

COMMERCIAL LEASING SECTION

OPEN MEETING

Issues and Strategies in Dealing

With Lease Defaults and Remedies

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Key Issues in Resolving Lease Defaults – Paul White’s Cheat Sheet

1. Gather all the facts
2. Review lease terms, amendments and correspondence
3. Evaluate remedies, risks and opportunities
4. Two key questions:
 - a. Do you want to recover possession?
 - b. Does the tenant have money?
5. Is there an ADR provision? If so, you must follow it (negotiation/mediation/arbitration)
6. Notice of Default – required (and requirements)
7. Traps for the Unwary
8. Cure issues (n.b. difference between monetary and non-monetary defaults)
9. Eviction:
 - a. No self-help – GL ch. 184, sec. 18 (“No person shall attempt to recover possession of landother than through an action pursuant to chapter two hundred and thirty-nine or such other proceedings authorized by law.”)
 - b. Summary process – G.L. ch. 239, sec. 2.
 - i. District Court jurisdiction even if claim for money damages in amount greater than \$25,000
 - ii. No counterclaim permitted!
 - iii. Fast process and can be very effective for Landlords
10. Breach of Contract Action
 - a. Recover past and future rent per remedies in lease
 - b. Can add claims against other parties (e.g. guarantors)
11. Must understand concept of lease termination –if LL terminates, no further obligation to pay rent under lease and LL must rely on post-termination remedies contained in lease
12. Recovery of future rent
 - a. Recovery of future rent should be specified in remedy provision
 - b. No duty to mitigate under liquidated damage provision providing for rent acceleration: *Cummings Properties v. National Communications Corporation*, 449 Mass. 490 (2007); *NPS, LLC v. Minihane*, 451 Mass. 417 (2008)
 - c. Tenant should negotiate duty to mitigate in remedy provision
 - d. Any open questions? What about a provision accelerating rent under a thirty year lease with twenty nine years of the term remaining at the time of breach – if the provision has no discount to present value and tenant did not negotiate for mitigation, can you still argue that the liquidated agreed to sum is so “disproportionate” to the actual anticipated damages as to constitute a penalty? What about agreed to interest?
13. Indemnity: 275 *Washington Street Corp. v. Hudson River International, LLC*, 465 Mass. 16 (2013)
14. Attorney’s fee provision – the “prevailing party” provision and the risk of counterclaims

Cases and Statutes Governing Lease Defaults

1. Statutes

- (a) C.186, §12 and 13 – terminating tenancy at will
- (b) C.186, §11 – terminating lease for non-payment of rent by 14 day notice to quit
- (c) C.186, §11A – terminating commercial lease for non-payment of rent
- (d) C.184, §18 – no recovery of possession except by summary process or other proceedings authorized by law

2. Cases

- (a) *Sutton v. Goodman*, 194 Mass. 389, 395 (1907) – termination of lease ends tenant's obligation to pay rent in absence of any other provisions.
- (b) *Wesson v. Leone Enterprises, Inc.* 437 Mass. 708 (2002) – overturning long standing common law rule that in commercial leases the respective obligations of landlord and tenant were considered independent of one another.
- (c) *Cummings Properties, LLC v. National Communications Corp.*, 449 Mass. 490 (2007) – full acceleration of future rent upon a tenant's default under a commercial lease is enforceable.
- (d) *Krasne v. Tedeschi & Grasso*, 436 Mass. 103, 109 (2002) – landlord is obligated to mitigate damages by using commercially reasonable efforts to relet when a lease is terminated by reason of a tenant's default.
- (e) *NPS, LLC v. Minihane*, 451 Mass. 417 (2008) – landlord is not obligated to mitigate damages in situations where lease contains liquidated damages provision.
- (f) *Howard D. Johnson Co. v. Madigan*, 361 Mass. 454 (1972) – Courts will not permit a lease termination where tenant's default was incidental or inadvertent and landlord has not been harmed.
- (g) *DiBella v. Fiumara*, 63 Mass. App. Ct. 640 (2005) – landlord not permitted to terminate lease where tenant default was deemed not material.
- (h) *275 Washington Street Corp. v. Hudson River International, LLC*, 465 Mass. 16 (2013) – landlord's remedy on termination of lease by tenant's default consisting of indemnification by tenant of landlord's lost rent requires landlord to wait until lease term would have expired before damages can be accurately calculated.
- (i) *Diamond Crystal Brands, Inc. v. Blackleaf, LLC*, 60 Mass. App. Ct. 512 (2004) – landlord's unreasonable interpretation of lease provision respecting tenant's obligation to pay additional rent for electricity subjected landlord to liability under c. 93A.

