

SUBLEASES: THE SAME THING AS LEASES, ONLY DIFFERENT

Andrew L. Herz^{*}
Russell G. Wohl^{**}

Editors' Synopsis: In this Article, the authors analyze the unique complexities that distinguish sublease transactions from lease assignments. The authors discuss points for consideration when drafting subleases, such as determining and evaluating the "box of rights" created by the landlord and tenant and exercising due diligence in the ensuing sublease transaction.

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^{*} Andrew L. Herz is a partner at Richards & O'Neil, LLP, New York, New York. He received his B.A. degree from Columbia College in 1968 and his J.D. degree from Columbia Law School in 1971. Mr. Herz is Co-Chair of the Office Leasing Committee, Real Property Division, American Bar Association Section of Real Property, Probate and Trust Law and former Chair of its Real Estate Management Committee.

^{**} Russell G. Wohl is an associate at Richards & O'Neil, LLP, New York, New York. He received his B.A. degree from The State University of New York at Binghamton in 1986 and his J.D. degree from St. John's University School of Law in 1989.

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I. INTRODUCTION

Sublease transactions are structured very differently from direct leases. Under a sublease, a tenant transfers only a partial interest in a lease.¹ For example, the original tenant may keep part of the original space, all of the space for some time after the sublease term, or some of the rights under the direct lease. These complexities do not exist in a lease assignment, which involves only a transfer of the entire lease to another party who steps into the tenant's shoes and usually assumes all of the responsibilities of the original tenant under the lease.²

When most lawyers think about subleasing, they focus primarily on the provisions in a direct lease that may allow, prohibit, or limit subleasing and

¹ See *OTR v. Flakey Jack's, Inc.*, 770 P.2d 629 (Wash. 1989); 49 AM. JUR. 2D *Landlord and Tenant* §§ 1077, 1157 (1995); see also MILTON R. FRIEDMAN, *FRIEDMAN ON LEASES*, § 7.401, at 362 (4th ed. 1997) (discussing the distinctions between assignments and subleases); EMANUEL B. HALPER, *SHOPPING CENTER AND STORE LEASES*, § 10.02[8], at 10-9 to 10-10 (1996) (discussing the importance of distinguishing between a sublease and an assignment); JOHN B. WOOD & ALAN M. DI SCIULLO, *NEGOTIATING AND DRAFTING OFFICE LEASES*, § 30.01, at 30-2 (1995) (introducing unique issues raised by subleasing).

² See *Block v. Brown*, 404 S.E. 2d 288 (Ga. 1991); *Weeks v. Cal-Maine Foods, Inc.*, 522 So. 2d 725 (Miss. 1988); *Siragusa v. Park*, 913 S.W. 2d 915 (Mo. App. 1996); 49 AM. JUR. 2D *Landlord and Tenant* §§ 1120, 1125, 1126 (1995); see also FRIEDMAN, *supra* note 1, § 7.401, at 362-63, 380, 382; WOOD & DISCIULLO, *supra* note 1, § 30.01[2], at 30-3.

assignment. Relatively little has been written on how to negotiate, evaluate, and review a sublease transaction from the subtenant's perspective.³

³ See Sidney G. Saltz & Martin P. Miner, *Subleases: A New Approach—A Proposal*, 34 REAL PROP. PROB. & TR. J. 1, 1 (1999); Mark A. Senn, *Assignments and Subleases: Have I Got the Right Form?*, 1999 GEO. U. L. CENTER ADVANCED COM. LEASING INST.

A sublease transaction is really two transactions in one. To a tenant, a direct lease is like a box that the landlord and the tenant have built for the tenant to live in. The landlord allows the tenant to occupy specific space and agrees to provide certain services. A sublease transaction involves two boxes: first, the one that the landlord has already built with the tenant, and second, one that the tenant and the subtenant must build together within the confines of the first.⁴

Usually, the parties to a sublease are unable, or the tenant is unwilling, to change the terms of the direct lease. For that reason, many parties consider subleasing to be easier than entering into a new lease, because the landlord and the tenant have already created an adequate set of rights and obligations between themselves.⁵ These rights and obligations are established and, for the most part, are already working well. Frequently, the subtenant simply inherits most of these predetermined rights and obligations. Because the tenant and the landlord have created a box with certain rights, the tenant or sublandlord can transfer only those rights.

The parties to a sublease usually cannot change the box that the landlord and the tenant have created, because the landlord generally has no reason to agree to do so. While this resulting inflexibility may create problems, it also creates advantages by simplifying the transaction. Many issues that landlords and tenants frequently negotiate receive little or no attention in subleases. For example, in most cases, the landlord and tenant will have negotiated major issues in the lease such as construction, permitted alterations, and non-disturbance. Most subleases do not revisit these issues. Nevertheless, a sublease has all the elements of a traditional lease transaction.⁶

⁴ See Robert V. Guido, *Which Provisions of an Overlease Should Apply in the Sublease*, 12 COM. LEASING L. & STRATEGY 8, 8 (1999); John A. Gose, *Assignment and Subletting Clauses*, Commercial Real Estate Leasing, ALI-ABA Course of Study, April 10, 1989, ALI-ABA 175.

⁵ See Saltz & Miner, *supra* note 3, at 2.

⁶ *But see* WOOD & DiSCIULLO, *supra* note 1, § 30.01, at 30-2 (discussing how “[s]ubleasing raises issues for a sublessee that are not necessarily encountered by a tenant under a lease . . .”).

Careful analysis of a sublease raises many additional issues that the practitioner should review, consider, and confirm as appropriate, including a number of due diligence items that do not exist in a straight leasing transaction.⁷ As a result, the work involved in preparing a sublease may be disproportionately high when compared to a lease transaction. Exhibit A to this Article provides an extensive due diligence checklist for a subleasing transaction, which goes beyond what parties typically consider in a routine subleasing transaction. However, in some cases these points may be crucial and so the list aims to provide a comprehensive checklist for a subtenant's counsel.

Because a subtenant generally enters into a sublease transaction after the lease term has commenced, the direct lease already may have addressed some of the basic concerns of an occupant of the space. Such concerns include determination of the commencement date; delivery of possession (insofar as this is the landlord's obligation); determination of the base amounts for escalation payments; initial construction of the premises by the landlord; and delivery of subordination, non-disturbance, and attornment agreements. For a subtenant, the lease is already a "work in progress."

II. DOES THE DIRECT LEASE WORK?

In evaluating a sublease transaction, the potential subtenant needs to decide, as a threshold issue, whether the direct lease works. This initial evaluation represents a major departure from a direct lease transaction. If a lease provision effectively prevents the potential subtenant from using the space (*e.g.*, if the lease prohibits the subtenant's anticipated use of the space), the subtenant must raise the issue with the landlord promptly or be foreclosed from the deal.

