“SPECIAL NEEDS” LEASE TRANSFER CLAUSES

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INTRODUCTION

Under the common law, a tenant is generally free to transfer its leasehold interest without landlord consent. Since the landlord’s selection of a tenant is generally influenced by the tenant’s reputation, longevity, and financial strength, landlords generally want to restrict a tenant’s ability to transfer its interest in the premises, or to permit a third party to occupy the space, and they do so through the assignment and sublet clause. Accordingly, the assignment and subleasing clause will generally prohibit, among other things:

- Assignments
- Subleases
- Encumbrances (which, among other things, prevents a restaurant tenant from pledging its lease as security for a loan)
- Occupancy of the premises by any person or entity other than the tenant (which effectively prohibits, among other things, licenses of space, space sharing arrangements, and permitted subtenants from assigning their subleases or sub-subleasing)
- Transfers of a majority of the stock, membership interests, or partnership interests in the tenant, by operation of law or otherwise. Some landlords will prohibit any such transfer, no matter how small. Such clauses prohibit, among other things, transfers of stock in public corporations and entities, and transfers of stock and equity interests by reason of death.

The reach of these clauses is breathtaking and thoroughly ties up the tenant’s ability to transfer the lease or to grant occupancy rights to third parties. Although the impact of the clause is generally ameliorated by the landlord’s agreement to act reasonably in determining whether or not to consent to a proposed assignment or sublet, the landlord’s agreement to be reasonable as to assignments and subleases will not help a restaurant tenant who needs to pledge the lease as security for a loan needed to buy equipment for a restaurant if the lease also prohibits any encumbrance of
the lease. In addition, although the landlord’s agreement to be reasonable may create a moral obligation, such agreement is legally toothless (except for a possible bad faith argument) if the lease limits the tenant’s remedy to an action for injunctive relief, thus barring any claim for monetary damages, as is often the case.

The tenant’s attorney therefore will generally seek to create a class of transactions (which will be referred to in these materials as “Permitted Transfers”) that do not require the landlord’s consent. Because tenants have different needs, the job of the tenant’s attorney is to determine what kinds of transactions should not require landlord consent and to negotiate for “no consent” rights. The landlord’s attorney, on the other hand, often views his or her job as hampering the tenant’s ability to engage in such transactions to the greatest extent possible in order to give the landlord the greatest possible leverage in controlling the space.

In some cases, notions of simple fairness dictate that landlord consent should not apply to certain types of transfers. For example, the death of a shareholder of a corporation should be treated as a tragedy, and not as a default under the lease. If the landlord doesn’t trust the children or spouse of the deceased shareholder to operate the tenant’s business, it should negotiate a right to terminate the lease, not create a default. If the landlord leases space to a publicly held corporation, a transfer of stock should not trigger a landlord consent right (although landlords often attempt to exert control in the case of “insider” transfers).

Described below are some common situations in which a tenant should consider negotiating a “no consent” provision. But the tenant’s lawyer needs to assess the needs of each tenant individually and adjust its negotiations to reflect the tenant’s actual needs.

LAWYERS

Law firms, as a group, often have a number of specific needs:

1. Law firms make new partners, lose partners, bring in partners laterally, and merge with other law firms. If the lease provides that transfers of equity interests constitute an assignment requiring the landlord’s consent, the landlord can control that process. Because law firm membership is a core aspect of law firm practice, few law firms would willingly give the landlord any control over changes in law firm ownership.
2. Law firms sometimes lease more space than they need in anticipation of growth; and law firms sometimes shrink. To protect the law firm’s ability to carry the space economically, any law firm should negotiate for a right to either share space or sublease space without the landlord’s consent. In such a case the landlord will, at a minimum, want to limit the amount of space that can be shared or subleased.

A sample law firm clause might be drafted as follows:

So long as Tenant is a law firm, the following transactions and occurrences shall not be subject to any of the provisions of this Article [Assignment and Subletting]:

1. Any change in the composition of Tenant’s partners or members resulting from (a) death or incapacity of any partner(s)/member(s), (b) withdrawal of any partner(s)/member(s), and/or (c) admission of any partner(s)/member(s).
2. A merger by Tenant, or consolidation by Tenant, with another law firm;
3. A sale of substantially all of the Tenant’s assets to another law firm;
4. Any reorganization by Tenant into another form of entity (e.g., a professional corporation);
5. Any license or licenses of space in the demised premises to other attorney(s) or one or more law firms [provided that the total space so licensed at any given time shall not exceed 33-1/3% of the total rentable area of the demised premises].
6. Any occupancy of space in the demised premises by a person or entity providing litigation services to Tenant ancillary to the conduct of Tenant’s business.

PUBLICLY OWNED COMPANIES

A publicly owned corporation clearly can’t agree to a lease provision that treats a transfer of shares or issuance of shares as an assignment of the lease, can’t accept an assignment of a lease that contains such a provision, and can’t sign a sublease if the overlease provides that transfers of shares of a subtenant is treated an assignment.

In addition, corporations often engage in certain kinds of transactions that cannot, from a business standpoint, be subject to the outside control of a landlord, including:
The simple fix to the first problem (transfers and issuance of shares) is the following provision:

............; provided that the foregoing shall not apply (1) if Tenant (or any subtenant) is a publicly owned entity, or (2) with respect to shares, partnership interests, or other equity interests sold in the over-the-counter market or on other recognized stock exchange.

Landlords will often attempt to limit the operation of such clauses by providing that:

............; provided that the foregoing shall not apply (1) if Tenant (or any subtenant) is a publicly owned entity, or (2) with respect to shares, partnership interests, or other equity interests sold in the over-the-counter market or on other recognized stock exchange; other than transfers of shares or other equity interests to those deemed “insiders” within the meaning of the Securities Exchange Act of 1934, as amended).

The “insider” language is the result of negative experiences some landlords had in connection with insider buyouts in the 1970s and 1980s, especially buyouts by corporate raiders. However, since a corporation cannot control who becomes an “insider” and launches a buyout, no corporation should agree to such language.

If a tenant is considering going public, it would add to the proposed language:

or (3) to the transfer of shares, partnership interests or other equity interests effected in connection with a “going public” transaction

With respect to mergers, consolidations, etc., the tenant might ask for the following clause:
Notwithstanding anything to the contrary contained in this Lease: The following transactions (“Permitted Transactions”) by Tenant or any subtenant shall not require the consent of Landlord and shall not be subject to any of the other provisions of this Article [Assignment and Subletting], except that (i) Tenant shall give Landlord written notice of such transaction and (ii) the assignee’s, subtenant’s, or occupant’s occupancy of the demised premises shall comply with Article ___ [Permitted Use]:

(A) An assignment or sublease to, or any occupancy of the demised premises by, any person or entity that, directly or indirectly, controls, is under common control with, or is controlled by Tenant (or subtenant); or

(B) An assignment of this Lease (whether effected by operation of law or otherwise) or a sublease of all of the demised premises effected in connection with: (i) a merger of Tenant (or subtenant) into another entity or a merger of another entity into Tenant (or subtenant), (ii) a consolidation of Tenant (or subtenant) with another entity, or (iii) a reorganization of Tenant (or subtenant), or (iv) a purchase of all or substantially all of Tenant’s (or subtenant’s) assets; in each case provided (x) Tenant is not in default of this Lease beyond any applicable cure period at the time of such transaction, and (y) such transaction is made for a valid business purpose and not as a subterfuge for the purpose of transferring this Lease.

A landlord-oriented clause might, among other things, (a) require prior notice of the transaction, (b) in the case of a merger, consolidation, or sale of assets, permit the transaction to proceed without consent only if the transferee’s net worth is the greater of tenant’s net worth (i) at the date of execution and delivery of the lease and (ii) immediately prior to the date of the transaction. Tenants should bear in mind that prior notice cannot be given by a publicly owned corporation of a prospective merger or sale of business assets; that tenant net worth rises and falls with the economy and that therefore a net worth test tied into the tenant’s net worth at the date of execution of lease will preclude a
consent-free transaction in a “down” economy; and that a merger might make perfect business sense even if the resulting entity has a lower net worth. Any restrictions imposed by the landlord on such a Permitted Transaction needs to be carefully scrutinized to ensure that the “tail” (the lease) doesn’t wag the “dog” (the tenant’s business) as a practical or theoretical matter.

