landlord from the exercise of the same or other remedies against Assignee at the same or different times. In recognition that Landlord must continue to have all remedies otherwise available to Landlord for defaults under the Lease, including the right to apply any security deposit, terminate the Lease and/or recover possession, regardless of whether Assignor or Assignee committed such defaults, Assignee's liability hereunder will in no way be limited to those matters arising after the Effective Date, but will extend to any and all obligations under the Lease arising prior to the Effective Date, as well as the performance of all**

obligations arising thereafter, and Assignee must look solely to Assignor for indemnity or reimbursement of any expenses, costs, damages or liabilities incurred with respect to any default in the performance of such obligations relating to the period prior to the Effective Date.]

3. Effective Date. The effective date of this Assignment is _____, 20____ ("Effective Date"). [As between Assignor and Assignee,] [A]ll obligations under the Lease arising, accruing or relating to the period before the Effective Date are allocated to Assignor and all obligations arising, accruing or relating to the period thereafter shall be allocated to Assignee. If the Effective Date occurs other than at the end of any period for which rentals or other charges under the Lease accrue or are due, then such rentals or other charges will be prorated between Assignor and Assignee on a per diem basis. Any as yet undetermined charges may be reasonably estimated by Landlord in its sole discretion, subject to re-proration between Assignor and Assignee after the actual charges have been determined.

[4. Release Fee. In consideration of the release set forth in Paragraph 5 below, within three (3) business days the Effective Date, Assignor must pay to Landlord a release fee of \$_____ in good funds (i.e., cashier's check or wire transfer). If Assignor fails to make the required payment in the manner set forth herein, Assignor will be in default under this Agreement and Landlord may exercise all remedies available at law or in equity against Assignor.]

[5. Release and Surrender of Assignor. Except as otherwise expressly set forth in this Assignment, Assignor will be discharged from any and all further obligations under the Lease as of the Effective Date. Notwithstanding the foregoing, Assignor will remain liable for all indemnities, liabilities and obligations of Assignor which expressly survive the termination of the Lease or which accrued prior to the Effective Date but have not yet been performed. Assignor must surrender the Premises to Landlord on or before 11:59 p.m. on the date prior to the Effective Date, in its present condition. Assignor relinquishes any right to any improvements, fixtures or equipment in the Premises.]

6. Representations; Indemnity. [As between Assignor and Assignee, without in any way affecting, limiting or waiving any rights of Landlord against either Assignor or Assignee under the Lease,] Assignor represents, warrants and covenants with Assignee that as of the Effective Date: (i) the Lease is in full force and effect; (ii) all sums due and payable under the Lease as of the Effective Date have been paid in full; (iii) any amounts that become payable after the Effective Date relating to the period prior to the Effective Date must be paid by Assignor promptly; (iv) the Lease has not been previously assigned, subleased, extended, modified, or amended, except as noted in this Assignment; (v) Assignor is not in default under any of its obligations under the Lease; and (vi) a true and correct copy of the Lease (including any amendments, prior assignments, subleases, or extensions thereto) is attached hereto as Exhibit "A". Assignor further represents and warrants to both Assignee and Landlord that Landlord is not in default under any of the terms and provisions of the Lease. Landlord and Assignor warrant and represent to Assignee that the Lease attached hereto as Exhibit A is a true, correct and complete copy of the Lease and all amendments thereto. ASSIGNOR AGREES TO INDEMNIFY, DEFEND AND HOLD HARMLESS ASSIGNEE FROM AND AGAINST ANY AND ALL LIABILITY, COSTS OR DAMAGES ARISING WITH RESPECT TO ANY BREACH OF THE FOREGOING REPRESENTATIONS, WARRANTIES OR COVENANTS. ASSIGNEE AGREES TO INDEMNIFY, DEFEND AND HOLD HARMLESS ASSIGNOR FROM AND AGAINST ANY LIABILITY, COSTS OR DAMAGES ARISING WITH RESPECT TO ANY BREACH OF THE LEASE AFTER THE EFFECTIVE DATE.

7. Landlord's Consent. Landlord hereby consents to this Assignment upon the terms and conditions set forth herein. Unless and until Landlord has executed this Assignment, this Assignment is of no effect, notwithstanding that Landlord may have accepted and may continue to accept rent or the performance of other obligations by Assignee. The consent granted herein should not be construed as consent to any further assignment. The failure or delay of Landlord in seeking to enforce any provisions of the Lease or this Assignment should not be deemed a waiver of rights or remedies that Landlord may have, or a waiver of any subsequent breach of the terms and provisions therein or herein contained.