⁷ See *id.* § 30.05, at 30-45; Jerome Berkman, *Negotiable Issues in Commercial Subleasing*, 13 REAL EST. L.J. 28 (1984).

Once the subtenant knows that the direct lease can meet the needs of a sublease, the subtenant's counsel should review the lease as a whole in order to:

1. determine whether the assignment and subletting provisions of the direct lease will allow the contemplated subleasing transaction;
2. understand the existing package of rights and duties created for the tenant in the direct lease and how the sublease should deal with them;
3. evaluate which provisions of the direct lease should govern the relationship between sublandlord and subtenant; and
4. identify which matters the sublease should address as independent obligations of the parties.

A. Can the Tenant Sublease?

To save time and to decide if the subleasing exercise is pointless, the subtenant's attorney should look first at the subletting provisions of the direct lease to determine whether the provisions permit the contemplated subleasing transaction; whether the sublease requires the landlord's consent; and whether the landlord can frustrate the transaction by "recapturing" the space.⁸ A sophisticated direct lease generally prohibits subletting without the landlord's consent in virtually all instances except subleases to related

⁸ See generally FRIEDMAN, *supra* note 1, § 6.8 (defining recapture and step-up clauses in leases); HALPER, *supra* note 1, § 10.02[14], at 10-20 to 10-23 (discussing issues regarding subletting provisions); Berkman, *supra* note 7, at 32-33 (discussing effects of landlord's right to recapture on parties with equal bargaining power); Martin D. Polevoy, *Assignment, Subletting and Lease Transfers*, 1994 PRAC. LAW INST. (providing a discussion of the basic elements of assignment and subleasing provisions for landlord or tenant attorneys); Marc A. Sobel, *Negotiating a Sublease or Assignment Clause*, 4 PROB. & PROP. 44, 45 (1990) (discussing important aspects of a lease's subletting and assignment provisions and considerations of the parties).

entities.⁹ The direct lease also may contain provisions that allow the landlord to recapture the space to be sublet by granting the landlord the right either to enter into the sublease as a subtenant, eliminate the sublease space from the leased premises, terminate the lease as to the space the sublease covers, or even terminate the entire lease. Many leases provide that if the landlord does not exercise the right of recapture, the landlord will not unreasonably withhold or delay consent to the sublease if the potential sublandlord and subtenant meet certain criteria and conditions. If the landlord has a recapture right, the subtenant should try to find out as early as possible whether the landlord has any intention of recapturing or if the landlord has previously waived recapture rights. If the subtenant's counsel cannot determine whether the landlord will exercise recapture rights, counsel should advise the subtenant of the risks in proceeding. Absent such a warning, the subtenant will expect to close the sublease transaction; will spend money on attorneys, architects, and other professionals; and may pass up other opportunities to lease alternative premises that do not pose the risk of losing the transaction. If the landlord does decide to recapture, or otherwise blocks the sublease transaction, the subtenant will lose the advantage of lead time and may experience an emergency situation in trying to find alternate space.

Assuming that recapture rights are not present, that the landlord waives the rights, or that the subtenant assumes the risk of proceeding without certainty, counsel for the subtenant must review the subletting provisions of the direct lease to determine (1) what information the tenant must furnish to the landlord in connection with the sublease and (2) whether the tenant and the subtenant can comply with the requisite conditions that obligate the landlord to grant consent.¹⁰

To start the landlord's clock ticking either to exercise recapture rights or to grant or deny consent to the sublease, the parties to the sublease must

⁹ See *Karbelnig v. Brothwell*, 53 Cal. Rptr. 335 (Cal. Dist. Ct. App. 1996); *Dudley v. Rapanos*, 91 N.W.2d 274 (Mich. 1958); FRIEDMAN, *supra* note 1, § 7.1, at 285, § 7.303(e)(3), at 314-16.

¹⁰ See *Keep Control of Tenant's Right to Sublet and Assign*, COM. LEASE L. INSIDER, Sept. 1996, at 5, 6 (contributions from Alan Eidler, Richard F. Muhlebach, Harvey M. Haber, and Neil E. Botwinoff).

furnish certain information to the landlord. Usually, the tenant must submit to the landlord either a proposed or executed sublease or a term sheet outlining the subleasing transaction. The sooner the landlord's recapture time period starts to run, the sooner the parties will know if a sublease will work. Accordingly, if only a term sheet is required, the tenant should submit it promptly while the parties proceed with negotiating the sublease.

In some instances, a primary lease gives the tenant the right to approach the landlord with an intention of subletting. Subsequently, the landlord must determine whether or not to exercise any recapture right. In this situation, the landlord's right of recapture probably will expire before the parties fully negotiate the proposed sublease transaction. If the right of recapture expires, the tenant should give the subtenant evidence that the recapture right no longer exists.

Many direct leases require the tenant to provide the landlord with financial information about the subtenant, including, *e.g.*, certified financial statements and references. The subtenant's failure to have certified financial statements or the subtenant's unwillingness to release them to the landlord will frustrate the subleasing transaction unless the landlord waives the requirement. If the tenant retains occupancy of most of the leased premises, a waiver would not be an unreasonable request. Sometimes landlords require a meeting with the proposed subtenant. In that case, the subtenant should be aware of the meeting requirement and have the necessary assistance available.

Even when a landlord cannot unreasonably withhold or delay consent to subletting, the direct lease frequently has conditions that the sublandlord or subtenant must satisfy.¹¹ Although these conditions may appear reasonable,

¹¹ See *Amjems, Inc. v. F.F. Orr Constr. Co.*, 617 F. Supp. 273 (S.D. Fla. 1985); *Arrington v. Walter E. Heller Int'l Corp.*, 333 N.E.2d 50 (Ill. 1975); *Newman v. Hinky Dinky Omaha-Lincoln, Inc.*, 427 N.W.2d 50 (Neb. 1988); FRIEDMAN, *supra* note 1, § 7.304(c), at 339-53; Berkman, *supra* note 7, at 29-32; Sobel, *supra* note 8, at 45; Jon M. Laria, Recent Case, *Julian v. Christopher: New Standards for Landlord's Consent to Assignment and Sublease*, 50 MD. L. REV. 464 (1991). For a discussion of consent from the prime landlord's perspective, see Richard S. Rosenstein, *Get Safeguards in Sublet Consent*, COM. LEASE L. INSIDER, May 1993, at 1.

in practice they often fall into the “gotcha” category; *i.e.*, even though the lease seems to allow subletting in theory, the “fine print” is intended to preclude subletting.