Another issue for institutional tenants is that they often contract out certain functions, such as accounting functions, to independent contractors and provide office space to those contractors. Accordingly, public companies may ask to include as a Permitted Transaction:

Any occupancy of space in the Premises by a person or entity providing services solely to Tenant at the Premises, provided such services are ancillary to the conduct of Tenant’s business.

Mom and Pop Business

If the tenant is a mom and pop business, the owners expect to pass the business onto the children, and do not want to sell the business, the tenant’s attorney might want to focus on estate planning and death. The owners may want to pass interests to the children during their lifetime; and they will want the children to inherit the business. Therefore, transfers of shares to the children and trusts need to be permitted, and transfers occurring by reason of death should not trigger the assignment clause. If the business might be sold, then the assignment and sublet clause needs to be structured to permit a sale of the business, whether by stock transfer or sale of assets.

A clause permitting gift and death transfers might provide as follows:

A transfer of stock or partnership interests (i) occurring by reason of death or incapacity, or (ii) to a spouse, parent, child or member of the transferring shareholder’s/partner’s immediate family or to a trust established for the benefit of the transferring shareholder/partner or any such spouse, parent, child or family member.
Conclusion

Every tenant has its own assignment and sublet needs, and every tenant’s lawyer needs to determine what those needs are. If the attorney represents a tenant with significant leverage, he or she can negotiate a broad spectrum of Permitted Transactions. If the attorney represents a tenant with limited leverage, he or she should explain the risks and focus on the important issues.
INTRODUCTION TO RETAIL ASSIGNMENT AND SUBLETTING PROVISIONS

In retail, landlords are more concerned with tenant mix, tenant suitability, how tenants run their established business and how each tenant fits into the streetscape or scene the landlord has planned for its center or street level office building. Retail tenants are more idiosyncratic; some have very personal needs that must be reflected in their assignment and sublet clauses. Others lend cache or anchor a center, and, due to their structure or publically traded nature, need certain corporate carve-outs to the strict no-assignment or no-sublease clauses landlords like. Restaurants are an interesting subculture in retail, and we will explore briefly the effects of franchises and build-to-suits on ground leases and their effects on assignment and subleasing clauses. Assignment and subletting provisions in retail leasing tend to be individually crafted to reflect the nature, business needs, and even personality of the tenant. The tradeoff to retail landlords who are willing to bend the typical restrictive assignment and subleasing language can be accepting more practical and creative comforts to their concerns and a happier, thriving tenant.

I. ISSUES FOR SMALL BUSINESSES

Typically, concerns of these types of tenants are individual, even personal:

- Sale of a business
- Retirement planning
- Estate planning
- Partnership issues
- Particular subleasing or assignment issues, particular to the type of business

We will look at:
A. **Solo practice veterinarian in a shopping center**

B. **Gym owned by two unrelated individuals through an LLC in a shopping center**

Landlords want uniformity throughout their leases in the center, predictability for management of the center, a steady stream of income and knowing who is in their space. Let's see how this can be worked out.
EXAMPLES I

SMALL BUSINESSES
Example I-A

User: Veterinarian

Original Lease Language Drafted by: Landlord

- **Client's Instructions:** This veterinarian's business plan was to work in this location for 20 years and then to retire, selling his business and his lease to his successor vet. Thus the assignment provision was key to his exit.

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**ARTICLE 23
ASSIGNMENT AND SUBLET**

2301. Consent. Without the prior written consent of Landlord in each instance, which consent may be given or withheld in Landlord's sole and absolute discretion, Tenant shall not assign, mortgage, pledge, encumber, sublet, underlet, license or permit the Premises or any part thereof to be used by others, or otherwise transfer, voluntarily, by operation of law, or otherwise, this Lease or the Premises or any interest herein or therein, provided, however, Landlord's consent for an assignment of this Lease or a subletting of the entire Premises shall not be unreasonably withheld, conditioned or delayed subject to Section 2306. Neither the Premises, nor any part thereof, will be used, occupied or managed, by anyone other than Tenant, or used for any purpose other than as permitted under this Lease. A sale, transfer, assignment, conveyance, endorsement or other disposition of (a) a general partnership interest, if Tenant is a partnership, (b) a managing member's interest, if Tenant is a limited liability company or (c) fifty percent (50%) or more of the capital stock of Tenant (if Tenant is a corporation) or of the interest in capital, profits, or losses of Tenant (if Tenant is a partnership, limited liability company or partnership) shall be deemed to be a transfer of this Lease within the meaning of this Section 2301, unless such sale or transfer is made by (i) a publicly owned corporation, (ii) involves the sale or issuance of securities registered under the Securities Act of 1933, as amended, (iii) is made entirely amongst the existing stockholders or interest holders of Tenant, or (iv) results from the death of a stockholder or interest holder of Tenant. The transactions described in this Article are sometimes referred to in Article 23 as a "Transfer," and the person to whom Tenant's interest is transferred shall be referred to as a "Transferee."

2302. Intentionally Deleted.

2303. Entities. If Tenant is a partnership, (i) each present and future general partner or venturer shall be personally bound by all of the covenants, agreements, terms, provisions and conditions set forth in this Lease and (ii) in confirmation of the foregoing, at the time that Tenant admits any new general partner to its partnership or venturer to its joint venture, Landlord may require, and Tenant shall deliver, an agreement executed by each new partner in form and substance satisfactory to Landlord whereby such new general partner or venturer shall agree to be personally bound by all of the covenants, agreements, terms, provisions and conditions of this Lease, without regard to the time when such new partner is admitted to the partnership or when any obligations under any such covenants, agreements, terms, provisions and conditions accrue.
Section 2311 below, granting or withholding its consent to the proposed Transfer. Should Landlord consent to a Transfer, Tenant, its proposed Transferee and Landlord shall execute an agreement, acceptable to Landlord and such parties in their reasonable discretion, under which the proposed Transferee shall be bound by the terms and conditions of this Lease. Any consent by Landlord to a Transfer shall not in any manner be construed to relieve Tenant, any Guarantor or any of their Transferees from obtaining the consent in writing of Landlord to any further Transfer, nor shall the same release or discharge Tenant from any liability, past, present or future, under this Lease, and Tenant shall continue fully liable in all respects hereunder. Further, all of the provisions of this Article 23 shall apply to any proposed Transfer by any Transferee and their respective Transferees. Notwithstanding anything contained herein to the contrary, if an Event of Default exists on the date of the Transfer, Tenant shall not be permitted to make such Transfer.

2309. Reasons to Refuse Consent. Without limiting the generality of this Article 23, it will be reasonable for Landlord to refuse consent to any Transfer if, at the time of either Tenant's notice of the proposed Transfer or the proposed commencement date thereof: (i) there exist an uncured Event of Default by Tenant; (ii) the proposed Transferee is an entity (aa) with which Landlord is already in negotiation as evidenced by the issuance of a written proposal; (bb) which is already an occupant of the Shopping Center; (cc) which is incompatible with the character of occupancy of the Shopping Center; or (dd) which would subject the Premises to a use which would (1) involve increased insurance, personnel or wear upon the Shopping Center, (2) violate any exclusive rights or restrictions contained in the lease of another tenant of the Shopping Center, or violate Exhibit E of this Lease, or conflict with the primary use of another tenant; (3) require any addition to (including improvements thereon) or modification of the Premises, or all or any portion of the Shopping Center, or any additional action by Landlord, in order to comply with building code or other governmental requirements, or (4) increase the governmental parking requirements for the Premises or the Shopping Center; (iii) the Transferee has less than three (3) years experience with respect to owning or operating the same type of business as the Permitted Use; (iv) the nature of the proposed Transferee's proposed or likely use of the Premises would involve any increased risk of the use, release or mishandling of any Hazardous Substances (as defined in Article 31); (v) the business reputation or character of the proposed Transferee or the business reputation or character of any of its affiliates is not reasonably acceptable to Landlord; (vi) Landlord has not received assurances acceptable to Landlord in its sole discretion that all past due amounts owing from Tenant to Landlord (if any) will be paid and all other defaults on the part of Tenant to the effectiveness of the proposed Transfer; or (vii) Landlord is not satisfied that the proposed Transferee's assets, businesses or inventory would not be subject to seizure or forfeiture under any Laws related to criminal or illegal activities. In no event may Tenant mortgage, pledge or otherwise encumber its leasehold interest as collateral for a debt.