Provision 1

In the event that:

- (a) The LESSEE shall default in the payment of any installment of rent or other sum herein specified and such default shall continue for ten (10) days after written notice thereof; or
- (b) The LESSEE shall default in the observance or performance of any other of the LESSEE's covenants, agreements, or obligations hereunder and such default shall not be corrected within thirty (30) days after written notice thereof; or
- (c) The LESSEE shall be declared bankrupt or insolvent according to law, or, if any assignment shall be made of LESSEE's property for the benefit of creditors,

then the LESSOR shall have the right thereafter, while such default continues, to re-enter and take complete possession of the leased premises, to declare the term of this lease ended, and remove the LESSEE's effects, without prejudice to any remedies which might be otherwise used for arrears of rent or other default. The LESSEE shall indemnify the LESSOR against all loss of rent and other payments which the LESSOR may incur by reason of such termination during the residue of the term.

Provision 2

Default and Rent Acceleration. In the event that (a) any assignment for the benefit of creditors, trust mortgage, receivership, or other insolvency proceeding shall be made or instituted with respect to LESSEE or LESSEE's property, or (b) LESSEE shall default in the observance or performance of any term herein, and such default shall not be corrected within 10 days after written notice thereof, then LESSOR shall have the right thereafter, while such default continues and without demand or further notice, to re-enter and take possession of the premises, to declare the term of this lease ended, and/or to remove LESSEE's effects, without liability, including for trespass or conversion, and without prejudice to any other remedies. If LESSEE defaults in the payment of any rent, and any such rental default continues for 10 days after written notice thereof, and because both parties agree that nonpayment of said sums is a substantial breach of this lease, and, because the payment of rent in monthly installments is for the sole benefit and convenience of LESSEE, then, in addition to any other remedies, the net present value of the entire balance of rent due herein as of the date of LESSOR's notice, using the published prime rate then in effect, shall immediately become due and payable as liquidated damages, since both parties agree that such amount is a reasonable estimate of the actual damages likely to result from such breach.

Following termination of this lease, LESSOR shall use commercially reasonable efforts to relet the premises, without notice to LESSEE, for a term that may be greater or less than the balance of the term and on such conditions (which may include concessions, free rent and alterations of the premises) and for such uses as LESSOR in its absolute discretion shall determine.

Provision 3

1. Events of Default.

Tenant shall be considered to be in default of this Lease upon the occurrence of any of the following events of default (each an "Event of Default"):

- A. Tenant's failure to pay when due all or any portion of the Rent, if the failure continues for 5 days after written notice to Tenant ("Monetary Default").
- B. Tenant's failure to comply with the terms and provisions of Articles 5, 12 or 15 if the failure is not cured within 10 days after written notice to Tenant.
- C. Tenant's failure (other than a Monetary Default or an Event of Default under Section 19.B) to comply with any term, provision or covenant of this Lease, if the failure is not cured within 30 days after written notice to Tenant. However, if Tenant's failure to comply cannot reasonably be cured within 30 days, Tenant shall be allowed additional time (not to exceed 90 days) as is reasonably necessary to cure the failure so long as: (1) Tenant commences to cure the failure within 30 days, and (2) Tenant diligently pursues a course of action that will cure the failure and bring Tenant back into compliance with the Lease. However, if Tenant's failure to comply creates a hazardous condition, the failure must be cured immediately upon notice to Tenant. In addition, if Landlord provides Tenant with notice of Tenant's failure to comply with any specific term, provision or covenant of this Lease on 3 occasions during any 12 month period, Tenant's subsequent violation of the same term, provision or covenant of this Lease shall, at Landlord's option by written notice to Tenant, be an incurable Event of Default by Tenant.
- D. Tenant or any Guarantor becomes insolvent, makes a transfer in fraud of creditors or makes an assignment for the benefit of creditors, or admits in writing its inability to pay its debts when due.
- E. The leasehold estate is taken by process or operation of Law.

