



# Let's Work It Out

Association of Corporate Counsels – Roundtable

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What a law firm  
*should be.*



# Big Picture

- What are the considerations for Tenant?
- What about Landlord?



# How did we get here?



## PRE-COVID VS. POST-COVID LEASE RESTRUCTURING

- Pre-COVID
  - Tenant limited leverage
  - Lease restructurings occurring usually were done due to extreme financial hardship and a cooperative Landlord
  - Burden on demonstrating financial hardship on Tenant
  - Crucial to communicate with Landlord early
- Post-COVID
  - More even playing field, depending on facts leverage in favor of Tenant
  - Prevalence of hybrid work environment and work from home
  - Retail demand in urban core locations diminished (suburban/rural retail has stayed strong, generally), minimizing food options for workers
  - Food delivery apps further hurting urban core retail
- **BOTTOM LINE:** Lease restructure in post-COVID era highly market driven and fact specific, but Tenants tend to have a bit more leverage vs. pre-COVID



# What is the Landlord concerned about?

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- Cash Flow projections affect compliance with Loan Documents (if applicable)
  - Debt Service Coverage Ratio concerns
  - Liquidity covenants for Guarantors/Borrowers
  - Collections thresholds, if applicable (Delinquency up 232% over the past ~18%)
  - Approvals from Lender necessary in most cases with large office tenants
- Occupancy Rates affect value of Property
- Inability to sell Property due to lower rent numbers and occupancy?
- Co-tenancies affecting the building? Could cause chain reaction with other tenants dependent on occupancy percentage or certain tenants.
- Concerns about Landlord's limited partners/investors and any covenants required of Landlord with vis-à-vis those parties.
  - potential for removal of landlord's general partner/developer based on loss of income of certain threshold
  - Added guarantor liability potentially to cover Lender losses associated with reduction in net operating income ("NOI") of building
- \$308,000,000,000 office loan maturities coming up in the next 24 months, but lenders aren't loaning money and don't want to exercise remedies



# What are the concerns of Tenants?

## NEW LEASES

- How do I provide flexibility to adjust square footage based on occupancy & head count?
- Do I need to provide further flexibility to expand from initial square footage of Premises with a Right of First Offer (“ROFO”) or Right of First Refusal (“ROFR”)?
- Open Floor Plans vs. office hoteling
- Extension Options based on market rate reset or flat increases?
- Termination Option
- Base Year/Operating Expense caps & resets
- Reliance on internal/external space planners and resource management for assistance on determining square footage needs.

## EXISTING LEASES

- Initial Considerations:
  - How much Term left on Lease?
  - How occupied is the current square footage?
  - Has the “market” per square foot rent changed around the building? Should Tenant ask for rent adjustment?
- “Blend & extend” an option?
- Add contraction right?
- Can you renew for less than the full space? (per lease or not)
- Abatement?
- Extend Term in exchange for one or more of the above?