2310. Continuing Liability. Subject to Section 2313 below, notwithstanding any permitted Transfer, Tenant shall at all times remain directly and primarily liable for the payment of Rent and for compliance with all of its other obligations under this Lease. Upon the occurrence of an Event of Default under Article 26 of this Lease, if the Premises or any part of the Premises are then assigned or sublet, Landlord, in addition to any other remedies provided in this Lease or by law, may collect directly from the assignee or subtenant all rents due and becoming due to Tenant under the sublease and apply the rent against sums due from Tenant under this Lease. The collection of any Rent directly from an assignee or subtenant shall not be construed to constitute a novation or release of Tenant from the further performance of Tenant's obligations nor shall such acceptance of Rent be construed as a waiver of any Tenant violation under Article 23. Any guaranty of Tenant's performance executed as consideration for this Lease shall remain in full force and effect before and after any Transfer. Landlord may require Tenant, and Tenant agrees, to execute a guaranty of this Lease before Landlord consents to any Transfer. Landlord may proceed directly against Tenant without first exhausting any remedies for default which Landlord may have against any Transferee. In the event of a termination, re-entry or dispossession by Landlord following a sublease by Tenant, Landlord may, at Landlord's option, take over all of the right, title and interest of Tenant (as sublessor) under such sublease, and the subtenant shall, at Landlord's option, attorn to Landlord pursuant to the provisions of such sublease.

2311. Review Charges. Tenant shall pay to Landlord $2,000.00 for attorney's fees and administrative expenses involved with the review, processing or preparation of any documentation in connection with a Transfer, whether or not Landlord's consent to such Transfer is required or obtained. Such fee shall be paid at the same time that Tenant submits its request for such assignment or sublet.

2312. Bankruptcy. Anything contained in this Lease to the contrary notwithstanding, and without prejudice to Landlord's right to require a written assumption from each Transferee, any person or entity to whom this Lease is transferred including, without limitation, assignees pursuant to the provisions of the Bankruptcy Code, shall automatically be deemed to have assumed all obligations of Tenant arising under this Lease. If this Lease is assigned to any person or entity pursuant to the provisions of the Bankruptcy Code, any and all monies or other consideration payable or otherwise to be delivered in connection with such assignment shall be paid or delivered to Landlord and shall remain the exclusive property of Landlord and not constitute the property of Tenant or Tenant's estate within the meaning of the Bankruptcy Code. All such money or other consideration not paid or delivered to Landlord shall be held in trust for the benefit of Landlord and shall be promptly paid or delivered to Landlord.

2313. Assignment of Lease in Connection with Sale of Business. Notwithstanding anything set forth in this Article 23, Landlord agrees that in the event of a sale of all of Tenant's business to a permitted Transferee, such sale shall be subject to Landlord's consent which shall not be unreasonably withheld, conditioned or delayed, subject to Section 2308, but shall not be subject to the recapture right described in Section 2305 above. In addition, in the event of such sale of Tenant's business to a permitted Transferee, and notwithstanding the express terms of Section 2307 above, Landlord agrees that it shall not be entitled to any portion of the compensation received by Tenant for the sale of its business. Notwithstanding anything stated in Sections 2308 or 2310, in the event of a permitted Transfer of this Lease in connection with a sale of Tenant's business, the named Tenant herein (and not its successors or assigns) and the Guarantor that executed the Guaranty attached hereto as Exhibit F shall be released from all liability accruing under this Lease after the date that is one hundred eighty (180) days after the Transfer, provided (i) there has been no Transfer during the first three (3) Lease Years of the Term, (ii) provided that the Transferee deposits with Landlord an additional Security Deposit in the amount of three (3) full months of Rent then being paid by Tenant at the time of such Transfer, and (iii) there has been no Event of Default under this Lease at any time during the Term. In the event the named Tenant herein and the Guarantor that executed the Guaranty attached hereto as Exhibit F are released from liability, pursuant to the terms and conditions set forth in this Section 2313, after such release this provision shall be null and void and no longer in full force or effect.
DISCUSSION FOR EXAMPLE 1-A - VETERINARIAN

Tenant wanted to sell his business upon his retirement and assign his lease

- Lease contained a personal guaranty
- 3000 square feet
- This veterinarian's business plan was to work in this location for 20 years and then to retire, selling his business and his lease to his successor vet. Thus the assignment provision was key to his exit.
- He wanted his personal guaranty to burn off.
- The form shopping center lease's boiler plate language prohibits just about every scenario imaginable and gives Landlord 50% of all profits for any transfer. It gives detailed reasons for Landlord's refusal of consent and allows Landlord to recapture.
- However, it all boils down to Section 2313, Assignment of Lease in Connection with Sale of a Business. That provides for:
  - Sale of business to a permitted transferee, is subject to landlord's consent (not unreasonably withheld, conditioned or delayed)
  - But with no recapture rights
  - No compensation to landlord for the sale of the business
  - Release of the guaranty 180 days after the transfer, if
    - The business/transfer doesn't occur in first three years, and
    - No event of default during term, and
    - Three months rent paid in advance at the time of the transfer
    - But only as to this vet

This corporate landlord, with its extensively planned text, wanted comfort that the transfer would be controlled and controllable, but that the exit strategy for the tenant had to include the transfer of space occupied by the business with the business and the tenant won the negotiation in this case.
Example I-B

User: Gym in A Shopping Center, Owned by Two Unrelated Individuals Through an LLC

Original Lease Language Drafted by: Landlord

Client Instructions: This tenant was a partnership of two unrelated individuals, who wanted: (a) protection on family transfers and protection to allow the other individual partner to take over the business upon the death of one individual; (b) specific sublease permission for businesses related to a gym, as they had success with these subtenants at their other locations: juice bar, day care, massage, sports equipment, clothing sales, and a tanning salon.

ARTICLE 6
ASSIGNMENT AND SUBLETTING; RECAPTURE

Prohibition: Permitted Transfers.

(a) Tenant covenants and agrees that neither this Lease nor the term and estate hereby granted, nor any interest herein or therein, will be assigned, mortgaged, pledged, encumbered or otherwise transferred, whether voluntarily, involuntarily, by operation of law or otherwise, and that neither the Premises nor any part thereof will be encumbered in any manner by reason of any act or omission on the part of Tenant, or used or occupied or permitted to be used or occupied, by anyone other than Tenant, or for any use or purpose other than a Permitted Use, or be sublet (which term, without limitation, shall include granting of concessions, licenses and the like) in whole or in part, or be offered or advertised for assignment or subletting by Tenant or any person acting on behalf of Tenant, without, in each case, the prior written consent of Landlord, which in the case of a proposed assignment of this Lease or subletting of the entirety of the Premises for a period of not more than one (1) day less than the remainder of the Term (a “Proposed Transfer Transaction”), shall not be unreasonably withheld, conditioned or delayed, subject however to the terms and conditions hereof. Without limiting the foregoing, any agreement pursuant to which: (a) Tenant is relieved from the obligation to pay, or a third party agrees to pay on Tenant’s behalf, all or any portion of the Basic Rent or Additional Rent under this Lease; and/or (b) a third party undertakes or is granted by or on behalf of Tenant the right to assign or attempt to assign this Lease or sublet or attempt to sublet all or any portion of the Premises, shall for all purposes hereof be deemed to be an assignment of this Lease and subject to the provisions of this Article 6. Subject to Section 6.1(b) below, the provisions of this paragraph (a) shall apply to a transfer (by one or more transfers) of a controlling portion of or interest in the stock or partnership or membership interests or other evidences of equity interests of Tenant (an “Equity Transfer”) as if such transfer were an assignment of this Lease.

