CO-TENANCY ISSUES

&

COVENANTS TO OPERATE

or

"Dancing In The Dark."

The Kiss And Promise Of Co-Tenancy Protection, Covenants To Operate And The Dark Consequences of Their Failure

Submitted By

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§1.00 CO-TENANCY ISSUES

§1.01 In General One of the most contentious subjects in shopping center lease negotiations today is the co-tenancy clause. Whether the topic is being discussed in the context of a deal contingency, a possession requirement, an initial opening requirement, an initial full rent co-tenancy provision or an ongoing co-tenancy requirement that applies during the entire term,[1] the topic carries with it an enormous risk for the landlord. While landlords can often extract operating covenants from in-line specialty retailers, a landlord will be less successful in obtaining one from big box retailers or the department stores. Thus, a landlord's ability to keep the shopping center open and operating as a financially successful center and to generate the expected rent stream for the landlord, its investors and lenders will depend purely upon the arbitrary decision of the department store or big box tenant to remain open or to close.

Further, where the landlord may secure an operating covenant from a specialty retailer, that obligation is itself interlocked with the ability of other retailers constituting a minimum percentage of gross leasable area[2] to be open and operate. A closure (whether or not in violation of the lease) of one or more of those specialty retailers will precipitate the domino effect of a series of closures and the implosion of the center.

There are those within the landlord community that argue that the tenant's entry into the shopping center is a *marketplace risk* and not a developer risk and there should be no co-tenancy protection at all.[3] They argue that the tenant had sufficient time and resources to analyze the center and the surrounding demographics and the tenant's location within the center. As a marketplace risk, it should be shouldered by the tenant and not the landlord.

Nevertheless, specialty tenants (at least those of a national stature) are able to secure co-tenancy provisions to ensure that the shopping center in which they currently find themselves remains consistent with the one originally marketed to them by the landlord. From the tenant's respective it is a question of *rental value* - what rent should the tenant pay for a half-dead center as compared to a fully open and operating one, or for a center anchored by a high end department store vs. one anchored by a big box discounter or theater? This has little to do with whether the tenant's sales have remained strong despite the closure of a significant number of stores or the replacement of original anchors by those of lesser stature. A tenant would not expect to be paying the same rentals for locations of disparate quality regardless of whether its level of sales were the same in both locations. In the same way that a landlord seeks an increase in a tenant's rental when another department store opens in the center - upon the theory that the rental value of the center has increased – a tenant should expect to pay less when the department store or the satellite store population diminishes or deteriorates and the retail climate is less than was promoted to the tenant when it first signed its lease.

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[1] These terms will be explained in these materials.

[2] E.g. 75% or 85% of the non-anchor gross leasable area being open and operating.

[3] Mark S. Hennigh, Esq., Greene, Radowsky, Maloney, Share & Hennigh, San Francisco, CA, Elizabeth H. Belkin, Esq., (currently) Belkin Law Offices, Chicago, ILL. and Joel R. Hall, (currently) Law Office of Joel R. Hall, Santa Rosa, CA :"Lease Clauses That Will Always Be Debated" ICSC Law Conference 1991).

On the question of a marketplace risk, it must be remembered that the shopping center itself is the "market", one created by the landlord. A landlord cannot conveniently ignore, when a shopping center begins to fail, that it is a universe unto itself assembled by the landlord and marked by the quality of tenants in it. Otherwise, if a tenant were merely concerned about the surrounding marketplace in which the shopping center itself was located, there would be no compulsion to go into the landlord's shopping center. A tenant could find a street location in that marketplace and only be required to pay minimum rent and taxes and be free from the following concerns: percentage rent, CAM charges, central HVAC costs, merchant's association dues, obstructive kiosks, relocation clauses, intrusion by columns or conduits, use clauses, tradename restrictions, limits on assignability and an operating covenant. It is the retail environment created by the shopping center that a tenant bargains for (and that the landlord held out to the tenant), not merely the marketplace in which it is located.[4] The co-tenancy clause functions in a number of circumstances throughout the life of the lease as outlined in §§1.02 through 1.06 of these materials.