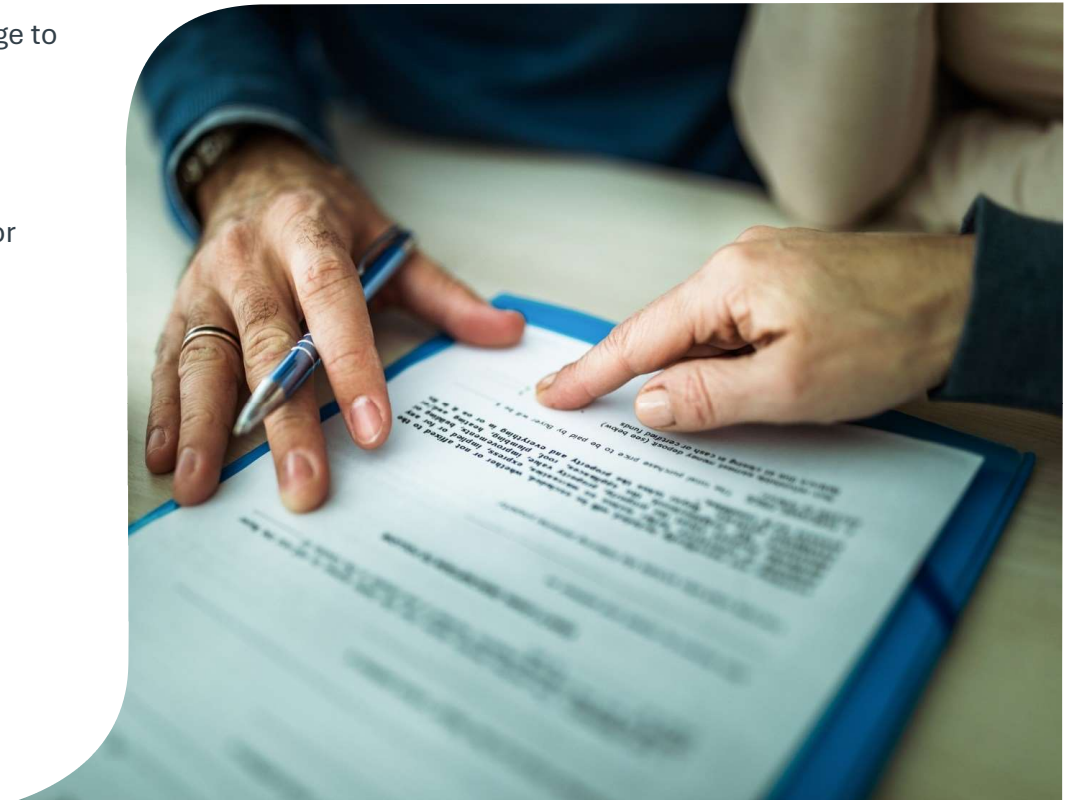
How to negotiate these provisions as Tenant looking for flexibility?

- Right of First Offer
- Right of First Refusal
- Relocation in favor of Landlord?
- Termination/Contraction Right
- Concerns for government contractors and entities concerned with security clearance issues



# Right of First Offer

- Provides flexibility for Tenants to add additional square footage to Premises based on additional need.
- Landlord required to deliver notice to Tenant prior to commencement of leasing of certain portions of the building
- Usually limited to certain spaces, portions of specific floors or areas of the building:
  - “only with respect to Suite 100”
  - “for any and all space located on the 4<sup>th</sup> floor”
  - “for any office spaces specifically improved for a use substantially similar to the use of the Premises”
- Important provisions:
  - Trigger Date
  - Notice timing
  - How to calculate rent for ROFO space?
  - How long does Tenant have to decide?



# Right of First Offer Provisions

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- Specifying the particular space, floor or area of the building subject to the ROFO:
  - “As to the space on the [\_\_\_\_\_] floor known as “Suite [\_\_\_\_\_]” depicted on **Exhibit A** attached hereto (the “**ROFO Space**”), Landlord agrees that Tenant shall have a one-time right of first offer as to the ROFO Space on the following terms and conditions:”
- ROFO triggered on Landlord’s determination that the particular ROFO Space is available:
  - At such time as Landlord determines that the ROFO Space or a portion thereof (the “**Offered Space**”) is available for leasing (*[but only after the initial leasing thereof after the Effective Date]*), Landlord may notify Tenant thereof and provide Tenant with a notice containing a map of the Offered Space and the financial terms upon which Landlord would be willing to lease the Offered Space (“**Landlord’s Notice of Terms**”)
- Tenant is then generally provided a certain period of time to respond to the Notice of Terms or the tenant can determine if they accept the Notice of Terms or if there is some kind of arbitration mechanism.
  - Tenant shall have five (5) business days from the receipt of Landlord’s Notice of Terms within which to notify Landlord whether or not Tenant is interested in leasing the Offered Space. If Tenant does not provide written notice of exercise to Landlord prior to such deadline, then Tenant shall be deemed to have conclusively waived its right to the lease of the Offered Space and such space shall be released from the terms of this Section
- Important for Tenant’s to try and negotiate so called “three broker method” level of determination of market rent for ROFO space. Ideally, Landlord and Tenant come to a “market” calculation without third party involvement, but Tenant’s should try and include “three broker method” type determination (*see language on next slide*)