At the outset of any subleasing transaction, the subtenant’s counsel must read carefully every restriction and condition limiting subleasing in the direct lease. For example, the lease may provide that the sublease rent cannot be less than the rent the landlord is then charging for comparable space in the building. A tenant usually cannot meet such a condition unless the tenant has made substantial and valuable improvements to the premises. Because the sublease is a lesser estate¹² and the parties cannot customize the lease rights box, sublease rentals usually amount to less than the rentals that a landlord could charge if the landlord leased the space for a comparable term to a new tenant. Although the sublease rent may be greater than the rent under the direct lease, a higher rent generally reflects either a dramatically improved leasing market or the substantial value of improvements made by the tenant to the space. A tenant, having only a lesser estate, generally can extract payment from a subtenant only for those rights that the tenant already holds and that are transferable. As a result, a tenant leasing directly from the landlord will deal directly with a service provider and may be able to negotiate rights and options that the tenant, as sublandlord, cannot deliver to a subtenant.

¹² *See supra* note 1.

B. Is the Existing Package of Rights Under the Direct Lease Acceptable to the Subtenant?

Once the subtenant's counsel has determined that the sublease transaction will work, counsel must review the direct lease to make sure that its terms are acceptable.¹³ Obviously, the terms of the direct lease must be consistent with those of the proposed sublease transaction; *i.e.*, the lease should cover at least the space proposed to be sublet, have a term at least as long as the sublease term, and allow the use contemplated under the sublease. All other terms of the direct lease must be tolerable for the subtenant. Common problem areas involve alterations, services, and other landlord covenants. In some cases, counsel may be pleased to find that the tenant's transferable rights exceed the rights that the subtenant reasonably could have negotiated for in a sublease. This can be true if the tenant is extremely creditworthy and has leased a large block of space or if the tenant signed a lease when the landlords were hungrier for tenants.

If a provision in the direct lease is not acceptable, the parties to a sublease must address the issue in the subleasing transaction. In some situations, the parties can only solve problems by going back to the landlord to modify the landlord's rights and obligations. These modifications may be for the benefit of the subtenant alone or for the benefit of both the tenant and the subtenant. In the first case, this can be handled in the landlord's consent to sublease, which the tenant must obtain.¹⁴ In the second case, an amendment to the direct lease may best solve the problem. Because landlords rarely have any incentive to change the terms of direct leases, the sublease parties must agree fairly quickly whether the tenant or the subtenant bears the responsibility and the costs of gaining concessions from the landlord. A tenant who is remaining in occupancy of some of the

¹³ See *Faucet v. Provident Mut. Life Ins. Co.*, 13 So. 2d 182 (Ala. 1943); *Pedro v. Potter*, 242 P. 926 (Cal. 1926); 51C C.J.S. *Landlord and Tenant* §§ 47, 48(1)(a) (1968); FRIEDMAN, *supra* note 1, §7.701, at 408 (noting that "a subtenant has been said to be under a duty to ascertain the terms of the headlease").

¹⁴ See WOOD & DISCIULLO, *supra* note 1, § 30.04, at 30-34; Senn, *supra* note 3, at 20-25.

demised premises may not want to risk alienating the landlord by demanding changes.

Finally, the prospective subtenant's counsel must review all documents that constitute the lease or affect the tenant's rights and obligations. These documents include all lease amendments, all estoppel certificates¹⁵ that the tenant has given to the landlord or anyone else, all commencement date agreements, information regarding any disputes between the landlord and tenant, copies of approvals the landlord has granted, any non-disturbance agreements the tenant has received, and all relevant communications that the tenant has received from the landlord. The subtenant should understand all relevant "non-legal" information about the building such as construction rules; freight elevator hours; charges for heating, ventilating, and air conditioning; and other overtime services and cleaning specifications.

Analysis of the existing lease also needs to take into account that the sublease may begin after the tenant is already "living in the box" and has performed substantial construction work or improvements. For a major tenant, this might include above-standard installations such as supplemental air conditioning, dining facilities, and trading floors. The cost of this work may reach millions of dollars. Therefore, the subtenant may be assuming an obligation to restore any changes upon moving out.¹⁶ The subtenant must understand this obligation and must have copies of all documents relating to the tenant's construction. Installations transferred from the tenant to the subtenant may represent a substantial portion of the consideration that the subtenant will pay under the sublease. The subtenant should get the full benefit of all of these improvements, including any warranties and guaranties, because the subtenant assumes responsibility for their continued maintenance and operation.

¹⁵ For a general discussion on the importance of estoppel certificates, see Andrew L. Herz, *The Use and Misuse of Estoppel Certificates*, AM. C. REAL EST. LAW. NEWSL., Mar. 2000.

¹⁶ See Robert C. Epstein, *Hidden Sublease Restrictions*, N.Y.L.J., Oct. 9, 1996, at 5.

C. Interplay Between the Direct Lease and the Sublease

The last step in reviewing the direct lease determines the level of interplay between the rights and obligations under the direct lease and the sublease. Practitioners differ on how to draft the sublease document. Most prefer to incorporate the direct lease into the body of the sublease document, with modifications and deletions as appropriate. The next section addresses how this can be done.

III. DOES THE SUBLEASE WORK?

As with any direct lease, the preparation and negotiation of a sublease must cover a range of areas. Counsel in a sublease transaction will want to make sure that the sublease document does the following:

1. accurately sets forth the terms of the proposed transaction between the tenant (sublandlord) and the subtenant;
2. complies with the requirements of the direct lease, which must be addressed in the sublease;
3. allocates between the tenant and the subtenant any risks or obligations that the lease sets forth in the manner that the parties have agreed upon;
4. covers matters that are independent of the box of rights created under the direct lease; and
5. whenever possible, streamlines the sublease document by appropriate incorporation by reference of provisions of the direct lease to save time, space and effort.

In addition, the sublease generally will need to set forth the conditions for its effectiveness, particularly the need for and conditions of the landlord's consent.

A. Preliminary Inquiries

Before deciding whether the client's subleasing goals are accomplished, the subtenant's counsel must think about some of the same issues that are important in a traditional direct lease.¹⁷ Beyond the basic economic terms regarding rent and escalations, the subtenant should determine that the subleased space as described in the sublease will work for the subtenant. An exhibit of the subleased premises early in the process will help confirm the understanding of the parties. The subtenant should seek all of the rights that the direct lease grants to the tenant, including the right to use portions of the lobbies, elevators, and common areas of the building needed for access to, and full use of, the subleased premises.