(b) Notwithstanding any provision of this Lease to the contrary, but otherwise subject to the provisions of this Article 6:
(i) Provided there is no then-current Event of Default or condition which with the lapse of time or giving of notice would become an Event of Default, upon written notice to Landlord given any time after the commencement of the sixth (6th) Lease Year: (a) a Principal may transfer all or a portion of his ownership interests in Tenant (i.e. stock, membership interests, partnership shares, etc., as applicable) to another Principal without charge and without Landlord’s consent being required, so long as the remaining Principal(s) continue to control Tenant and otherwise fulfill the obligations of Section 5.1(d); (b) a Principal may transfer all or a portion of his ownership interests in Tenant to a person who is not a Principal, subject to Landlord’s approval, which will not be unreasonable withheld, conditioned or delayed so long as the proposed transferee has a net worth of at least $1 million and at least five (5) years relevant prior operating experience; and (c) Tenant may sublet a portion of the Premises for uses related to the Permitted Use including, but not limited to, day care, massage, a juice bar, sports equipment sales, clothing sales, or a tanning salon.

(ii) Upon written notice to Landlord but without Landlord’s consent being required, a Principal may transfer or assign to family members, as a gift for estate planning purposes, limited partnership interests, non-managing member interests, or stock in Tenant, so long as the Principals continue to remain in control of Tenant and otherwise fulfill the obligations of Section 5.1(d).

(iii) In the event of the death of a Principal, such person’s ownership interest in Tenant may be transferred to such person’s estate or beneficiaries under or pursuant to such person’s will, but if the deceased was a general partner, manager or managing member of Tenant, the deceased person’s interest shall be converted to that of a limited partner or non-managing member, as applicable. Any such transfer requiring the appointment of a new manager of Tenant or resulting in the obligations of Section 5.1(d) being unfulfilled will require Landlord’s consent, not to be unreasonably withheld, conditioned or delayed.

Acceptance of Rent. If this Lease be assigned, or if the Premises or any part thereof be sublet or occupied by anyone other than Tenant, whether or not in violation of the terms and conditions of the Lease, Landlord may, at any time and from time to time, collect rent and other charges from the assignee, subtenant or occupant, and apply the net amount collected to the rent and other charges herein reserved, but no such assignment, subletting, occupancy, collection or modification of any provisions of this Lease shall be deemed a waiver of this covenant, or the acceptance of the assignee, subtenant or occupant as a tenant or a release of Tenant from the further performance of covenants on the part of Tenant to be performed hereunder. Any consent
by Landlord to a particular assignment, subletting or occupancy or other act for which Landlord's consent is required under paragraph (a) of Section 6.1 shall not in any way diminish the prohibition stated in paragraph (a) of Section 6.1 as to any further such assignment, subletting or occupancy or other act or the continuing liability of the original named Tenant. No assignment or subletting hereunder shall relieve Tenant from its obligations hereunder, and Tenant shall remain fully and primarily liable therefor. Landlord may revoke any consent by Landlord to a particular assignment, subletting or occupancy if the assignment or sublease does not provide that the assignee, subtenant or other occupant agrees to be independently bound by and upon all of the covenants, agreements, terms, provisions and conditions set forth in this Lease on the part of Tenant to be kept and performed.

**Excess Payments.** If Tenant assigns this Lease or sublets the Premises, Tenant shall pay to Landlord as Additional Rent fifty percent (50%) of the amount, if any, by which (a) any and all compensation received by Tenant as a result of such assignment or subletting exceeds (b) in the case of an assignment, the Basic Rent and Additional Rent under this Lease, and in the case of a subletting, the portion of the Basic Rent and Additional Rent allocable to the portion of the Premises subject to such subletting. Such payments shall be made on the date the corresponding payments under this Lease are due. Notwithstanding the foregoing, the provisions of this Section shall impose no obligation on Landlord to consent to an assignment of this Lease or a subletting of all or a portion of the Premises.

**Further Requirements.** When seeking Landlord's consent to a Proposed Transfer Transaction or proposing an Equity Transfer, whether or not Landlord’s consent is required, Tenant shall furnish such information and materials as Landlord may require in order to evaluate the Proposed Transfer Transaction and the parties thereto, including without limitation the proposed effective date thereof. Tenant shall reimburse Landlord on demand, as Additional Rent, for any out-of-pocket costs (including reasonable attorneys’ fees and expenses) incurred by Landlord in connection with any actual or proposed assignment or sublease or other act described in paragraph (a) of Section 6.1, whether or not consummated, including the costs of making investigations as to the acceptability of the proposed assignee or subtenant. Any sublease to which Landlord gives its consent shall not be valid unless and until Tenant and the sublessee execute a consent agreement in form and substance satisfactory to Landlord in its reasonable discretion and a fully executed counterpart of such sublease has been delivered to Landlord. Any sublease shall provide that: (i) the term of the sublease ends no later than one day before the last day of the Term of this Lease; (ii) such sublease is subject and subordinate to this Lease; (iii) Landlord may enforce the provisions of the sublease, including collection of rents; and (iv) in the event of termination of this Lease or reentry or repossess of the Premises by Landlord, Landlord may, at its sole discretion and option, take over all of the right, title and interest of Tenant, as sublessor, under such sublease, and such subtenant shall, at Landlord’s option, attorn to Landlord, but nevertheless Landlord shall not (A) be liable for any previous act or omission of Tenant under such sublease; (B) be subject to any defense or offset previously accrued in favor of the subtenant against Tenant; or (C) be bound by any previous modification of such sublease made without Landlord’s written consent or by any previous prepayment of more than one month’s rent.
DISCUSSION FOR EXAMPLE I-B - GYM

The tenant was a partnership of two unrelated individuals and had several other gyms in the geographic area, making it a small regional chain. As individuals with families they were concerned about estate planning and that the death of one individual would not put the spouse of the deceased in the business with the surviving partner. They wanted the surviving partner to be able to buy out the spouse. See section (b)(ii) and (iii).

They wanted to be able to transfer to another gym business if they sold the business (See section (b)(i)).

They also had a proven track record of subleasing to very specific related businesses that improved their profitability. In a shopping center with possible competing tenants, they wanted certainty that they could sublet without landlord approval or profit sharing. (See section (b)(i)).

Again, the process for this small business owner was to chip away at the landlord's extensive prohibitions, carving out the very specific needs that were of utmost importance to its business plan. Experienced landlords are accustomed to compromises that will help their tenants thrive and keep them willing to negotiate and occupy.
II. ISSUES FOR CHAINS

National chain retailers' issues are very different from those of small businesses. They are typically large national or international corporations or divisions of large corporations. These tenants do not want any one of their tens or hundreds of landlords dictating corporate policy on mergers, intercompany transfers, sales of divisions or sales of stock, especially if they are public companies. If they sell their business to a competitor they will often dictate to the landlord the terms of the assignment.

Landlords trade the loss of negotiating power with these tenants for a more secure stream of income (they hope). The initial forms of lease may well be the tenant's form and the landlords provide the comments.