[8. **Reassignment Provision.** Assignee hereby agrees that if Assignee defaults in the performance of any obligation under the Lease, Assignor may at any time after notice thereof from Landlord cure said default, in which case Assignee shall immediately upon demand reassign the lease to Assignor, vacate and surrender possession of the Premises to Assignor, and reimburse Assignor for all amounts expended by Assignor to cure Assignee's default as well as any additional damages suffered by Assignor because of Assignee's default. If Assignee fails to reassign the Lease to Assignor within ten (10) days after demand, or to vacate and surrender the Premises to Assignor, Assignee acknowledges that Assignor will suffer irreparable injury for which there would be no adequate remedy at law, that Assignor would be entitled to an injunction to compel the reassignment of the lease and the restitution of the Premises to Assignor, and that Assignor will not oppose a motion for such injunctive relief. NOTE: INCLUSION OF THIS PROVISION MAY RENDER THE ASSIGNMENT A SUBLEASE.]

[9. **Guaranty and Consideration of Landlord's Consent to This Assignment.** The release of Assignor pursuant to the terms of this Assignment, Landlord has required the execution of a Guaranty from _____. In that regard, concurrently with the execution of this Assignment, _____ has executed and delivered to Landlord a Guaranty in the form attached hereto as Exhibit B.]

[10. **Brokers.** ASSIGNOR HEREBY AGREES TO INDEMNIFY, DEFEND AND HOLD HARMLESS LANDLORD FROM AND AGAINST ANY AND ALL CLAIMS, LOSSES, DAMAGES, COSTS OR EXPENSES OF ANY KIND OR CHARACTER ARISING OUT OF OR RESULTING FROM ANY AGREEMENT, ARRANGEMENT OR UNDERSTANDING ALLEGED TO HAVE BEEN MADE BY LANDLORD, ASSIGNOR OR ASSIGNEE WITH ANY BROKER OR FINDER IN CONNECTION WITH THE ASSIGNMENT OR THE TRANSACTION CONTEMPLATED HEREBY.]

11. **Limitation of Liability.** Except to the extent provided expressly in the Lease, no partner, trustee, director, officer, employee, beneficiary, shareholder or agent of Landlord or its agent is personally liable under or in connection with the Lease, or this Assignment, and Assignor and Assignee and their successors and assigns must look solely to Landlord's interest in the Property for the satisfaction of any claim or judgment requiring the payment of money by Landlord. The limitation of liability provided in this paragraph is in addition to, and not in limitation of, any limitation on liability applicable to Landlord provided by law or any other agreement or instrument.

12. **Notices.** Any notice given by any party to another party hereto must be given in the manner required under the Lease. The addresses set forth below supercede any addresses for notices set forth in the Lease.

LANDLORD:

ASSIGNOR:

ASSIGNEE:

13. **Successors.** Except as herein otherwise provided, this Assignment will be binding upon and inure to the benefit of the parties, and their respective heirs, executors, administrators,

successors and assigns.

[14. Submission Fee. In order to reimburse Landlord's legal and administrative expenses in reviewing this Assignment, Assignor must pay before or contemporaneously with its submission hereof for Landlord's review the non-refundable amount of _____ (\$_____) (the "Submission Fee"). Landlord's acceptance of such Submission Fee will impose no duty or obligation upon Landlord to consent to the transaction contemplated herein nor to execute this Assignment. If the foregoing Submission Fee has not been submitted before or contemporaneously with this Assignment, it will become due as an additional rental obligation under the Lease, payable upon demand by Landlord, and will become the joint and several obligation of the Assignor, and if this Assignment is executed by Landlord, of Assignee. Assignor and Assignee are jointly and severally liable for any other amounts required to be paid under the Lease in connection with the assignment of the lease, including without limitation, any required share of premiums or profits in connection therewith.]

15. Counterparts. This Assignment may be executed in multiple counterparts, each of which, once executed, will be an original and fully-binding on the parties so executing; and all such counterparts together constitute one and the same agreement.

16. Binding Offer. This Assignment will be not be binding until executed and delivered by all three parties.

IN WITNESS WHEREOF, the parties have executed this Assignment as of the date first above written.