The sublease should describe the condition in which subleased space must be delivered.¹⁸ Must the sublandlord perform any construction work or simply deliver the space in "broom clean condition"? At a minimum, the space generally must be free and clear of all other occupancies. More complex transactions may contemplate delivery of portions of the space in stages. The subtenant's counsel must consider what happens if the sublandlord cannot deliver the space. Does the sublease terminate? Are there financial or rent penalties for delay? The earlier these issues can be raised and resolved, the better for both parties.

Counsel should also determine whether the sublease transaction includes any personalty, furniture, equipment, telephone systems, and the like. If so, must these items be in working order? Will the network cabling or telephone systems work correctly for just the subleased space? This, in turn, will cause the parties to focus on issues of timing and coordination.

The sublease often does not cover all of the space demised by the direct lease. In these cases, the subtenant must decide whether to construct new walls to demise the subleased space and whether the sublet premises provide legal means of ingress and egress. The parties also must address

¹⁷ See WOOD & DISCIULLO, *supra* note 1, § 30.01, at 30-2.

¹⁸ See Elizabeth Kluger Cooper, *Ten Key Non-Monetary Sublease Provisions*, 7 COM. LEASING L. & STRATEGY 6-7 (1995).

issues such as the equitable allocation of charges relating to utilities and shared areas or services. If the subtenant desires overtime air conditioning or other shared services and the facilities cannot separately serve the subleased premises, the parties must allocate the charges. Similar allocation applies to shared electrical consumption when a single meter or submeter serves all of the space.¹⁹ Allocation of the charges based upon the respective floor areas of the sublet space and the space that the sublandlord retains might be unfair depending upon how the parties use the two portions of space.

B. Compliance with the Direct Lease

Although the sublease needs to comply with the requirements of the direct lease, compliance is relatively easy to accomplish. If the sublandlord's counsel has properly reviewed the direct lease, the parties can set forth any necessary provisions in the initial draft of the sublease.

¹⁹ See WOOD & DISCIULLO, *supra* note 1, § 17.02, at 17-11.

C. Allocation of Risks and Costs

In allocating risks between the parties, a sublandlord properly will emphasize those obligations that by their nature only the landlord can perform.²⁰ These obligations include providing building services, making repairs, or otherwise performing landlord- or owner-specific obligations, including restoring the building and building systems after a casualty or condemnation.²¹ Subleases usually provide that the sublandlord has no responsibility or liability for failing to fulfill these obligations. Except when the sublandlord's default caused the landlord's failure to perform these obligations, this is an appropriate position for a sublandlord to take because the sublandlord is entitled to receive these services or benefits from the landlord and is not in a position to perform the obligations. However, because the subtenant is not in privity with the landlord, the sublandlord should agree to take such reasonable acts as will enable the subtenant to proceed directly against the landlord if the landlord defaults under the direct lease.²² Exhibit B to this Article provides a model clause requiring the sublandlord to take certain actions against the landlord for the benefit of the subtenant.

The subtenant's counsel should make sure that the sublandlord remains responsible for any of the sublandlord's own acts or omissions that allow the landlord to stop performing the landlord's obligations under the direct lease, thus depriving the subtenant of landlord services. To the extent that the sublandlord was able to negotiate self-help rights in the direct lease, the subtenant will want the sublandlord to agree to exercise those rights on behalf of the subtenant. The sublandlord should be agreeable to such an arrangement unless the sublease covers only part of the premises that the direct lease demises and the sublandlord, in good faith, disagrees with, or

²⁰ See Staton Schuman, *Assignments and Subleases*, in *COMMERCIAL LANDLORD/TENANT PRACTICE* ¶ 6.6, at 6-7 (Ill. Inst. for Continuing Legal Educ., Supp. 1998) (1996).

²¹ See *id.* ¶¶ 6.9-6.10, at 6-8.

²² See WOOD & DISCIULLO, *supra* note 1, § 30.2[2][i], at 30-30 to 30-31 (noting that “[t]he Sublessor agrees to cooperate with the Sublessee in an effort to obtain the services or Landlord's performance [but] this should provide little comfort.”)

could incur liability from, granting the subtenant's request. Exhibit C provides sample language for dealing with some of these issues.

Conversely, the sublandlord typically will pass through to the subtenant any obligations under the direct lease that relate to the subtenant's use and occupancy of the sublet space. Such obligations often include a pass-through of an appropriate percentage of the real estate tax and operating cost escalations, with a change in applicable base years for the escalations (if part of the business deal). The subtenant also will agree to bear an appropriate share of other monetary obligations, such as payment for electrical consumption. To the extent that the landlord gives the tenant any documentation about costs, the subtenant should insist on promptly receiving copies.²³

If applicable, the sublease should allow the subtenant to challenge the landlord's operating statements. The subtenant should request that the sublandlord preserve the subtenant's rights under the direct lease to dispute all escalation and other pass-through obligations and also should request that the sublandlord exercise any such dispute rights on the subtenant's behalf. If successful, the subtenant should receive a share of any credit received by the sublandlord upon resolution of any dispute. Because the sublandlord's dispute rights under the direct lease often depend upon the timely delivery of notices and elections, the subtenant may seek some control over these matters. If the direct lease provides for the arbitration of disputes, such as a dispute over the right to terminate the direct lease if there is casualty damage or over proposed new rules and regulations, the subtenant similarly may want to be involved in these matters. In some cases, the subtenant has no right to advise or participate; in other cases, the parties may agree to reasonable cooperation. As with any negotiation, the

²³ "The sublessee's job is to gather and have the right to gather in the future, adequate data to determine whether or not its share of additional rent is fair and equitable. . . . [I]f the Landlord does not want the Sublessee to see these records, the Sublessee has no right to enforce this provision against the Landlord; those two parties are not in privity of contract and Landlord has no obligation to cooperate." WOOD & DISCIULLO, *supra* note 1, § 30.03[2][e], at 30-27.

outcome of these matters is dependent on the particular facts and circumstances.

When considering issues related to the direct lease, the subtenant must always remember that two separate boxes of rights and obligations exist. The subtenant's counsel also should think about the possibility that the sublandlord could lose the direct lease, either because the sublandlord defaults under the direct lease, or because the landlord defaults under a mortgage, which leads to lease termination in a foreclosure action.²⁴ The practical importance of such issues depends on the size and term of the subleasing transaction. Typically, the parties do not consider these issues for any sublease that is either less than a full floor or less than three years; however, disregarding these issues is the client's decision rather than the lawyer's.