We will look at:

A. National Clothing Retailer (mall, center or highly urban first floor)

B. National Convenience Store – Ground Lease; Tenant Constructs the Store
EXAMPLES II

NATIONAL CHAIN RETAILERS
Example II-A

User: National Clothing Retailer

Original Lease Language Drafted by: Tenant

Client's Instructions: This publicly traded company has considerable power in the marketplace. So much so it provides its own leases. It cannot and will not allow a single landlord to stand in the way of any of its needs relating to the sale of its stock, mergers, acquisitions, financings, or assignments in connection therewith. The instructions from the client were to allow as few changes as possible to the standard provision. In fact almost nothing in this assignment and subleasing section is negotiable. Tenant's outside counsel was required to check with inhouse counsel on all modifications.
Assignment and Subletting. Notwithstanding anything to the contrary contained in this Lease, Tenant shall be entitled to assign this Lease or sublease the Premises upon the following terms and conditions:

(a) Tenant may, without obtaining the consent of Landlord, sublease a portion of the Premises for the operation of an alteration or tailor shop for the accommodation of Tenant's customers and the public.

(b) Tenant may, without obtaining Landlord's consent:

(i) assign or otherwise transfer the leasehold estate created by this Lease to any "affiliate" of Tenant, which for purposes of this Lease shall be any entity under common control with Tenant, or to the parent, any franchisee or any subsidiary or successor corporation of Tenant;

(ii) merge into or consolidate with any entity; and

(iii) assign or otherwise transfer the leasehold estate created by this Lease (A) to a purchaser of all or substantially all of the assets of Tenant, as a going business, or (B) to the purchaser of the assets comprising a substantial number of Tenant's stores, provided that in any such instance the acquiring entity, immediately following such acquisition, assumes directly to Landlord the obligation to perform and be bound by this Lease for all payments and performance accruing from and after the date of such acquisition.

(c) In the event Tenant seeks to assign or transfer only the leasehold estate created by this Lease and does not seek to assign or transfer in conjunction therewith any of the other stores, assets or shares of Tenant, Tenant shall, subject to the ensuing provisions of this paragraph (c), be entitled to effect such an assignment or transfer provided that the acquiring entity agrees in writing to be bound by all of the covenants, duties and obligations of Tenant under this Lease. However, prior to the consummation of any such assignment or transfer, Tenant shall notify Landlord in writing that such transaction is being considered, which notice ("Tenant's Transfer Notice") shall set forth (i) the trade name and legal name of the proposed assignee or transferee (which trade name and legal name shall be deemed to be expressly approved by Landlord for use at the Premises if Landlord does not cancel this Lease as hereinafter provided in this paragraph), and (ii) a description of the business conducted by the proposed assignee or transferee (which business shall be deemed to be expressly approved by Landlord as the use of the Premises if Landlord does not cancel this Lease as hereinafter provided in this paragraph). In addition, together with Tenant's Transfer Notice, Tenant shall provide Landlord with an income statement and balance sheet of such proposed assignee or transferee. Within thirty (30) days after the date of Tenant's Transfer Notice, Landlord shall have the right to terminate this Lease by sending Tenant written notice of such termination ("Landlord's Transfer Termination Notice"). Within thirty (30) days after Tenant's receipt of Landlord's Transfer Termination Notice, Tenant shall notify Landlord, in writing, of the date upon which this Lease shall terminate, which
date (i) shall thereafter be the Termination Date and (ii) shall not be less than six (6) months nor more than twelve (12) months after the date Tenant received Landlord's Transfer Termination Notice. In the event that Tenant does not receive from Landlord Landlord's Transfer Termination Notice within thirty (30) days after the date of Tenant's Transfer Notice, Landlord shall be deemed to have approved the assignment or transfer and Tenant may proceed to effect same.

(d) In the event of any permitted assignment or other transfer heretofore described in this Section 7, other than a sublease, Tenant shall be and remain liable for the full performance of this Lease and for all payments and performance falling due or accruing up to the date of any such assignment or transfer, but Tenant shall be relieved of any responsibility with respect to any and all covenants, duties and obligations under this Lease occurring or accruing from and after the date of any such assignment or transfer.

(e) No transfer or issuance of the shares of Tenant shall be regarded as an assignment or transfer of the leasehold interest created by this Lease to which Landlord's consent shall be required.

(f) No consent of Landlord shall be required to any pledge or assignment of this Lease or Tenant's interest herein in connection with the general corporate financing or a pledge or assignment of all or substantially all of Tenant's assets, leases or leasehold interests.
DISCUSSION FOR EXAMPLE II-A – NATIONAL CLOTHING RETAILER

Paramount to the tenant were the instructions to its counsel: "Negotiate as few changes as possible. Almost nothing is negotiable. Check every request for modification with inhouse counsel." Let's examine why.

This publically traded company has considerable power in the market place. So much so it provides its own leases. It cannot and will not allow a single landlord to stand in the way of any of these needs.

Tenant's positions are pretty clear.

1. It always subleases to a tailor or alterations specialist in every shop, in every lease and it does not allow landlord approval rights.

2. It is a public company. Thus, inherent in its nature is:
   a. Transfer of shares, including especially, on the stock exchange.
   b. Assignment of its leases for corporate lending purposes.
   c. Assignments of assets to corporate affiliates.
   d. Corporate mergers.
   e. Sales of the business in its entirety or as some substantial portion of the stores only.

3. If the tenant transfers or assigns otherwise it will specify the assignee, its business, income statement and balance sheet. Landlord can terminate the lease within thirty days; or if landlord does not, then the assignment or transfer is deemed approved.

4. Other than subleases, the tenant is released in all transfers.

In other words, this tenant takes charge of the assignment and sublet situations up front. A landlord which does not accept them does not rent to them.
Example II-B

User: National Convenience Store – Ground Lease; Tenant Constructs Own Building

Original Lease Language Drafted by: Tenant

Client's Instructions: The attractiveness of this tenant to landlords was its control of market share. It constructs its own improvements and desired complete control over the site and complete corporate freedom, but it will make its landlords "comfortable".

17. **SUBLETTING AND ASSIGNING.** Tenant may assign this Lease (in whole or in part), mortgage or otherwise encumber this Lease (in whole or in part), or sublease all or any part of the Leased Premises without requiring Landlord's consent. Tenant shall furnish Landlord written notice of the assignment or sublease within thirty (30) days thereafter, together with the name and address of the assignee or subtenant. Upon such assignment or subletting however, Tenant's obligations shall continue under the terms hereof until the expiration of the then current term, unless sooner terminated by mutual agreement.

Notwithstanding anything in the previous paragraph to the contrary, Tenant, without Landlord's consent, shall have the right to assign its interest in the Lease to any entity which, as a result of reorganization, merger or sale of assets, succeeds to the business now carried on by Tenant, provided that in any such instance, Tenant shall give Landlord an executed assumption agreement whereby the successor shall assume and agree with Landlord to pay the rent and to perform all other terms, covenants and conditions under this Lease. Tenant shall be released and relieved from further liability hereunder upon any subletting or assigning in accordance with this paragraph. For purposes of this paragraph, the term "succeeds to the business" shall mean that the successor entity takes over the business of Tenant at the Leased Premises and in at least ten (10) other locations in the geographical vicinity in which the Leased Premises is located.
DISCUSSION FOR EXAMPLE II-B

Essentially, tenant, which has constructed its building on the site, via a ground lease wants complete control over the site and corporate freedom.

- Tenant acquires all permits, demolishes current improvements and builds its store at tenant's expense, and landlord agrees to cooperate.

- There is an option to purchase, and a first right of refusal.

- Tenant expects full rights to assign or sublet or mortgage without landlord's consent.

- Tenant gives landlord a mere thirty day notice of any assignment or sublet, but tenant remains liable.

- However, in the event of a corporate merger, sale, or other transfer, the landlord's consent is not necessary and the tenant is released from all liability.

- In addition, in the event of a successor which takes over the business of tenant at the premises and at least ten (10) other convenience stores in the chain in the geographic vicinity, there is also no landlord consent necessary and the tenant is released.

This last point is another creative way of approaching the comfort factor for the landlord. If an assignee takes over eleven of these chain stores "in the vicinity" of each other, each with a lease like this one, that deal itself proves that the successor possesses the depth of operational experience and financial wherewithal to comfort a landlord.
III. ISSUES FOR RESTAURANTS

Restaurants have their own issues. They can be national chains, regional chains or very individualized. They can be franchised or not, and we will look at one franchised restaurant.