# “Three Broker Method” of determining Market Rent

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- Landlord and Tenant shall have thirty (30) days within which to negotiate in good faith a mutually acceptable [Prevailing Rental Rate]. If Landlord and Tenant cannot reach agreement within said thirty (30) day period, Tenant may, prior to the expiration of the foregoing 30-day period, either elect to rescind its notice to extend the Term by providing written notice thereof to Landlord or require that the determination of the Prevailing Rental Rate be made by brokers pursuant to the procedure described below. If Tenant does not provide Landlord with written notice to Landlord rescinding its notice to extend the Term, within ten (10) days after the expiration of the 30-day period, each party shall select a qualified commercial real estate broker with at least ten years' experience in leasing property and buildings in the submarket in which the Premises are located. The two brokers shall give their opinions of prevailing rental rates within 20 days after their retention. In the event the opinions of the two brokers differ and, after good faith efforts over the succeeding 20-day period, they cannot mutually agree, the brokers shall immediately and jointly appoint a third broker with the qualifications specified above. This third broker shall immediately (within five days) choose either the determination of Landlord's broker or Tenant's broker and such choice of this third broker shall be final and binding on Landlord and Tenant. Each party shall pay its own costs for its real estate broker and shall share the cost of the third broker equally. The parties shall immediately execute an amendment as set forth above.
- *NOTE: THERE ARE MANY VARIATIONS OF THIS PROCESS, INCLUDING, THIRD BROKER PROVIDES ITS OWN DETERMINATION (A THIRD) USING THE OTHER TWO AS A GUIDE BUT THE THIRD BROKER COMES UP WITH ITS OWN MARKET RENT AND IF THE FIRST 2 BROKERS ARE WITHIN X% OF EACH OTHER THAN THE AVERAGE OF THE TWO BECOMES THE MARKET RENT BUT IF THE 2 BROKERS ARE NOT WITHIN X% OF EACH OTHER THAN A THIRD BROKER DETERMINES MARKET RENT AND THAT DETERMINATION IS BINDING.*