2. Remedies.

- A. Upon an Event of Default by Tenant which is continuing, Landlord shall have the right without notice or demand (except as provided in Section 1) to pursue any of its rights and remedies at Law or in equity, including any one or more of the following remedies:
 - 1. Terminate this Lease by notice in writing to Tenant, in which case Tenant shall immediately surrender the Premises to Landlord. If Tenant fails to surrender the Premises, Landlord may, in compliance with applicable Law

and without prejudice to any other right or remedy, seek a summary process judgment to enter upon and take possession of the Premises and expel and remove Tenant, Tenant's Property and any party occupying all or any part of the Premises. Tenant shall pay Landlord on demand the amount of all past due Rent and other losses and damages which Landlord may suffer as a result of Tenant's default, whether by Landlord's inability to relet the Premises on satisfactory terms or otherwise, and any deficiency that may arise from reletting or the failure to relet the Premises.

2. Following termination of this Lease, Landlord shall use commercially reasonable efforts to relet all or any part of the Premises, without notice to Tenant, for a term that may be greater or less than the balance of the Term and on such conditions (which may include concessions, free rent and alterations of the Premises) and for such uses as Landlord in its absolute discretion shall determine. The foregoing obligation to use commercially reasonable efforts shall not apply if Landlord seeks liquidated damages under Sections 2.A.3 or 2.A.4. Landlord may collect and receive all rents and other income from the reletting which (less Landlord's Costs of Reletting, as hereinafter defined) shall be credited against Rent otherwise payable by Tenant hereunder. Notwithstanding the termination of this Lease, Tenant shall remain liable to Landlord for the Rent as it becomes due under this Lease subsequent to its termination and Tenant shall pay Landlord on demand all past due Rent and any deficiency arising from the reletting or failure to relet the Premises. Provided Landlord has used commercially reasonable efforts, Landlord shall not be responsible or liable for the failure to relet all or any part of the Premises or for the failure to collect any Rent. The re-entry or taking of possession of the Premises shall not be construed as an election by Landlord to terminate this Lease unless a written notice of termination is given to Tenant. "Costs of Reletting" shall include all costs and expenses incurred by Landlord in reletting or attempting to relet the Premises, including, without limitation, reasonable legal fees, brokerage commissions, the cost of alterations and the value of other concessions or allowances granted to a new tenant.
3. In lieu of calculating damages under Sections 2.A.1 or 2.A.2 above, Landlord may elect by written notice to Tenant at any time following a termination of this Lease to receive as liquidated damages the sum of (a) all Rent accrued through the later of the date of termination of this Lease or date of Landlord's election, and (b) an amount equal to the total Rent that Tenant would have been required to pay for the remainder of the Term following the date of Landlord's election discounted to present value at the Prime Rate (defined in Section 2.B. below) then in effect, minus the then present fair rental value of the Premises for the remainder of the Term, similarly discounted, after deducting all anticipated Costs of Reletting.

4. In lieu of any other damages or indemnity and in lieu of full recovery by Landlord of all sums payable under the other provisions of this Section, Landlord may, by written notice to Tenant, at any time after termination of this Lease elect to recover, and Tenant shall thereupon pay, Liquidated Damages. "Liquidated Damages" shall be equal to (a) the aggregate of the Base Rent and Additional Rent accrued in the twelve (12) months next following such termination (but not more than the Base Rent and Additional Rent due for the then remainder of the Lease Term); plus (b) the amount of Rent of any kind accrued and unpaid at the time of termination and the remaining unamortized cost of any free rent and any Tenant allowances paid by Landlord pursuant to the Work Letter attached to this Lease as **Exhibit C** as of the time of termination. Nothing contained in this Lease shall, however, limit or prejudice the right of Landlord to prove for and obtain in proceedings for bankruptcy or insolvency by reason of the termination of this Lease, an amount equal to the maximum allowed by any statute or rule of law in effect at the time when, and governing the proceedings in which, the damages are to be proved, whether or not the amount be greater, equal to, or less than the amount of the loss or damages referred to above.