The variables for transfers for these tenants are broad but almost always include addressing the landlord's very specific concerns on the type of food and/or quality of restaurant which may take an assignment or sublease (i.e., fast food, white cloth, full service, family style, with liquor license, class A business lunch and dinner), or what type of restaurant cannot be the assignee or sublessee due to competition or prohibitions in the leases of other tenants, or types of restaurants inappropriate for the project. We will look at:

A. High Quality Fast Casual Franchise Restaurant

B. Construction of a Stand Alone Restaurant on a Ground Lease with Leasehold Mortgage and Subsequent Subleasing
EXAMPLES III

RESTAURANTS
Example III-A

User:  High Quality Fast Casual Franchise Restaurant

Original Lease Language Drafted by:  Landlord.  The versions below show (i) tenant's edited comments to the initial landlord's draft; (ii) tenant's initial conceptual comments to the initial landlord draft; (iii) the resulting compromise; and (iv) the effect of the franchisor's collateral assignment to which the landlord consents.

Client's Instructions:  This tenant was a desirable, but small tenant, and cost conscious. Caught between a mighty franchisor and a landlord, tenant's counsel managed to bring the lease more center without having a license to nitpick the text of the lease. While more could have been done, "more" was not the instruction received from the client. The instructions tenant's counsel received were "Hit the major points; do not "over lawyer"; keep the bill reasonable." (The client changed the instruction to request a more detailed review for subsequent deals.)

(i)  Landlord's initial draft:
Tenant's counsel's initial conceptual comments to landlord's counsel:

(ii) Tenant's counsel's initial conceptual comments to landlord's counsel:

A. Amend to permit sale to Franchisor pursuant to franchise agreement.

b. Section 13.2 - Tenant will give reasonable notice to Landlord (but no right to reject or repossess space) of assignment or sale to Franchisor or assignment or sale among owners of Tenant of their interest in Tenant; or transfer due to death of individual owner of Tenant.
c. If Tenant assigns or sells or subleases otherwise, Landlord's written consent required, unless assignee/Sublessee has previous experience operating Franchise restaurant and net worth in excess of TBD, in which case no consent necessary following evidence of same to Landlord.

d. Section 13.1 – if Tenant subleases at a profit, Landlord only collects 50% of increased rent.
(iii) Resulting compromise:

ARTICLE XIII
ASSIGNMENT, SUBLETTING AND CONCESSIONS

Section 13.1. Consent Required.
Tenant will not sell, assign, mortgage, pledge or in any manner transfer this lease or any interest therein nor sublet all or any part of the premises, nor license concessions nor lease departments therein, without Landlord’s written consent. Consent by Landlord to any assignment or subletting shall not waive the necessity for consent to any subsequent assignment or subletting. This prohibition shall include a prohibition against any subletting or assignment by operation of law. If this Lease is assigned or the premises or any part underlet or occupied by anybody other than Tenant, Landlord may collect rent from the assignee, under-tenant or occupant and apply the same to the rent herein reserved, and Landlord shall be entitled to retain fifty percent (50%) of any increases in rent resulting from such assignment or sublettings, but no such assignment, underletting occupancy or collection of rent shall be deemed a waiver of this covenant or the acceptance of the assignee, under-tenant or occupant as tenant, or release of Tenant from the performance by Tenant of any covenants on the part of Tenant herein contained. Landlord hereby consents to the execution of the Collateral Assignment of Lease, attached hereto as Exhibit "G", by an between Tenant and Tenant shall remain fully liable on this Lease and for the performance of all terms, covenants and provisions of this Lease.

Notwithstanding the aforesaid, Tenant may without Landlord’s consent, assign or sublease the lease to someone who purchases the [redacted] business operating in the Premises provided the assignee or sublessee has operated a for a period of at least one year prior to the purchase and provided that the assignee or sublessee provides a financial statement which demonstrates that the assignee or sublessee will have a minimum of $200,000 in liquid assets following the purchase of the business. And further provided that the Tenant shall not be delinquent on any monetary obligations under the lease and Tenant agrees to pay all reconciliations which may become payable after the date of the sale of the business for the period up to the date of the sale of the business.

Section 13.2. Corporate Ownership.
If any corporate stock of Tenant is transferred by sale, assignment, bequest, inheritance, operation of law or other disposition so as to result in a change in the effective voting control of Tenant as it existed on the date hereof, Tenant shall promptly give Landlord written notice of such change and Landlord may terminate this lease at any time after such change in control by giving Tenant ninety (90) days written notice of such termination.
(iv) Franchisor's collateral assignment to which landlord consents:

Exhibit—B-1

COLLATERAL ASSIGNMENT OF LEASE

FOR VALUE RECEIVED, the undersigned ("Assignor") assigns, transfers and sets over to a limited liability company ("Assignee"), all of Assignor's right and title to and interest in that certain "Lease" a copy of which is attached as Exhibit A respecting premises commonly known as __________________________. This assignment is for collateral purposes only and except as specified in this document Assignee will have no liability or obligation of any kind whatsoever arising from or in connection with this assignment or the Lease unless and until Assignee takes possession of the premises the Lease demises according to the terms of this document and assumes Assignor's obligations under the Lease.

Assignor represents and warrants to Assignee that it has full power and authority to assign the Lease and that Assignor has not previously assigned or transferred and is not otherwise obligated to assign or transfer any of its interest in the Lease or the premises it demises.

Upon Assignor's default under the Lease or under the "Franchise Agreement" for a Restaurant between Assignee and Assignor or in the event Assignor defaults under any document or instrument securing the Franchise Agreement Assignee has the right to take possession of the premises the Lease demises and expel Assignor from the premises. In that event Assignor will have no further right and title to or interest in the Lease but will remain liable to Assignee for any past due rental payments or other charges Assignee is required to pay Lessor to effectuate the assignment this document contemplates.
DISCUSSION FOR EXAMPLE III-A – HIGH QUALITY FAST CASUAL FRANCHISE RESTAURANT

Tenant's instructions: hit the major points; do not "over lawyer"; keep bill reasonable.

Deal Description:

- High quality fast food
- High profile franchisor
- New shopping center, village-type design
- 2370 square foot tenant; very large center
- Franchisor required collateral assignment of the lease to the franchisor
- Tenant had major tenant improvements in the space

Problems:

- Counsel was limited to one round of issue spotting and negotiation by the tenant client
- Counsel never saw the franchise agreement
- Landlord pdfed the lease so no changes were possible to the text

Franchises

A few words on franchise agreements: Franchise agreements add a third dimension to lease negotiations. The landlord and franchisor have differing goals to some extent that need to be worked out.

The landlord wants to: (1) limit the number of its obligations and liabilities, (2) eliminate opportunities for either franchisee or franchisor to terminate the lease, and (3) maintain back up security such as guaranties, liens, and security deposits.

The franchisor wants to: (1) protect the location, (2) protect the franchise's reputation (that is, be able to rid itself of a troublesome franchisee), and (3) maintain consistency across its franchise operations.

The tenant has little interest in the franchisor's collateral assignment, apart from making sure that the deal gets done.

Typically, the franchisor requires the right to take an assignment in the event of a franchisee default – either under the lease or under the franchise agreement or both. From a
landlord's perspective, this can be a great advantage because it provides additional security from a party with deeper pockets if the original franchisee defaults.

Generally, the franchisor will not assume the liabilities of the franchisee, requiring the landlord to pursue the franchisee for outstanding debts. Landlords, of course, will try to argue that the franchisee was chosen by the franchisor, and the franchisor should share in the burden of the franchisee's failure to meet its obligations.

Franchisors also typically want to assign to another franchisee after the franchisor takes the space back. A compromise can be reached with the landlord using the conditions and approvals which were binding on the old franchisee. However, the landlord may want a new guarantor.

Most franchisors want notice of default and the opportunity to cure. Most landlords accept this, and may prefer it, given that the franchisor is likely in better financial condition than the franchisee.