# Right of First Refusal

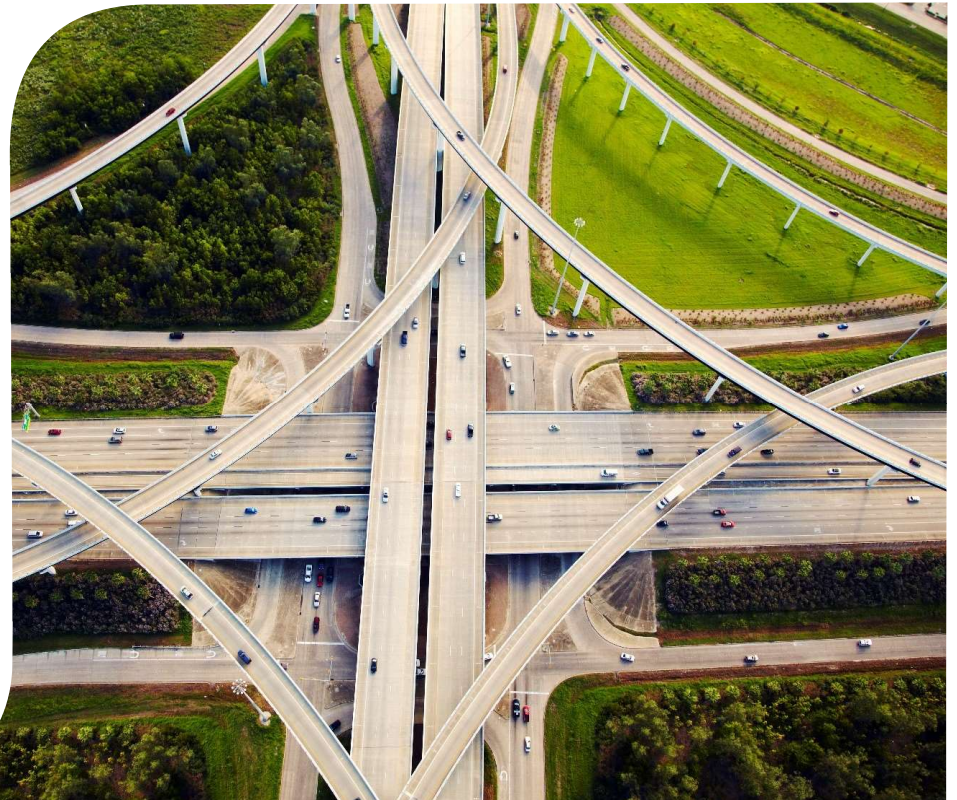
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- Similar to ROFO but process slightly different as Tenant has the right to “match” what a third party is willing to lease certain space for
- Still same concerns regarding specifying the particular space that the Tenant has the ROFR on
- Tenant to think about exercise of right and amount of lease term that may be required based on when current lease expires
- Usually short timeframe for Tenants to respond to ROFR Notice as a third party is waiting
- “Right of First Refusal to Lease. The Tenant shall have the continuous right of first refusal (the “**ROFR**”) during the Term of this Lease to lease all or any portion of that certain space [[which is located contiguous to the Premises]] [[containing approximately \_\_\_\_\_ rentable square feet and located adjacent to the Premises, as more particularly shown on the floor plan attached hereto as Exhibit and made a part hereof]] (the “**ROFR Space**”); provided, however, that the ROFR is expressly subject and subordinate to any existing rights granted prior to the Effective Date by the Landlord and its predecessors to other tenants in the Building. If the Landlord receives an offer from a bona fide third party to lease all or any portion of the ROFR Space which the Landlord intends to accept, the Landlord shall provide written notice of such offer to the Tenant (the “**ROFR Offer Notice**”). The Tenant shall have ten (10) Business Days after receipt of the ROFR Offer Notice (the “**ROFR Period**”) to notify the Landlord of the Tenant’s exercise of the ROFR to lease the ROFR Space identified in the ROFR Offer Notice. The Tenant’s lease of such ROFR Space shall be upon the same terms and conditions as set forth in [[the ROFR Offer Notice]] [[this Lease for the remainder of the Term hereof, at a Base Rent equal to the then applicable rate per square foot set forth in Section 1.1 above (subject to the subsequent escalations thereof as provided herein) and in its “AS IS, WHERE IS” condition]]. If the Tenant notifies the Landlord in writing of the Tenant’s exercise of the ROFR prior to the expiration of the ROFR Period, the Landlord shall prepare and deliver to the Tenant an amendment to this Lease that incorporates such ROFR Space into this Lease effective as of the date set forth in the ROFR Offer Notice upon the terms and conditions set forth above. The Landlord and the Tenant shall thereafter execute and deliver to each other counterparts of such lease amendment. If the Tenant fails to notify the Landlord in writing of the Tenant’s exercise of the ROFR prior to the expiration of the ROFR Period, or if the Landlord and the Tenant are unable to agree upon and execute, within ten (10) days after the Tenant has exercised the ROFR, the form of the lease amendment to be executed by the parties, the Tenant’s ROFR shall be deemed waived and of no further force or effect.”



# Relocation

- Tenants need to be mindful of agreeing to relocation provisions
- Very Landlord friendly provision
- Usually at Landlord's discretion but can be triggered by specific circumstance (i.e. redevelopment of at least 50% of the Building, Landlord has a Lease ready to be executed with a third party willing to occupy at least X square feet of the Building)
- Make sure to include language in relocation provision that specifically indicates the type of space that Landlord can move Tenant
- Moving Costs reimbursement?
- Costs of moving infrastructure?
- How much time does Landlord have to exercise rights once relocation notice provided?