²⁴ See *V.O.B. Co. v. Hang It Up, Inc.*, 691 P. 2d 1157 (Colo. Ct. App. 1984) (holding sublease terminated upon termination of sublessor's lease); *127 Korea House, Inc. v. House of Korea, Inc.*, 372 N.Y.S.2d 679 (N.Y. 1975) (holding sublease terminated after foreclosure of landlord's interest); *Hooper v. Seventh Urban, Inc.*, 434 N.E.2d 1367 (Ohio Ct. App. 1980) (noting that order of restitution against lessee terminated sublessee's right to possession); see also FRIEDMAN, *supra* note 1, § 7.703, at 419-21 (discussing the effect of the termination of the prime lease on sublease); Epstein, *supra* note 16, at 1 (discussing recognition language); Michael P. Carbone, *Strategies for Effectuating Assignments and Subleases*, 10 COM. LEASING L. & STRATEGY 3, 3 (1998). For a discussion of non-disturbance agreements from the prime landlord's perspective, see *Report of the Subcommittee on Nondisturbance Agreements*, Commercial Leasing Committee, 1993 REAL PROP. SEC., N.Y. ST. B. ASS'N.

If the subtenant is concerned about default by the landlord, the subtenant should determine whether the landlord has sufficient financial strength and whether the tenant is adequately protected against the landlord's default or failure otherwise to perform the obligations of the direct lease. Does the landlord have security for building work obligations? Does the sublandlord, as tenant, have the benefit of a non-disturbance agreement from the mortgagee? Without protections such as these, the subtenant runs the risk of losing the investment because if the tenant's estate terminates, so too does the subtenant's.²⁵ In this regard, the subtenant also should consider the effect of a bankruptcy of the sublandlord.²⁶

For a major sublease, a subtenant should seek a recognition agreement from the landlord, stating that if the direct lease ever terminates, the landlord will recognize the subtenant as a direct tenant.²⁷ The subtenant would prefer that this recognition relationship incorporate all the terms and conditions of the sublease. As a fallback, the subtenant may be willing to live with the terms of the direct lease, equitably applied to the subleased space. The relationship can become rather tricky and unsatisfactory for the party (landlord or subtenant) that may have to operate under a non-negotiated document. Accordingly, landlords hesitate to provide recognition agreements for subtenants, particularly smaller subtenants. If the tenant had both foresight and leverage during direct lease negotiations, though, the landlord may have no choice but to recognize the subtenant's rights.

²⁵ See *Chusmash Hill Props. Inc. v. Peram*, 46 Cal. Rptr. 2d 366 (Cal. Dist. Ct. App. 1995) (holding non-disturbance agreement between landlord and subtenant gave nonbreaching subtenant right to retain possession after sublandlord's bankruptcy).

²⁶ See *Chatlos Sys., Inc. v. Kaplan*, 147 B.R. 96 (D. Del. 1992) (holding rejection of direct lease operates to reject subleases as well); FRIEDMAN, *supra* note 1, § 7.703, at 420 n.4 (compiling cases addressing the insolvency of a prime tenant and the effect on a subtenant); see also *Carbone*, *supra* note 23, at 3 (holding when debtor's lease is rejected pursuant to bankruptcy statute, any subleases under primary lease are also rejected).

²⁷ See *Chusmash*, 46 Cal. Rptr. 2d at 366; see also FRIEDMAN, *supra* note 1, § 7.704b, at 429-31 (discussing the protection that a non-disturbance agreement affords a subtenant with a prime landlord).

Although a subtenant may want to understand the financial strength of the landlord, the inquiry does not end with the landlord's assets. A subtenant also must understand the financial strength of the sublandlord. Just as a landlord may default in failing to perform obligations under the mortgage of the building, so too may a sublandlord default in failing to perform obligations under the lease. A subtenant should insist that the sublandlord expressly agree to perform all obligations under the direct lease, including timely payment of all rent. A sublandlord often will, and probably should, condition these obligations upon the subtenant's not being in default under the sublease. As a matter of convenience, the subtenant often will want the right to request overtime and other extraordinary services directly from the landlord and the right to pay such charges directly to the landlord. If the sublandlord fails to perform, the subtenant will want enough flexibility to have the time and ability to cure defaults under the direct lease.

D. Interplay of Direct Lease and Sublease Provisions and Independent Matters to Address

1. Generally

Because a sublease transaction has a double set of rights and obligations, the direct lease by itself cannot adequately cover the interplay between the provisions of the direct lease and those of the sublease. Some provisions of the sublease transaction are independent of the direct lease transaction. The distinction between the independent provisions and interplay provisions can be blurred and hard to understand. The direct lease may address many of the independent provisions discussed below. By drafting the independent provisions from scratch, though, counsel avoids creating the complexity, confusion, and possible mistakes that may result from trying to incorporate by reference and then extensively modifying the corresponding provisions from the direct lease.

Provisions from the direct lease that interact with the provisions in the sublease, or require independent provisions in the sublease, usually fall into one of the following five categories:

1. the status of the direct lease and the sublet premises;
2. the sublandlord's exercise or non-exercise of certain rights under the direct lease as against the subtenant;
3. recomputation of time periods;
4. assignment and subletting, construction, consents, and insurance; and
5. general and separate boilerplate provisions.

2. *Status of Direct Lease and Condition of Sublet Premises*

Although practitioners often view representations and warranties as an invitation to future disputes and claims, certain representations and warranties about the underlying direct lease documents are essential in a sublease transaction. A subtenant should demand a full set of representations to identify all of the direct lease documents. By making such a demand, a subtenant will know with certainty the box of rights and obligations that come with the sublease. A sublandlord should be willing to represent and warrant, among other things, that (1) the direct lease, together with all other identified amendments and agreements, is the entire agreement between the landlord and the sublandlord; (2) the lease documents are in full force and effect; and (3) no outstanding uncured notices of default or termination exist.²⁸ A subtenant also may want to know whether any notices of default have issued under the direct lease.

A subtenant should insist that the sublandlord not modify the direct lease documents in any way that would adversely affect the subtenant without obtaining the subtenant's consent. If the direct lease already provides for certain future modifications, the sublease parties would need to permit them, and the subtenant would need to understand them as part of due diligence about the direct lease. A sublandlord may want to keep the

²⁸ See Herz, *supra* note 16 (discussing estoppel certificates).

right to amend the direct lease. As a reasonable resolution of these issues, a sublandlord often will agree not to amend the sublease voluntarily if such an amendment would adversely affect the subtenant's rights under the sublease, increase the subtenant's obligations under the sublease, decrease the size of the sublet premises, or shorten the term of the sublease.²⁹

3. *Exercise of Rights*

Because any subtenant's rights derive entirely from the sublandlord's rights under the direct lease, the subtenant should request that the sublandlord agree not to exercise rights under the direct lease that could hurt the subtenant or the sublease. Unless the subtenant has obtained a recognition agreement from the landlord, the subtenant must limit the right of the sublandlord to terminate the direct lease voluntarily. The subtenant should not permit the sublandlord to terminate the direct lease without the consent of the subtenant other than in case of termination due to condemnation or casualty, or a specifically negotiated cancellation right. The subtenant may even limit the right of the sublandlord to effect a casualty termination to those situations in which the landlord terminates the direct lease. The subtenant may want the sublandlord to agree to exercise, or in some instances, refrain from exercising, one or more renewal or expansion options. Such an agreement is especially appropriate in transactions in which the subtenant has pre-negotiated a direct lease with the landlord that will commence when the sublease ends.