B. Unless expressly provided in this Lease, the termination and repossession or re-entering of all or any part of the Premises shall not relieve Tenant of its liabilities and obligations under the Lease. Unless expressly provided, no right or remedy of Landlord shall be exclusive of any other right or remedy. Each right and remedy shall be cumulative and in addition to any other right and remedy now or subsequently available to Landlord at Law or in equity. If Landlord declares an Event of Default by Tenant, Landlord shall be entitled to receive interest on any unpaid item of Rent at a rate equal to the Prime Rate plus 4%. For purposes hereof, the "Prime Rate" shall be the per annum interest rate publicly announced as its prime or base rate by a federally insured bank selected by Landlord in the state in which the Building is located. Forbearance by Landlord to enforce one or more remedies shall not constitute a waiver of any default.

COMMONWEALTH OF MASSACHUSETTS

Suffolk County

Superior Court Department
Of the Trial Court
Business Litigation Session
Case No.

SMITH & CO.,
Plaintiff

v.

JONES, LLC,
Defendant

AMENDED COMPLAINT

COMES NOW, the Plaintiff, Smith & Co. (“Smith”), and complains of the Defendant, Jones, LLC (“Jones”) as follows:

Parties and Jurisdiction

1. The Plaintiff, Smith, is a New York corporation.
2. The Defendant, Jones, is a Delaware limited liability company.
3. This court has subject matter jurisdiction of this action pursuant to M.G.L. c. 212 §3.
4. This court has personal jurisdiction over the Defendant pursuant to M.G.L. c. 223A §3(e), as this action concerns, among other things, Defendant’s Lease of real property located in the Commonwealth of Massachusetts.
5. Filing in the Business Litigation Section is proper as this is a complex commercial dispute alleging the breach of a commercial property in Suffolk County, Massachusetts, entered into by Plaintiff and Defendant.

Factual Background

6. Smith is in the business of operating retail stores throughout the United States.
7. Jones is in the business of servicing consumer and commercial equipment and machinery.
8. Smith and Jones have contracted with one another under a Master Services Agreement for Jones to service certain machines purchased by consumers from Smith retail stores.
9. On March 1, 2014, Smith and Jones entered into a written Lease for 65,500 feet of commercial space at 10 Merrimac Drive, Randolph. A true and correct copy of the Lease is attached to this Complaint as Exhibit 1.

The Lease

10. The term of the Lease was from March 1, 2014 through September 30, 2034. Ex. 3 ¶5(a).
11. Jones agreed to pay Smith \$35,479.00 per month in rent for the period March 1, 2014 through February 28, 2015, \$38,754.00 per month in rent for the period March 1, 2015 through February 28, 2016, and \$40,040 per month in rent for the period March 1, 2016 through September 30, 2034. Ex. 3 ¶8(a).
12. Jones paid rent to Smith under the Lease through February 2015.
13. Since February 2015, Jones has failed to remit further rent as required by the Lease.
14. Smith sent Jones written notice of its failure to pay rent pursuant to the Lease by letter dated August 12, 2015. *See* Ex. 3 ¶¶26(a); 32.

15. Such notice was delivered to the address specified in the Lease on August 17, 2015. *See* Ex. 3 ¶32.

16. Jones failed to remit the rent it owed within ten days of receiving the written notice, placing it into Default under the Lease. *See* Ex. 3 ¶26(a).

17. Smith exercised its right to terminate the Lease on October 1, 2015. *See* Ex. 3 ¶26(f).

18. As of the date of termination, Jones owes Smith \$271,278.00 in unpaid rent under the Lease. *See* Ex. 3 ¶26(f)(i).

19. As of the date of filing of this Complaint, Jones owes Smith \$86,808.96 in interest on the unpaid rent as of the time of termination and said unpaid rent shall continue to bear interest as provided in the Lease (*See* Ex. 3 ¶26(f)(i)) through the date of any award.

20. As of the date of filing of this Complaint, the amount of unpaid rent which would have been earned after termination is _____, plus interest thereon pursuant to the terms of the Lease (*See* Ex. 3 ¶26(f)) and such interest so shall continue to accrue through the date of any award.

21. In addition, Jones owes Smith the amount of any unpaid rent for the balance of the term after the time of any award until such time as Smith is able to reasonably avoid such future loss.

22. Pursuant to Paragraph 27 of the Lease, Jones agreed that it would pay Smith's attorney's fees and costs as the prevailing party on any action brought for breach of the Lease.

Count I
(Breach of Contract – Massachusetts Lease)

23. The plaintiff realleges and incorporates as if fully set forth herein its allegations contained in paragraphs 1 through 22.