# Relocation Provision

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- **Relocation.** In order to either **[REVISE THE FOLLOWING BASE ON DEAL SPECIFICS: (i) consolidate the Premises with other adjoining space leased or to be leased to another actual or prospective tenant in the Property; and/or (ii) recapture the Premises in connection with any reconfiguration and/or expansion of the Property, the Landlord shall have the right at any time after the [[initial Term]] to relocate the Tenant to another [description] space]** designated by the Landlord within the portion of the Property identified as the “Permissible Relocation Area” on **Exhibit** \_\_\_\_\_ attached hereto (the "**New Premises**") in accordance with the following terms:
  - (a) The Landlord shall give the Tenant at least one (1) year prior written notice of the Landlord's intent to relocate the Tenant, and the Tenant agrees to reasonably cooperate in good faith with Landlord in connection with such relocation;
  - (b) The size, configuration, amount of frontage, access to, visibility of and the amount of and proximity to parking of the New Premises shall be substantially the same or better as the Premises unless the Landlord and the Tenant otherwise agree in writing;
  - (c) The Landlord shall pay the Tenant's reasonable moving costs and the reasonable cost of the permanent improvements (as distinguished from the Tenant's personal property including furniture, fixtures and equipment which shall be reused in the New Premises to the extent reasonably practical), including all out of pocket soft and hard costs associated with such permanent improvements, installed in the New Premises, which permanent improvements shall be substantially the same as (or, if the Landlord and the Tenant otherwise agree in writing, better than) the permanent improvements in the Premises;
  - (d) The Tenant shall have no obligation to vacate the Premises until the date that is thirty (30) days after the tenant improvements in the New Premises are Substantially completed and sole possession has been delivered to the Tenant and the Tenant has received all necessary regulatory approvals to move from the Premises to the New Premises (the "**New Rent Commencement Date**");
  - (e) As compensation for indirect costs incurred by the Tenant as a result of the relocation, such as costs incurred in changing addresses on stationery, business cards, directories and advertising, the Landlord shall reimburse the Tenant an amount of Ten Thousand Dollars (\$10,000.00), which such reimbursement shall be paid to the Tenant within thirty (30) days after the New Rent Commencement Date;
  - (f) Base Rent and Tenant's Percentage Share shall be appropriately reduced if the New Premises is smaller than the Premises, but shall not be increased if the New Premises is larger than the Premises; and
  - (g) The Landlord and the Tenant shall promptly execute an amendment or modification to this Lease confirming the relocation of the Premises, any change in the Base Rent, Tenant's Percentage Share, the New Rent Commencement Date and any other changes in the provisions of this Lease agreed upon by the Landlord and the Tenant.



## Relocation Provision(cont.)

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- If the Landlord and the Tenant, after reasonably cooperating in good faith, disagree as to whether the New Premises presented by the Landlord meets the conditions described above, then the Landlord or the Tenant shall have the right to terminate this Lease by providing at least one (1) year prior written notice to the other party (however, the Landlord may elect, in its sole discretion, to void any the Tenant termination notice by withdrawing the Landlord's relocation notice within fifteen (15) days after receipt of any the Tenant termination notice) and allowing the Tenant to remain in the Premises and thereafter the Landlord's relocation right shall be waived for the remainder of the Term of this Lease).
- Upon the effective date of any termination of this Lease as provided herein, (i) the Tenant shall surrender possession of the Premises to the Landlord in the condition required by this Lease, (ii) all duties and liabilities of the Landlord and the Tenant under this Lease (except those which expressly survive the expiration or earlier termination thereof) shall terminate, and (iii) the Landlord shall promptly return the security deposit (subject to the Landlord's rights under this Lease with respect thereto), if any, to the Tenant.
- Notwithstanding the foregoing, the Landlord and the Tenant agree that Landlord may relocate the Tenant only once during the Term of this Lease. In no event shall Tenant be required to relocate if there are fewer than two (2) years remaining on the Term of the Lease unless the Landlord and the Tenant shall mutually agree to negotiate in good faith an extension of the term of this Lease.]]