4. *Recomputation of Time Periods*

Many times during the life of a sublease, the sublandlord is simply a courier who conveys messages between the landlord and the subtenant. The sublandlord needs more time than the direct lease provides when the sublandlord must communicate with the landlord and get the landlord to act under the direct lease. Correspondingly, time periods must be shorter when the sublandlord must convey a message to the subtenant and get the

²⁹ See Saltz & Miner, *supra* note 3, at 33.

subtenant to take action. Otherwise, the sublandlord may default under the direct lease. Accordingly, the parties must change almost all time periods in the direct lease when they are incorporated into the sublease. The subtenant's goal is to make sure that the sublandlord is a speedy messenger. The subtenant wants enough time to take any actions that the landlord requires and also wants to make sure that the landlord responds promptly to any requests.

5. *Generally Independent Provisions*

Provisions regarding assignment and subletting, construction, consents, insurance, and general boilerplate are the provisions that the parties most often independently set forth in the sublease. To some degree, the parties also will incorporate these provisions by reference from the direct lease. Use of both methods helps to avoid ambiguity; however, it is important to provide in the sublease that, as between sublandlord and subtenant any conflicts are resolved in favor of the sublease.

a. Assignment and Subletting; Alterations and Consents

Depending on the language of the assignment and subletting provisions of the direct lease, the parties may simply want to incorporate these provisions wholesale from the direct lease.³⁰ At a minimum, whether as an independent provision in the sublease or as an incorporated provision from the direct lease, the sublease should address whether the sublandlord can "recapture" the subleased premises or participate in any profits from an assignment of the sublease or a further subletting. A landlord usually will try to participate in assignment or subletting "profits" under the theory that the only party who should make any "profits" from the landlord's building

³⁰ See *Boston Props. v. Pirelli Tire Corp.*, 185 Cal. Rptr. 56 (Cal. Ct. App. 1982); but see *Krasner v. Transcon. Equities, Inc.*, 420 N.Y.S.2d 872 (N.Y. App. Div. 1979); see also FRIEDMAN, *supra* note 1, § 7.701, at 376-77 (stating that "[a] restriction against assignment, included in a headlease, does not bar assignment by a subtenant. For this reason landlord may want to include a restriction . . . under a sublease.").

is the landlord. This argument does not extend to the treatment of “losses,” of course. The strength of this argument is diminished substantially when the landlord is only a sublandlord. Similarly, because the sublandlord has no long-term residual interest in the building itself, the case for including onerous requirements on construction and insurance in any sublease is not as compelling as it might be in a direct lease.

A critical issue for any subtenant is the need to obtain approval from the sublandlord and landlord for the subtenant’s initial alterations and any possible future assignment or subletting. If the direct lease requires the landlord’s approval, the subtenant normally will want the sublandlord to agree to submit approval requests to the landlord for quick approval. Ideally, the subtenant wants the sublandlord to agree that anything that the landlord approves automatically will be deemed approved by the sublandlord. If the subtenant’s leverage is not strong enough to obtain such a provision, the sublandlord often will still agree to be reasonable about granting approvals. The subtenant also should try to persuade the sublandlord to agree that if the subtenant ever believes the landlord is unreasonably withholding consent, the sublandlord will challenge the landlord’s denial of consent to the extent that the direct lease permits a challenge. Of course, the subtenant should pay any costs of a challenge and protect the sublandlord against liability.

A subtenant also should focus on any obligation to remove tenant improvements at the end of the sublease. This obligation may be particularly burdensome if the sublandlord already has made substantial improvements that the landlord may require to be removed at the end of the direct lease term. This obligation can impose substantial costs upon a subtenant or tenant if not appropriately addressed.

b. Insurance

A sublease often requires the subtenant to provide insurance for the sublet space.³¹ Just as a tenant must, a subtenant should confirm with insurance advisers that the subtenant will be able to obtain the required insurance at a reasonable cost. To the extent that the sublease requires more insurance than the subtenant would otherwise provide, any resulting cost is simply another cost of the sublease.

Most direct leases contain a waiver of subrogation and release of liability clause for the benefit of the tenant. The subtenant's risk management professionals should determine whether the clause protects the subtenant from claims by the landlord or the landlord's insurer.

c. Boilerplate Provisions

A sublease usually includes the typical boilerplate provisions found in most substantial legal documents, as well as a few provisions of unique importance to subleases. These provisions may include mutual brokerage representations and indemnities, separate arbitration clauses, protections for successors and assigns, and assurance against oral modifications and waivers. The sublease can safely incorporate most boilerplate provisions, default provisions, and remedial provisions.

³¹ For a discussion of insurance and other issues for consideration, see HALPER, *supra* note 1, at § 12.06; see also Schuman, *supra* note 21, ¶ 6.11, at 6-9 (discussing need for insurance, indemnities, and waivers in sublease agreement).

6. *Incorporation by Reference*

After the parties have considered the substantive issues discussed above, they still must decide exactly how much of the direct lease they should incorporate by reference into the sublease.³² The terms of any direct lease usually fall into one of the following three categories: (1) terms that require modification before incorporation by reference into the sublease; (2) terms that the sublease normally should incorporate by reference; and (3) general terms that the sublease can incorporate without change.

In its simplest form, a sublease provides for incorporation by reference of all terms of the direct lease with a notation that “landlord” refers to “sublandlord” and “tenant” refers to “subtenant.” This approach, however, may be overly simplistic. Other terms in the direct lease may be incorporated, but with changes to fit the specific business deal. For example, the sublease should provide its own definitions for “premises,” “fixed rent,” “additional rent,” and “commencement date.”

One standard lease clause that a subtenant will not want to incorporate by reference is a provision that limits the landlord’s liability to the interest in the building or the premises. Because sublandlords often lose money on subleases, a subtenant should know that the general credit of the sublandlord backs the sublandlord’s obligation to preserve the direct lease. If the sublandlord’s liability is limited to the interest in the building (*i.e.*, the direct lease), the subtenant may have no claim against the sublandlord if the sublandlord decides to abandon its entire position. Nonrecourse clauses may make sense in some real estate transactions, but not in subleases.