Landlords do not want to be in the position of having to terminate a lease due to a default under a franchise agreement, so if the franchisor terminates the franchise, landlords typically want the franchisor to take the assignment of the lease.

Textual Analysis

In the example given:

1. The collateral assignment to the franchisor was locked and loaded. There was nothing either landlord or tenant could do about it. The Deal was not happening without it. So the sale/assign provision to franchisor was not an issue.

2. As to corporate transfers and termination, the lease contained restrictive provisions stating if stock in the lessee were transferred by sale, assignment, inheritance, operation of law or otherwise, the landlord had an outright termination option.

That was unworkable for three reasons:

(1) Franchisee agreement

(2) Tenant had major tenant improvement money in the space

(3) Depends to whom it is transferred; why should landlord care if the new tenant is just as good an operator?

This tenant was a desirable, but small tenant, and cost conscious. Caught between a mighty franchisor and a landlord, tenant's counsel managed to bring the lease more center without having a license to nitpick the text of the lease. While more could have been done, "more" was not the instruction received form the client.
3. Three other points raised:

a. Landlord gets only 50% of any increase in rent on a permitted assignment. Landlord agreed.

b. Tenant's counsel tried to get the tenant's owners the ability to construct an estate plan via a sublease/assignment or sale and a sale or assignment among themselves. Tenant didn't get exactly that.

c. Tenant's counsel asked for a free, no consent assign/sublease/assign sale to someone/entity who buys the business (i.e., the franchise) with previous experience running this very restaurant and net worth in excess of TBD. Evidence of all of the above was required.

In the compromise, the parties agreed that the tenant had permission to assign or sublease to someone who purchases the business provided $200,000 in liquid assets following purchase and one year's experience operating this specific type of restaurant. That was broad enough to include estate planning if the business stayed in the family – so the tenant took the compromise and called it a win.
Example III-B

User: Regional Chain Restaurant Build-Out by the Tenant on Long Term Ground Lease; Leasehold Mortgage and Subsequent Sublease

Original Lease Language Drafted by: Ground Lessor

Client's Instructions: Tenant wanted maximum flexibility to mortgage, assign, sublease or transfer its rights in the building along with the business.

This national restaurant chain was privately held at lease execution. The site was a stand alone restaurant constructed by tenant via a leasehold mortgage half on a ground lease and half on a fee owned by the tenant. The restaurant served two hotels. The ground lessor was a family trust and the parties negotiated the assignment/sublease provision you see at Example III-B. Through a dizzying set of assignments and corporate mergers, which are not included here, including a public offering and later corporate spin offs, the ground lease and the fee ended up as the asset of a spin off limited partnership of the original ground tenant. The end result was that to understand the assignment and subletting arrangement, a ground lease and a restaurant lease and several subleases had to be analyzed as the restaurant changed hands over the years. The current restaurant operator is a sub-tenant of the tenant as to the fee half of the site and the sub-sub-tenant of the tenant as to the ground leased half. The usual corporate mergers, transfers and financing, and sale arrangements are permitted with net worth parameters.

The following assignment and transfer language is from the original ground lease with the ground lessor.
ARTICLE TEN
ASSIGNMENT AND SUBLETTING

10.01 Binding Effect

The Lease shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors, and assigns. Except as provided in Sections 10.02 through 10.05, Tenant shall not assign nor sublet its interest in the Lease without the written consent of Landlord, which consent shall not be unreasonably withheld or delayed. Landlord shall promptly notify Tenant of any assignment or transfer of a beneficial interest in the Trust. The assignor or grantor under the instrument effecting such assignment or transfer shall not be released from liability or responsibility under the Lease until expressly agreed to by Tenant, which agreement shall not be unreasonably withheld or delayed.

10.02 Assignment

as Tenant, shall have the right, without Landlord's consent, to assign the Lease:

(a) To any subsidiary corporation or Affiliate of

(b) To any Bona Fide Institutional Lender as security for any Leasehold Mortgage,

(c) In connection with a merger, consolidation or other corporate reorganization of , including the sale of all or a major portion of its assets, or
(d) To an institution or third-party investor, including a joint venture or partnership, whether limited or general, in which [redacted], a [redacted] Affiliate and/or a Bona Fide Institutional Lender is a venturer or partner, as the case may be ("Investor"), pursuant to a sale and leaseback transaction or to a transaction by which [redacted] operates the Improvements, or other improvements permitted pursuant to Section 5.14, pursuant to a management agreement or lease as agent, independent contractor or tenant of the Investor if (i) the Investor either (y) has a net worth, determined in accordance with generally accepted accounting principles consistently applied, consisting of at least Five Million Dollars ($5,000,000) or (z) at the time of assignment invests equity in or purchases an equity interest for an amount not less than One Million Dollars ($1,000,000) in the Improvements or other improvements permitted pursuant to Section 5.14, (ii) the Investor becomes tenant of Landlord and assumes all of Tenant's obligations under the Lease (thereby relieving [redacted] of any further obligations hereunder), and (iii) the operating agreement or lease pursuant to which [redacted] operates the Improvements or other improvements permitted pursuant to Section 5.14 as agent, independent contractor or tenant of the Investor is subordinate to the Lease. Upon compliance with the foregoing, [redacted] shall be released from any obligations accruing under the Lease subsequent to the date of such assignment. The
Investor shall have the right to terminate such operating agreement or lease, provided the Investor continues to comply with all of its obligations under the Lease (including the payment of all Rental) and within a reasonable period of time (not to exceed 180 days) engages an experienced hotel operator of established reputation to operate the Improvements or in the event use of the Leased Premises has been modified pursuant to Section 5.14, an operator skilled in management and operation of the then present use.

10.03 Other Assignment

Any Tenant hereunder, if not or any subsequent Tenant shall have the right to assign the Lease to:

(a) Any subsidiary corporation or Affiliate of Tenant or to a party of good moral character which is either an experienced, competent and nationally recognized hotel chain operator, or, in the event use of the Leased Premises has been modified pursuant to Section 5.14, an operator skilled in management and operation of the then present use, or enters into a lease or operating agreement with an experienced, competent and nationally recognized hotel chain operator; or in the event use of the Leased Premises has been modified pursuant to Section 5.14, an operator skilled in management and operation of the then present use; provided, however, that such Tenant shall continue to be liable hereunder,

(b) A third party Investor or,

(c) A Bona Fide Institutional Lender as security for any Mortgage of Tenant.
Provided any of the foregoing either (i) has a net worth equal to or greater than Five Million Dollars ($5,000,000) (as adjusted periodically according to the Price Index) or (ii) at the time of assignment invests equity in or purchases an equity interest for an amount not less than One Million Dollars ($1,000,000) in the Improvements or other improvements permitted pursuant to Section 5.14; and, provided further, that any assignee pursuant to this Section becomes Tenant of Landlord and assumes all of Tenant's obligations under the Lease and enters into an operating agreement or lease to be approved by Landlord with a party to be approved by Landlord (neither of such approvals to be unreasonably withheld or delayed) which provides that it shall be subordinate to the Lease, and upon such assignment and compliance with the provisions of this Section Tenant shall be released from any obligations accruing under the Lease subsequent to the date of such assignment.

10.04 Subletting

Tenant shall be entitled, without Landlord's consent, to sublease or grant concessions of the Leased Premises for hotel-related business purposes such as barber and beauty shops, airline ticket counters, car rental agencies, newsstands, and gift shops (or for business purposes reasonably related to the then current use following modification of use pursuant to Section 5.14); provided that the term of any such sublease or concession shall not extend beyond the term of the
Lease and; provided, further that any such sublease or concession agreement shall be subordinate to the Lease and shall recognize Landlord's option to terminate such sublease or concession in the event the Lease is terminated.