# Termination Option

- Should be negotiated at LOI stage
- Keep in mind that termination fee will be charged, sized based on Landlord total costs incurred concerning the lease transaction (brokerage fees/improvement allowance)
- Cancellation Fee should only be the “unamortized” costs (i.e. what Landlord hasn’t already recovered through Rent)
- Trigger usually a certain month of the Term with specific notice provisions as to when written notice to be delivered to Landlord
- Usually irrevocable, but keep that in mind
- Most frequently only exercised for the entirety of the space vs. portions of the space. If Premises being occupied lends itself to partial termination, perhaps ask within LOI stage of transaction
- More frequently being provided to Tenants in the current environment
- Timing primarily in second half of Term



# Termination Right provisions

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- Tenant shall have the one-time right to cancel this Lease (the “**Termination Right**”) effective as of 11:59 p.m. Eastern Standard Time on the last day of the [\_\_\_\_\_ calendar month] of the Term (the “**Early Termination Date**”), but solely upon and subject to all of the provisions of this Section 6.
- B. Tenant must give written notice to Landlord on or prior to the date which \_\_\_\_\_ days prior to the [Early Termination Date] (time being of the essence) (the “**Termination Notice Deadline**”) of Tenant’s election to cancel this Lease in accordance with this Section (the “**Termination Notice**”).
- C. Tenant shall pay Landlord the Cancellation Fee (as defined below) in cash [simultaneously] with the delivery of the Termination Notice. The “**Cancellation Fee**” shall mean an amount equal to the sum of the unamortized amount (as of the Termination Date) of: [(w) brokerage commissions paid or owed by Landlord in connection with this Lease, (x) the Allowance and the hard and soft incurred by Landlord to construct and install the any tenant improvements to the extent provided in this Amendment, if any, and (y) an amount equal to three (3) months then current (as of the date of the Early Termination Date) gross Rent (including any and all Additional Rent due and payable in connection therewith). To determine the Cancellation Fee, amortization shall be calculated over the Term (without regard to any actual or possible termination under this Section) at a rate of 8% per annum, compounded monthly.
- Other Provisions to look out for:
  - Is the Termination notice revocable? Usually not.
  - Does a default during a certain period of time negate the termination right? Usually a period of time that is covered here. 6 months? As of Termination Notice Date. This is a very important “gotcha” that is frequently in Leases.
  - Can the termination right be transferred to an assignee? Is the right just personal to the named Tenant?



# Government Contractor Concerns

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- SCIF Use Related Provisions
  - USE: General office and ancillary uses, a sensitive compartmented information facility (“SCIF”) and as otherwise permitted by the permit/license necessary for the Permitted Use and no other purposes.
- Security Access Provisions (next page)
- Access for maintenance
- Removal of Improvements (including SCIF Improvements), see below:
  - Within thirty (30) days of Landlord's receipt of Tenant's written request for Landlord's consent to any Alterations, including Specialty Alterations (as defined below), Landlord shall advise Tenant if removal of said Alterations may be required at the end of the Term (collectively, the “**Required Removables**”). Notwithstanding anything contained in this Lease to the contrary, the following shall be deemed Required Removables: Specialty Alterations (as defined below) (if required by Landlord). At Landlord's option, Tenant shall be obligated to remove the Required Removables and repair any damage to the Project caused by such construction and installation upon the expiration or earlier termination of the Term. As used herein, “**Specialty Alterations**” shall mean improvements which are not standard office space installations, such as kitchens (other than a pantry installed for the use of Tenant's employees only and of the type normally found in the space of office tenants in comparable buildings), raised floors, computer room installations, supplemental HVAC equipment and components, safe deposit boxes, vaults, slab penetrations, conveyors, dumbwaiters, non-Building standard life safety systems, security systems or lighting, all cabling and wiring, and other improvements of a similar character