The following list summarizes many terms of a direct lease that a sublease often will incorporate by reference. Following each term is a quick summary, if relevant, of the position a subtenant may take regarding each of the terms and any limitations or modifications that may be desirable when the sublease incorporates a term by reference. These annotations reflect a subtenant’s idealized view of the world. The subtenant may ask for these changes, but may not be able to obtain any of them.

³² See Guido, *supra* note 4; Schuman, *supra* note 21, ¶ 6.6, at 6-7.

Issue	Subtenant's Position
Abatements	Pass through to the subtenant.
Alterations and Approvals of Alterations	One review or consent process. If the landlord approves, the sublandlord is deemed to have approved.
Compliance with Law	Especially if the sublandlord has retained space, limit the subtenant's obligation to the subtenant's particular use and alterations of the space.
Dispute Resolution	The sublandlord must exercise the sublandlord's rights under the direct lease, including arbitration rights, for the subtenant's benefit.
Escalations	If the subtenant agrees to pay escalations, the subtenant should have the right to challenge (or require the sublandlord to challenge) the landlord's calculations and statements.
Estoppel Certificates	Mutual obligation.
Notices	If the subtenant notifies the sublandlord of any matter, such notification satisfies the subtenant's obligation. The sublandlord should give the subtenant copies of all notices from the landlord regarding sublet space.
Renewal and Expansion Rights	Very deal-specific. If the subtenant's rights depend on the sublandlord's exercise of renewal options, the subtenant may want a power of attorney or the landlord's agreement that the subtenant can exercise on behalf of

	the sublandlord.
Repairs (Building)	Although usually not assumed by the sublandlord, the sublease must address the need for repairs made necessary by the sublandlord.
Roof Rights	Pass through to the tenant. If the sublandlord has moved out, the subtenant can exercise exclusively any roof rights held by the sublandlord.
Surrender at End of Term	Delete any obligation to remove existing or installed alterations. Surrender may depend on whether alterations generally are usable by other office tenants.
Tenant's Property	Very deal-specific. The sublandlord may release its rights and provide a bill of sale. Consider sales tax implications.
Use	Allow the subtenant's contemplated use.
Violations	Expand to protect the subtenant from the sublandlord's acts or omissions.

A subtenant usually will not want to incorporate by reference the following matters covered by the direct lease: (1) payment of rent (if it varies from rent payable under the sublease) and (2) matters that have occurred already, such as the commencement date and initial construction.

In addition to the items listed above, a common sense approach makes identifying objectionable provisions fairly easy. Analysis depends almost entirely on the level of sophistication of the direct lease. However, if the parties do not delete or address certain "traps" in the economics of the transaction, they can result in significant implications to a subtenant or tenant. These traps include the sublandlord's ability to impose separate rules and regulations; access to the sublet premises; governmental

compliance issues, such as the sublandlord's obligation to obtain an amended certificate of occupancy for space already built-out; rent abatement provisions at the beginning of the term; rights to recapture and share profits; limits on further subletting and assignments; responsibility for environmental hazards not caused by the subtenant; insurance for the building; notice provisions; the covenant of quiet enjoyment; and, depending on the agreed upon business transaction, expansion options, renewal options, and cancellation options.

7. Conditions to Effectiveness of Sublease

The final hurdle for the parties to the sublease is setting forth the conditions that the sublease must satisfy before it will become effective.³³ The most important condition for the parties to obtain is the landlord's consent to the transaction. As described earlier, the direct lease may give the landlord rights that allow the landlord to thwart or delay the sublease transaction. Timing is often a critical issue for the subtenant. Because the sublease undoubtedly will be contingent upon obtaining any required consent from the landlord, a subtenant often will want to specify an outside date for obtaining consent. The subtenant should tie the consent deadline to the period in which landlord must grant or deny consent pursuant to the provisions of the direct lease. If the subtenant does not obtain consent by the deadline, the sublease should provide that the subtenant, and possibly the sublandlord, have the right to terminate the sublease and recover any money and letters of credit that the subtenant may have provided when the parties signed the sublease.

The sublease also should deal with other matters directly related to the landlord's consent. The sublandlord should agree promptly, or within a specified time period after execution and delivery of the sublease, to submit the request for consent and any required information to the landlord. The subtenant should agree to cooperate with the sublandlord's effort to obtain the landlord's consent. The sublease also should state which party will bear

³³ See *supra* note 12; Murray S. Levin, *Withholding Consent to Assignment: The Changing Rights of the Commercial Landlord*, 30 DEPAUL L. REV. 109 (1980).

costs incurred in obtaining the landlord's consent. If the subtenant has identified problems regarding particular provisions of the lease, the subtenant may want to insist that the landlord's consent contain certain additional consents or assurances. Such consents and assurances may include the landlord's consent to the subtenant's anticipated use of the subleased premises, if different from that permitted by the direct lease; consent to the subtenant's initial alterations; the number of listings for the subtenant on the building directory; and rights similar to those of the tenant regarding future assignments or subletting. This last point may be particularly important because many direct leases do not permit any further assignments or sublettings. If the subtenant wants nondisturbance or recognition protections, the sublease should be conditioned upon delivery of those documents.

IV. CONCLUSION

Subleases are deceptive. They seem much easier to negotiate because the landlord and tenant have completed much of the work in negotiating the direct lease. But because the sublease is a hybrid, the subtenant and counsel face many issues that are more complex than they appear at first blush.

A sublease transaction has all of the traditional elements of a direct lease transaction, but it is different because of the two boxes of rights that the parties must evaluate, interconnect, and make work.

EXHIBIT A
DUE DILIGENCE FOR THE SUBLEASE
TRANSACTION

Unlike the typical leasing transaction in which the landlord and tenant are free to define their relationship, a sublease transaction requires a subtenant to step into a “relationship in progress.” The subtenant and counsel need to ask many important questions about the relationship in progress. Not only must the subtenant decide if the proposed deal is suitable, but the subtenant must also understand what has already occurred in the existing landlord-tenant relationship and how that history will affect the subtenant.

The following due diligence checklist attempts to cover only issues that are unique to a sublease transaction.

The starting point in all instances is the direct lease and all identified amendments and modifications. These documents ultimately are the starting point for examining the box of rights and obligations between the sublandlord and the subtenant. Obviously, the size of the subleasing transaction affects the appropriate level of scrutiny. In larger, more significant subleasing transactions, sensitivity to these due diligence items allows the practitioner to advise the subtenant appropriately about hidden risks, costs, and benefits. Next, the prospective subtenant must examine all communications between the landlord and the tenant under the lease. Finally, the prospective subtenant must examine any actions the tenant has taken already with respect to the leased space.