10.05 Assignment and Subletting Upon Default Under Leasehold Mortgage

Landlord agrees that (x) so long as the Lease shall be in effect, then from and after the occurrence of any default by the then Tenant under any Leasehold Mortgage, or of any act, condition or event which would permit any Leasehold Mortgagee to declare all or any part of the indebtedness secured by such Leasehold Mortgage to be immediately due and payable, or (y) if the Lease shall have terminated, then at all times that any new (or substitute new) lease made pursuant to the provisions of Section 6.01(b)(vi) shall be in effect:

(a) Tenant may assign the Lease and/or the leasehold estate hereby created without the consent of Landlord on condition that (i) such assignment shall be in a writing duly executed and acknowledged by the assignee in proper form for recording; and (ii) a duplicate original of such assignment shall be delivered to Landlord, together with an assumption agreement [except as otherwise provided in Section 6.01(b)(vi)] properly executed by the assignee in form for recording, pursuant to which the assignee shall assume all of the terms, covenants and conditions of the Lease to be performed by Tenant from and after the date of such assignment. An assignment of the Lease by Tenant shall not release or discharge Tenant from any obligation or liability under the Lease.
(b) Tenant may sublet, underlet or license all or part of the Leased Premises, provided that such sublease, underlease or license shall be subject and subordinate to the terms and provisions of the Lease and that in case of a sublease or underlease of all or substantially all of the Leased Premises, a copy of such sublease or underlease shall be delivered to Landlord.

(c) Tenant may assign the Lease or sublease, underlease or license substantially all of the Leased Premises as may elsewhere be provided in the Lease, in addition to the rights granted in this Section.

10.06 Notification of Assignment

Within thirty (30) days after any assignment made pursuant to this Article Ten, (except for an assignment to a subsidiary or Affiliate of [REDACTED]), Tenant will notify Landlord of said assignment and shall provide Landlord with the name and address of the assignee and a photocopy of the assignment agreement.

END OF ARTICLE TEN
Second level assignment language from affiliate of original tenant to third party:

2. Assignor hereby represents and warrants to Assignee that to its knowledge (a) the Lease is true and complete in all respects, and is in full force and effect and binding upon the Ground Lessor; (b) there are no agreements or undertakings between Assignor and the Ground Lessor other than as set forth in the Lease; (c) Assignor has paid rent under the Lease currently through [ ] and (d) neither the Assignor nor, to the Assignor’s knowledge, the Ground Lessor is in default under the Lease.

3. Assignor hereby sells, transfers, sets over and assigns unto Assignee all right, title, estate and interest of Assignor in, to and under the Lease.

4. Assignor hereby sells, transfers, sets over and conveys unto Assignee all right, title, estate and interest of Assignor in and to all Leasehold Improvements.

5. Assignor represents and warrants to Assignee that as of the date of this Assignment, (i) Assignor’s leasehold interest created by the Lease is free and clear of all liens, encumbrances, pledges or security interests, (ii) Assignor has good and marketable title to the Leasehold Improvements (except for the Leasehold Improvements subject to and governed by the terms of that certain Ground Sublease dated as of [ ], between [ ], as Landlord, and [ ], as tenant, as such Ground Sublease may have been amended from time to time), and (iii) all such Leasehold Improvements, and Assignor’s interest therein, are free and clear of all liens, leases, encumbrances, claims, pledges or security interests of any kind or nature of anyone claiming or to claim by, through or under Assignor.

6. Assignee hereby accepts the within assignment and agrees to assume and perform all covenants and obligations required of Assignor under the Lease accruing from the date of this Assignment for the balance of the term of the Lease. Assignee hereby represents and warrants to Assignor that as of the date of this Assignment, (i) Assignee has a net worth, determined in accordance with generally accepted accounting principles consistently applied, of at least Five Million Dollars ($5,000,000), and (ii) Assignee has entered into a contract with [ ] for the management of the inn located on the Leased Premises.
The following is the Ground Sublease language from a third party operator (known as "Landlord" herein) back to original tenant's spin off entity (known as "Tenant" herein)

5. Tenant has read and understands the terms of the Ground Lease and covenants to take no action (including, without limitation, failing to pay all sums described in sections (i) and (ii) of paragraph 3 of this Lease) or suffer the Restaurant Lessee to take any action or suffer any condition that causes a default under the terms of the Ground Lease and will take all actions necessary as relates to the Sublease Property (or cause the Restaurant Lessee to take such actions) as shall be necessary to prevent or cure within any applicable grace period a default under the Ground Lease relating to the use, occupancy or operation of the Sublease Property or the improvements thereon. Landlord covenants to take no action or suffer the taking of any action or the existence of any condition on the Leased Premises (except that part thereof constituting the Sublease Property, which shall be the responsibility of Tenant) that would cause a default under and termination of the Ground Lease (and a consequent loss of Tenant's right to occupy the Sublease Property), and will take all actions necessary as relates to the Leased Premises (other than the Sublease Property) as shall be necessary to prevent or cure within any applicable grace period a default under the Ground Lease relating to the use, occupancy or operation of the Leased Premises (other than the Sublease Property) or the improvements thereon. Tenant may freely assign or sublease its interests under this Sublease and may use the Sublease Property or cause it to be used for any lawful purpose, provided that any such assignment, sublease or use would not cause a default under the Ground Lease, nor would such use be for the purpose of (i) nude or topless entertainment, (ii) stores or other facilities devoting a substantial portion of their sales or advertising to pornographic books, x-rated movies or other items of so called "adult entertainment" or "adult gifts" or (iii) uses of a similar nature. Without limiting the generality of their other rights, Landlord and Tenant agree that they shall indemnify and hold the other harmless from any loss, liability or damage arising out of or resulting from their violation of this paragraph.
DISCUSSION FOR EXAMPLE III-B – REGIONAL CHAIN RESTAURANT BUILT BY TENANT ON LONG TERM GROUND LEASE

The tenant wanted maximum flexibility to mortgage, assign, sublease or transfer rights to the building and business it built on the site with a leasehold mortgage.

This national restaurant chain was privately held at lease execution. The site was a stand alone restaurant constructed by tenant via a leasehold mortgage half on a ground lease and half on a fee owned by the tenant. The restaurant served two hotels. The ground lessor was a family trust and the parties negotiated the assignment/sublease provision you see at Example III-B. Through a dizzying set of assignments and corporate mergers, which are not included here, including a public offering and later corporate spin offs, the ground lease and the fee ended up as the asset of a spin off limited partnership of the original ground tenant. The end result was that to understand the assignment and subletting arrangement a ground lease and a restaurant lease and several subleases had to be analyzed as the restaurant changed hands over the years. The current restaurant operator is a sub-tenant of the tenant as to the fee half of the site and the sub-sub-tenant of the tenant as to the ground leased half. The usual corporate mergers, transfers and financing, and sale arrangements are permitted with net worth parameters.

As to the ground leased half

- The first assignment was to an affiliate of tenant
- The second assignment was to a third party operator
- Which third party operator then subleased to the spin off of the original tenant

This ground lease half was then joined to the fee half which had gone through a similarly dizzying set of corporate transfers, all the while subject to the collateral lease assignment for a mortgage to finance construction of the restaurant half on each lot.

You can see throughout these transfers that the original terms for permitted assignment without landlord consent and with release of the assignee as put in the ground lease by the ground lessor were honored:

- Transferee of "good moral character"
- Transferee of at least $5.0m net worth (or had $1.0m equity in the improvements)
- Experienced operator of this type of restaurant
- Permitted corporate transferee; in connection with a merger or financing; or a sale leaseback

For sublet, the ground lessor required that certain objectionable businesses (going to moral character perhaps) not be allowed, but otherwise permitted.
And if all these conditions are met, the ground lessor only gets notice of the transfer with no approval rights, which is appropriate, as the original tenant took out the loan and built the restaurant with its own money, and half the restaurant sits on ground the tenant owns. It is also interesting to note that any transfer by the ground lessor must be approved by the tenant before the original ground lessor is released.

This chapter is being revised for the fifth edition. Any suggestions or corrections would be appreciated. MSenn@SennLaw.com