# Security Access Provisions with Secure Spaces within Premises

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- In the event of an emergency involving immediate or imminent danger of physical injury to persons or damage to property, Landlord may enter a secure area without an Access Representative, and, if necessary, Landlord may so enter by breaking down the doors or by other forcible means and shall suffer no liability to Tenant whatsoever therefor.
- Unless access to a secure area is provided during the hours when cleaning service is normally rendered, Landlord shall not be responsible for providing such service to any such secure area or to those portions thereof which are inaccessible during said hours. Such inability by Landlord to provide cleaning services to inaccessible areas shall not entitle Tenant to any adjustment in Base Annual Rent, Additional Rent or other sums due hereunder.
- Tenant shall pay, within thirty (30) days after request therefor, all actual costs incurred by Landlord in connection with Landlord's compliance with this Section, including, without limitation, any overtime or additional charges for services or repair work not performed at the customary times or in the customary manner. Landlord have no liability to Tenant for any claims and/or damages based on, arising from and/or in connection with any secure area (including without limitation claims based on the interruption of or loss to Tenant's business), other than that which is caused by the gross negligence or willful misconduct of Landlord, its employees, and/or agents; provided, however, that in no event shall Landlord have any liability to Tenant for any indirect losses or consequential damages and/or punitive damages and/or special damages whatsoever or for claims for which Tenant is insured or required under this Lease to be insured. In addition, Landlord shall be under no obligation whatsoever, notwithstanding anything to the contrary contained in this Lease, to perform any cleaning, maintenance or repair work to any secure area to which Landlord is not given reasonable access at the time such cleaning, maintenance or other repair work is being performed for the balance of the Demised Premises, and there shall be no reduction or credit in rent or additional rent under this Lease as a result thereof. Notwithstanding anything to the contrary contained in this Lease, Tenant shall indemnify Landlord and hold Landlord harmless from and against all claims, loss, costs, expenses, damages and liabilities (including reasonable attorneys' fees and any costs of litigation) suffered by or claimed against Landlord arising out of or in connection with the access restrictions imposed by Tenant for Tenant's secure areas.



## Security Access Provisions with Secure Spaces within Premises (cont.)

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- Landlord acknowledges that the Demised Premises may contain certain “secure areas”, and Tenant may be required by Tenant’s customers to maintain a secure perimeter of such areas. Landlord and Tenant shall mutually agree to the location of such secure areas, and such areas shall be located in a manner not to interfere with Landlord’s ability to operate, maintain, or service the Building.
- Landlord, except in the case of emergencies involving immediate or imminent danger of physical injury to persons or damage to property, will not be entitled to enter the secure areas without an “Access Representative”. However, Tenant acknowledges and agrees that (i) the Landlord’s access rights set forth in Section 6.9 shall require that an Access Representative be made available to escort Landlord, Landlord’s Agent and their invitees through the secure areas during the hours of 9 am to 5 pm Mondays through Fridays upon no more than twenty-four (24) hours prior written notice to Tenant (except in the event of an emergency when Landlord shall be entitled to immediate access), and (ii) the foregoing provisions shall not, nor shall they be deemed to, limit or otherwise alter or restrict any other rights or remedies of Landlord in accordance with the terms and conditions of this Lease, and at law and in equity, in the event Tenant is then in default of any of the terms or conditions of this Lease beyond the applicable cure period, if any.
- At least one (1) Access Representative shall be available to Landlord twenty-four (24) hours a day, seven (7) days a week, each day of the year under the following conditions: during the Building’s normal business hours, at least one (1) Access Representative shall be immediately available to Landlord, and, outside of the Building’s normal business hours, at least one (1) Access Representative shall be available within four (4) hours after being contacted. Tenant shall provide Landlord with current information concerning each such Access Representative as the same may change from time to time.



# Most Litigated Lease Provisions & Miscellaneous considerations

- Most Litigated Lease Provisions
  - Use Clause (more retail but can apply to office)
  - Pass through expenses (cap, Base Year, true NNN)
  - Assignment and Subletting
  - Repair Obligations
  - Alterations/Duties on Surrender of Premises
  - Holdover Damages
- Miscellaneous Considerations
  - Base Year reset for newer properties/renovations (or buildings in high tax rate areas)
  - CAM Cap (controllable vs. non-controllable)
  - Audit Rights
  - Subletting to assist with unused space