ASSIGNOR:

_____,
a _____

By: _____
Name: _____
Title: _____

ASSIGNEE:

_____,
a _____

By: _____
Name: _____
Title: _____

LANDLORD:

_____,
a _____

By: _____
Name: _____
Title: _____

APPENDIX E-2

ASSIGNMENT OF LEASE
DRAFTING TIPS FOR LANDLORDS

- If the assignor is to remain liable under the lease, the assignment document should specifically provide that the assignor will remain liable for and the guarantor of all obligations of the tenant under the lease both before and after the effective date. The assignor should not be released from any liability by any further assignment or subletting, whether or not the assignor has received notice or consented to the assignment.
- The document should provide that the landlord will have all remedies against the assignor as are provided in the lease and in the same manner as if the assignment had not been made. In addition, the exercise by the landlord of any remedy against assignee should not preclude the landlord from the exercise of same or other remedies against the assignor.
- If the assignor has agreed to pay any sums to the landlord in exchange for a release of liability, the assignment document should specifically set forth the amount and terms of payment of such release fee.
- The assignor and/or assignee should specifically indemnify the landlord from any claims from brokers claiming a commission relating to the assignment.
- If the lease requires the assignor to pay a submission fee to cover the landlord's legal and administrative expenses in reviewing the assignment, the assignment document should specifically reference that such fees have been paid prior to or contemporaneously with the execution of the assignment.
- The landlord should ensure that the assignment document contains appropriate assumption language so that privity of contract will exist between the landlord and the assignee.

EXHIBIT E-3

ASSIGNMENT OF LEASE
DRAFTING TIPS FOR ASSIGNORS

- The document should contain granting language specifically assigning all of the assignor's right, title and interest in the lease (including any security deposit thereunder).
- The assignor should reserve the right to receive a refund of any amount overpaid to the landlord prior to the date of the assignment.
- The document should specifically provide that the assignee assumes each of the obligations of the assignor under the lease. The assignee may attempt to limit this assumption to those obligations which accrue after the effective date of the assignment.
- The document should provide that, as between assignor and assignee, all obligations under the lease accruing prior to the effective date are allocated to assignor and all obligations accruing thereafter are allocated to the assignee.
- If the landlord has agreed to release the assignor from liability, the document should specifically provide that the assignor will be discharged from any further obligations under the lease as of the effective date.
- If the landlord's consent is required, the document should contain landlord consent language.
- The document should contain an indemnity from assignee whereby assignee agrees to indemnify, defend and hold harmless assignor from and against any liability, costs or damages arising with respect to any breach of belief after the effective date.
- If the assignor is not released from liability, then either the assignment document or the landlord consent document should contain a provision which requires the landlord to provide notices of default under the lease to the assignor, in addition to the assignee.
- If the assignor is not released from liability under the lease, the assignment document might contain a reassignment provision which provides that upon the default by the assignee under the lease, the assignor may at any time after notice thereof from landlord cure such default, in which case the assignee must immediately reassign the lease to assignor and vacate and surrender the premises. Query, however, whether such a provision renders the document a sublease under the applicable law.

APPENDIX E-4

ASSIGNMENT OF LEASE
DRAFTING TIPS FOR ASSIGNEES

- The assignment should contain a representation from the assignor and the landlord that the assignee has received a true, correct and complete copy of the lease and all amendments thereto, and the lease and such amendments should be attached to such the assignment document so that there is no question as the document constituting the lease.
- Even if the landlord has agreed to release the sublessor from liability under the lease, the assignment document should provide that, as between assignor and assignee, the assignor is liable for all obligations under the lease arising prior to the effective date of the assignment. In addition, the assignor should indemnify the assignee from and against any and all liability, costs or damages arising with respect to any of the obligations under the lease accruing prior to the effective date.
- The assignor should represent, warrant and covenant with the assignee that as of the effective date: (i) the lease is in full force and effect; (ii) all sums payable under the lease have been paid in full; (iii) any amounts that become payable after the effective date, but which relate to the period prior to the effective date must be paid by assignor promptly; (iv) the lease has not been previously assigned, subleased or modified, except as otherwise noted; (v) the assignor is not in default under any of its obligations under the lease; and (vi) the landlord is not in default under any of the terms and provisions of the lease.
- If the landlord's consent is required for the assignment, the landlord should specifically consent to the assignment upon the terms and conditions set forth in the assignment document.