24. Pursuant to the terms of the Lease, Jones was obligated to pay monthly rent to Smith through September 30, 2034.

25. Jones failed to make the rent payments as required by the Lease.

26. After being given written notice of its failure to pay, and failing to cure the breach, Jones's failure to make the payments required by the Lease places it in breach of the Lease.

As a consequence of such breach, Smith is entitled to all of the remedies set forth in the Lease and provided below.

WHEREFORE, the Plaintiff demands the following relief:

1. That the Court award to Smith, and against Jones, all of the damages resulting from Jones's breach of the Lease described herein;
2. That the Court award to Smith its attorney's fees and costs in this action;
3. That the Court order such further relief as it deems just and proper.

Respectfully submitted,

SMITH & CO.,
By its attorneys,

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DATED:

subletting, the rights of any such assignee or sublessee of Subtenant herein shall be subject to all of the terms, conditions, and provisions of this Sublease, including, without limitation, restriction on use, assignment, and subletting and the covenant to pay Rent. Sublandlord may collect the rent owing by the assignee or sublessee directly from such assignee or sublessee and apply the amount so collected to the Rent herein reserved. No such consent to or recognition of any such assignment or subletting shall constitute a release of Subtenant's performance hereunder from further performance by Subtenant of covenants undertaken to be performed by Subtenant herein. Subtenant shall remain liable and responsible for all Rent and other obligations herein imposed upon Subtenant. Consent by Sublandlord to a particular Transfer shall not be deemed consent to any other or subsequent Transfer.

Notwithstanding any other provision of this Section, Sublandlord has the option, by written notice to Subtenant (the "Recapture Notice") within thirty (30) days after receiving any Transfer Notice to recapture the entire Premises by terminating this Sublease. A timely Recapture Notice terminates this Sublease effective as of the date specified in the Transfer Notice. After such termination, Sublandlord may (but shall not be obligated to) enter into a lease with the party to the Transfer proposed by Subtenant.

26. Defaults by Subtenant.

Subtenant shall be in "Default" for purposes of this Sublease if:

- a) Subtenant shall at any time fail to pay Rent or any other amount payable by Subtenant pursuant to this Sublease within ten (10) days after receipt of written notice from Sublandlord that such payment was not received; or
- b) Subtenant shall at any time fail to perform any of the other covenants, terms, conditions or provisions of this Sublease, which failure shall not be cured within thirty (30) days after written notice is given to Subtenant specifying the same, or, with respect to those items that cannot with due diligence be cured within thirty (30) days, if Subtenant fails to proceed within thirty (30) days after the giving of such notice and with all due diligence to cure the same and thereafter to prosecute the curing of the same with all due diligence (it being intended that in connection with a failure not susceptible of being cured with due diligence within thirty (30) days that the time of Subtenant within which to cure the same shall be extended for such period as may be necessary to complete the same with all due diligence); or
- c) The occurrence of any of the following events: (i) the making of any general arrangement or assignment for the benefit of creditors; (ii) becoming a "debtor" as defined in 11 U.S.C. § 101 of any successor statute thereto (unless, in the case of a petition filed against Subtenant, the same is dismissed within sixty (60) days);

- (iii) the appointment of a trustee or receiver to take possession of substantially all of Subtenant's assets located at the Premises or of Subtenant's interest in this Sublease, where possession is not restored to Subtenant within thirty (30) days; or
 - (iv) the attachment, execution or other judicial seizure of substantially all of Subtenant's assets located at the Premises or of Subtenant's interest in this Sublease, where such seizure is not discharged within thirty (30) days; provided, however, in the event that any provision of this subsection is contrary to any applicable law, such provision shall be of no force or effect, and not affect the validity of the remaining provision; or
- d) Any three (3) failures by Subtenant to observe and perform any material provision of this Sublease during any twelve (12) month period of the Term, as such may be extended, shall constitute, at the option of Sublandlord, a separate and noncurable Default. Sublandlord shall notify Subtenant in writing of any such material breach that will be counted as a failure under this Section; or
 - e) A Default as noted in any other Section of this Sublease; or
 - f) Subtenant causes a default by Sublandlord to occur under the Master Lease.