§1.02 Deal Contingency/Initial Signing Requirements. This clause, which usually arises in a new center or an expansion of an exiting center, *conditions the very lease* on the landlord securing leases with specified co-tenants, with attendant obligations of those co-tenants to open for business at a time which coincides with the tenant's expected opening, usually upon the grand opening date. If a tenant is arriving upon the scene too late to make the grand opening, the contingency may require that the specified co-tenants be actually open before the lease becomes non-cancelable.

§1.03 Delivery of Possession Requirements. Once the tenant has committed itself to the deal, it is nevertheless not required to take possession of its premises nor start construction and trigger the running of the free-rent construction period unless and until one of the following has occurred, depending upon the particular deal:

a. the landlord has secured leases with specified cotenants with an obligation to open on or before a certain date, or

b. the specified co-tenants have begun construction in their respective premises, or

c. the specified co-tenants have opened for business in their respective premises.

Often "delivery of possession" clauses are written to state that the cotenants are required to be open by the grand opening date or within thirty (30) days thereafter. Although the landlord may technically meet the delivery requirement when it produces such leases on the delivery date, one cannot know whether all of the cotenants in question will actually open until that thirtieth day following the scheduled opening date. By then the tenant will have opened and begun paying the full minimum rent. If all of the cotenants are not open on that thirtieth day, then the tenant would reduce its rent to the alternate rent. Whether the tenant should also get a refund for the difference between the regular rent and the alternate rent for the interim 30-day period is a matter of negotiation.

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[4] Ibid.

§ 1.04 Initial Opening Requirements. These clauses are found in new centers under construction or in expansions of existing centers, where a grand opening or "grand re-opening" of the center is contemplated. They can often be used in tandem with contingency clauses (**§**1.02 above) or delivery of possession requirement clauses (**§**1.03 above) where the specified co-tenants were required to have signed leases or taken possession of their premises. Once these preliminary hurdles are have been met, the tenant is not required to *open for business* until the specified co-tenants have also opened for business in their respective premises. If the tenant elects to open before the initial opening requirements are met, then the tenant would pay a negotiated reduced rental - usually 50% of the rentals - until the conditions are met.

§1.05 Full Rent Requirements Frequently, the tenant is required to open regardless of the status of the co-tenancy requirements but may be entitled to pay alternate, reduced rental until the conditions are met. If the conditions are not met for a long time, the tenant may also acquire a right to cancel the lease, although this is hardly beneficial after the tenant has invested considerable sums in building out the tenant finish work (unless the landlord agrees to repay the tenant for these costs upon such cancellation).

§1.06 Ongoing Co-Tenancy Requirements. While a landlord may have to risk compliance with the pre-opening co-tenancy requirements described above for a limited time, the ongoing co-tenancy requirements constitute an ongoing risk for the landlord throughout the term of the tenant's lease. In that situation the risk shifts to a somewhat more balanced arrangement as discussed below.

§1.07 Who Are the Co-tenants?. Traditionally, the co-tenants fell into two minimum categories: (i) the "majors" or "anchors", and (ii) the "satellite" or "specialty" retail tenants

In modern leasing transactions, the "anchors" have been further refined into subcategories of:

a. Required anchors by *name*;
b. required anchors by *type*, e.g. a department store or other "high drawing" large user;
c. a combination of (a) and (b);
d. a large space user of a certain size, regardless of use or type;
e. a combination of (b) and (d).

The category of the satellite tenants has been further refined into subcategories of:

x. specifically named "mandatory" key tenants;
y. specifically named "required" key tenants (i.e. not as mandatory as in (x) above) from a larger pool of choices;
z. a percentage of generic unnamed satellite stores.

The specific naming of anchor stores and satellite stores has played a larger role in such threshold issues as the **(i)** the initial signing requirements as a contingency of the deal [**§**1.02], **(ii)** delivery of possession requirements [**§**1.03], **(iii)** initial opening requirements [**§**1.04] and **(iv)** full rent requirements [**§**1.05]. Maintaining such specific requirements on an ongoing basis thereafter as a continuous operations requirement has been a much more controversial issue as the risk to the developer becomes exponentially greater.