1. Underlying lease
 - a. Identify the lease document
 - b. Have the parties amended the lease document?
 - c. Do any of the agreements operate as amendments?
 - i. Estoppel Certificates
 - ii. Consents to Subletting or Assignment
 - iii. Commencement Date Agreement
 - iv. Exercise or Waiver of Option, Renewal, or Expansion Rights

- v. Subordination, Non-disturbance, and Attornment Agreements
- vi. Recognition Agreements
- vii. Alteration Agreements
- viii. Consent to Alterations (with or without a waiver of restoration obligation)
- d. Do collateral documents exist that bind the tenant or subtenant?
 - i. Rules and Regulations (have they been amended?)
 - ii. Construction Rules
 - iii. Overtime or Supplemental Service Rate Schedules
 - (a) Freight Elevators
 - (b) Building HVAC
 - (c) Supplemental HVAC/Condenser Water
 - (d) Security Services
 - iv. List of Approved Contractors
 - v. Approval of Signage
 - vi. Default Notices
 - vii. Miscellaneous Notices
- e. Have any documents changed the relationship between the landlord and the tenant that might affect the subtenant?
 - i. Escalation or Additional Rent Statements
 - ii. Taxes
 - (a) Review underlying real estate tax bill
 - (b) Changes in base year taxes as a result of tax protest proceedings
 - iii. Operating Expenses Statements
 - iv. Cleaning Charges
 - v. CPI Calculations
 - vi. CAM Calculations
 - vii. Percentage Rent Calculations
 - viii. Electricity: Electrical Surveys or Notices of Rate Increases
 - ix. Settlement Agreements Regarding Disputed Items
 - x. Other Issues
 - (a) Has the landlord transferred the interest, and if so, has the new landlord assumed the obligations, and has the old landlord been released?

- (b) Are there pending disputes between the landlord and tenant?
 - (c) Is the landlord bankrupt?
- f. Performance by the landlord
 - i. Has the landlord completed all required construction?
 - ii. Has the landlord delivered any evidence relating to removal or abatement of asbestos?
 - iii. Has the landlord delivered all required governmental approvals, *e.g.*, Certificate of Occupancy?
- g. Tenant's actions
 - i. Construction and alterations
 - (a) Plans and specifications for build-out or alterations
 - (i) "As-builts"
 - (ii) Schematics
 - (1) Wiring: telephone, fiber optic, computer cable
 - (2) HVAC
 - (3) Uninterruptible power supply
 - (4) Chases and conduits
 - (5) Trading floor
 - (6) Cafeteria, dining room, or other special uses
 - (b) Licenses and approvals for build-out, including asbestos abatement and special use permits
 - (c) Architect's contract for build-out or alterations
 - (d) Construction contracts for build-out or alterations
 - (e) Guarantees and warranties for improvements and systems
 - ii. Service contracts
 - (a) Cleaning contract
 - (b) Systems maintenance contracts
 - (i) Mechanical equipment
 - (ii) Uninterruptible power supply
 - (iii) Supplemental HVAC
 - (iv) Telecommunications
 - (1) Fixed systems
 - (2) Satellite
 - (3) Video conferencing
 - (4) Cabling from premises to rooftop

- iii. Insurance Certificates
- iv. Violation notices received by the tenant
- v. Previous subleases entered into by the tenant
- vi. Correspondence between the tenant and the landlord
- vii. Liens caused by the tenant
- viii. Does the transaction include equipment (*e.g.*, telephones, computers) or furniture? If so, review purchase orders and leasing agreements and prepare schedule of included items.

EXHIBIT B
ENFORCEMENT OF RIGHTS AGAINST LANDLORD

If Landlord defaults in any obligation to Sublandlord regarding the Subleased Premises, then Sublandlord shall not, except as and to the extent set forth in this paragraph, be obligated to bring any action or proceeding or to take any other steps to enforce Sublandlord's rights against Landlord. Sublandlord shall cooperate, at no cost to Sublandlord, in seeking to obtain Landlord's performance under the Lease. Upon Subtenant's written request, Sublandlord shall make written demand upon Landlord to perform Landlord's obligations regarding the Subleased Premises. If, after Subtenant makes such demand, Landlord's grace period under the Lease expires and Landlord fails to perform Landlord's obligations under the Lease, then Subtenant shall have the right to proceed against Landlord in Subtenant's own name. All rights of Sublandlord under the Lease necessary for that purpose shall be, and hereby are, conferred upon and transferred to Subtenant. Subtenant shall be subrogated to such rights to the extent that they apply to the Subleased Premises. If Subtenant cannot proceed against Landlord in Subtenant's name because of lack of privity, nonassignability, or any other reason, Subtenant shall have the right, at its sole cost and expense, to proceed against Landlord in Sublandlord's name, provided Subtenant is not in default under this Sublease beyond any applicable notice or grace period. Sublandlord shall execute all documents and take all actions that Subtenant reasonably requests in connection therewith. To the extent that the Lease allows Sublandlord to exercise "self-help" rights and a reasonable basis exists for Subtenant to request that Sublandlord exercise such rights with respect to the Subleased Premises, Sublandlord shall exercise such rights for Subtenant's benefit. To the extent that, as a result of Landlord's default under the Lease affecting the Subleased Premises, Sublandlord recovers any sum from Landlord or is entitled to any abatement, credit, set-off, or offset, such recovery, abatement, credit, set-off, or offset, or the benefit thereof, shall belong exclusively to Subtenant.

EXHIBIT C
COOPERATION CLAUSE—GENERAL

Sublandlord shall use reasonable efforts to cooperate with Subtenant in (i) obtaining for Subtenant: (a) additional services requested by Subtenant under the Lease (as incorporated in this Sublease) and this Sublease; (b) any benefit to Sublandlord relating to the Subleased Premises under the Lease that would directly benefit Subtenant, including without limitation any dispute rights regarding operating expenses, real estate taxes, other escalations, or electricity payments as set forth in the Lease; and (c) Landlord's consent to any action for which the Lease (as incorporated into this Sublease) requires Landlord's consent, and (ii) delivering any notice to Landlord as required by any provision of the Lease, as incorporated into this Sublease, including, without limitation, promptly forwarding any request made by Subtenant to Landlord for services, or consent or approval, and providing Landlord with all information required (or that Landlord may reasonably request) regarding any such request. If Landlord consents to any matter that requires Landlord's consent under the Lease, then Sublandlord shall automatically be deemed to have given such consent under this Sublease, except for approvals and consents relating to Alterations (other than items for which neither Landlord's nor Sublandlord's consent shall be required). If Landlord grants any consent regarding Approvals, then Sublandlord shall not unreasonably withhold or delay consent or approval with respect thereto.