If Subtenant is in Default, as defined herein then in addition to any other remedies available to Sublandlord herein or at law or in equity, Sublandlord shall have the immediate option to terminate this Sublease and all rights of Subtenant hereunder by giving written notice of such intention to terminate. In the event that Sublandlord shall elect to so terminate this Sublease, then Sublandlord may recover from Subtenant:

- (i) the worth at the time of award of any unpaid rent which had been earned at the time of such termination; plus
- (ii) the worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss Subtenant proves could have been reasonably avoided; plus
- (iii) the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that Subtenant proves could be reasonably avoided; plus
- (iv) any other amount necessary to compensate Sublandlord for all the detriment proximately caused by Subtenant's failure to perform its obligations under this Sublease or which in the ordinary course of events would be likely to result therefrom; and at Sublandlord's election, such

other amounts in addition to or in lieu of the foregoing as may be permitted from time to time by the applicable laws of the State of Massachusetts.

The term "rent" or "Rent", as used in this Sublease, shall be deemed to be and to mean the Rent and all other sums required to be paid by Subtenant pursuant to the terms of this Sublease. In the event of any Default by Subtenant, Sublandlord shall also have the right, with or without terminating this Sublease, to reenter the Premises and remove all persons and property from the Premises; such property may be removed and stored in a public warehouse or elsewhere at the cost of and for the account of Subtenant, or at Sublandlord's option, all of Subtenant's fixtures, furniture, equipment, improvements, additions, alterations and other personal property shall remain upon the Premises and in that event, and continuing during the length of such Default, Sublandlord shall have the sole right to take exclusive possession of such property and to use it, rent or charge free, until all Defaults are cured or, at Sublandlord's option, at any time during the term of this Sublease, to require Subtenant to forthwith remove such property.

The "worth at the time of award" of the amounts referred to in subsections (a) and (b) of this Section is computed by allowing interest at such maximum contractual rate which could be legally charged in the event of a loan of such cost to Subtenant in the State of Massachusetts (but in no event to exceed eight percent (8%) per month), such interest to accrue continuously on any unpaid balance due to Sublandlord by Subtenant during the period commencing with the aforesaid due date and terminating with the date on which Sublandlord receives full payment of all amounts owing to Sublandlord at the time of said payment. The worth at the time of award of the amount referred to in subsection (c) is computed by discounting such amount at the discount rate of the Federal Reserve Bank of Boston at the time of award plus 1 percent.

In the event that Sublandlord shall elect to reenter, or shall take possession of the Premises pursuant to legal proceeding or pursuant to any notice provided by law, then if Sublandlord does not elect to terminate this Sublease as provided in this Section, this Sublease shall continue in effect for so long as Sublandlord does not terminate Subtenant's right to possession, and Sublandlord may enforce all its rights and remedies under this Sublease, including, without limitation, Sublandlord's right to from time to time, without terminating this Sublease, either recover all rental as it becomes due or relet the Premises or any part thereof for such term or terms and at such rental or rentals and upon such other terms and conditions as Sublandlord, in its sole discretion, may deem advisable with the right to make alterations and repairs to the Premises. Acts of maintenance or performance by Sublandlord of any of the covenants of Subtenant under this Sublease or preservation or efforts to relet the Premises or the appointment of a receiver upon initiation of Sublandlord or other legal proceeding granting Sublandlord or its agent possession to protect Sublandlord's interest under this Sublease shall not constitute a termination of Subtenant's right to possession. In the event that Sublandlord shall elect to so relet, then rentals received by Sublandlord from such reletting shall be applied: first,

to the payment of any indebtedness other than rent due hereunder from Subtenant to Sublandlord; second, to the payment of any reasonable cost of such reletting; third, to the payment of the cost of any alterations and repairs to the Premises reasonably required for such reletting; fourth, to the payment of rent due and unpaid hereunder; and the residue, if any, shall be held by Sublandlord and applied in payment of future rent as the same may become due and payable hereunder. Should that portion of such rentals received from such reletting during any month, which is applied by the payment of rent hereunder, be less than the rent payable during that month by Subtenant hereunder, then Subtenant shall pay such deficiency to Sublandlord immediately upon demand therefor by Sublandlord. Such deficiency shall be calculated and paid monthly. Subtenant shall also pay to Sublandlord, as soon as ascertained, any reasonable costs and expenses incurred by Sublandlord in such reletting or in making such alterations and repairs not covered by the rentals received from such reletting. No reentry or taking possession of the Premises or any other action under this Article shall be construed as an election to terminate this Sublease unless a written notice of such intention is given to Subtenant or unless the termination thereof is decreed by a court of competent jurisdiction. Notwithstanding any reletting without termination by Sublandlord because of any default by Subtenant, Sublandlord may at any time after such reletting elect to terminate this Sublease for any such Default.

Efforts by Sublandlord to mitigate the damages caused by Subtenant's default in this Sublease shall not constitute a waiver of Sublandlord's right to recover damages hereunder.

In the event that Sublandlord shall obtain possession by reentry, summary proceedings, legal or equitable actions or proceedings or other lawful measures as a result of any Default by Subtenant, Subtenant agrees to pay to Sublandlord all reasonable and ordinary legal expenses incurred by Sublandlord in obtaining possession of the Premises. Subtenant further agrees in such event to remain liable for and to pay all rents and other sums herein reserved, less the net amount of rents that shall be collected and received by Sublandlord from the Premises, for and during the balance of the term of this Sublease.

Notwithstanding anything to the contrary contained herein, if the Master Lease terminates as a result of a default or breach by Subtenant under this Sublease, Subtenant will be liable to the Sublandlord for all actual, reasonable damages suffered as a result of the termination, including without limitation Sublandlord's monetary damages, including the loss of the benefit of the bargain accruing to Sublandlord.

The remedies of Sublandlord in this Sublease are cumulative and shall be deemed additional to any and all other remedies to which it is now or may hereafter be entitled at law or in equity and shall include the right to restrain by injunction any violation or threatened violation, by Subtenant, of any of the terms, covenants or conditions of this Sublease and by decree to compel performance of any such term, covenant or condition. No delay or omission by Sublandlord to exercise any right or power accruing upon any noncompliance or Default by Subtenant with respect to any of the terms of this Sublease shall impair any such right or power

to be construed to be a waiver thereof, except as otherwise herein provided. A waiver by Sublandlord of any of the covenants, conditions or agreements hereof to be performed by Subtenant shall not be construed to be a waiver of any succeeding breach thereof or of any other covenant, condition or agreement herein contained.

27. Attorney's Fees.

Notwithstanding anything to the contrary herein, if any legal action, suit or proceeding is commenced between Sublandlord and Subtenant regarding their respective rights and obligations under this Sublease, the prevailing party shall be entitled to recover, in addition to damages or other relief, reasonable costs and expenses, attorneys' fees and court costs (including, without limitation, expert witness fees). As used herein, the term "prevailing party" shall mean the party which obtains the principal relief it has sought, whether by compromise settlement or judgment. If the party which commenced or instituted the action, suit or proceeding shall dismiss or discontinue it without the concurrence of the other party, such other party shall be deemed the prevailing party.

28. Indemnity

Subtenant shall indemnify Sublandlord and Master Landlord against, and save Sublandlord and Master Landlord harmless of and from, any and all loss, cost, damage, expense or liability (including, but not limited to, reasonable attorneys' fees and disbursements) incurred by Sublandlord or Master Landlord by reason of, and defend Sublandlord and Master Landlord against all claims, actions, proceedings and suits brought claimed or suffered by third parties, (except those caused solely by the willful or negligent acts or omissions of the Sublandlord), arising out of the actual or alleged injury to or death of any person or loss or damage to property in or upon the Premises, caused by the negligent or willful acts or omissions of Subtenant or its employees, agents or contractors. Subtenants' obligations under this Section shall survive the expiration of the Term or earlier termination of this Sublease.

Sublandlord shall indemnify Subtenant against, and save Subtenant harmless or and from any and all loss, cost, damage, expense or liability (including, but not limited to, reasonable attorneys' fees and disbursements) incurred by Subtenant by reason of, and defend Subtenant against all claims, actions, proceedings and suits brought claimed or suffered by third parties, (except those caused solely by the willful or negligent acts or omissions of the Subtenant), arising out of the actual or alleged injury to or death of any person or loss or damage to property in or upon the Premises, caused by the negligent or willful acts or omissions of Sublandlord or its employees, agents or contractors. Sublandlord's obligations under this Section shall survive the expiration of the Term or earlier termination of this Sublease.