While the Landlord can with some degree of comfort guarantee the *initial* appearance of specifically named department stores and satellite stores, their continued presence over time as businesses come and go (whether by assignment or closures) is a high risk proposition for the developer. For the tenant, however, the loss of the original quality of anchors and retailers that supported its decision to go into the center at an agreed-upon rent structure undermines the justification for continuing to pay the rents at that level. It is in this area where a greater attempt of a balanced compromise is addressed.

Relationship to Additional Anchor Rent Increase Clauses. Many landlord lease forms contain a provision that the tenant's rent will *increase* if additional anchors open within the center, reflecting an increase in *rental value*. For the tenant, the rationale should be the same and work in *reverse* – the loss of bargained-for anchors and a minimum quantum of specialty retailers should be reflected in a *decrease* in rental value, and ultimately lease termination.

§1.08 The Anchors. The *identity* of the anchor is a fundamental component of the co-tenancy clause. This topic has been the one in which developers have tried to be most creative in response to changing business trends and consequently has become the area of the greatest controversy.

Department Stores. Historically, the department stores have rightfully been equated with the concept of "anchor" or "major". These were the true anchors of the center, whose drawing power attracted customers to the center whereby the satellite retailers would derive the benefits of sales from the traffic generated by the department stores. This concept was so fundamental to the very notion of a shopping center that no definition of department store was deemed necessary – everyone knew who they were and understood that these were the anchors relied upon by the smaller retailers to support their businesses. The parties focused their attention on the number and identity of the department stores for various purposes of the lease.

Issues that arose (and continue to arise) are what types of department stores can replace the original department store anchor. If Nordstrom's was the original anchor, then unless the lease provided otherwise, its replacement by another department store, albeit lower down in the fashion and price point category, would keep the landlord in compliance with the co-tenancy clause. Thus, where a tenant signed a lease comfortably relying upon the presence of a Nordstrom's, there might come a time where Nordstrom's could be replaced by JC Penney or Target. While such retailers are not objectionable *per se*, they would be unacceptable to a tenant who tied its rent structure to the presence of a high end fashion department store, especially if that tenant were in close proximity to that department store site.

The only way a tenant can protect itself in this situation is to require that the department store replacement be equal to or better than the department store it replaces, in term of quality of merchandise offered and price points.[5]

[5] Some landlords are skittish about using "price points" as a yardstick because of a feared anti-trust implication. However, the requirement does not prevent the advent of the value priced department store into the center; it merely functions as a measure to determine whether tenant can avail itself of the remedies for a co-tenancy failure. It is not a credible argument that a developer would somehow be deterred from leasing to the value priced department store simply because one or more of its satellite stores might convert to alternate rent or cancel their leases. The signing of the new department store lease is too vital for the developer to ignore.

"Department Store" Is A Subjective Concept. Before there was a need to specifically define the term, the presence or number of "departments" was not *the* deciding factor in describing a "department store".[6] Although a certain merchandise assortment was necessary, the extent varied widely from one department store to the next. Nordstrom's, Neiman's or Saks do not carry hardgoods such as refrigerators or tools while Sears does – but all are considered "department stores". Indeed, in the definition which follows later in these materials (where certain objective criteria are set forth), many stores which are traditionally regarded as true "department stores" would not even qualify, while many other stores who were never regarded as department stores *would* qualify.

This fact illustrates the subjective nature of the concept. The idea of a department store is heavily based upon historical impressions and perceptions. It is extremely difficult to define objectively in such a way as to accurately include all of the "right" people and exclude all of the "wrong" people. Consider the following types of retailers:

Membership Warehouse Stores, e.g. Costco. While these stores meet the broadest definition of a department store - large, multi-departmented, carrying apparel, electronics, housewares, furniture, appliances, tools - why are they not perceived as "department stores"? Perhaps the biggest influence in people's perception is the *fashion level* and service level of the store coupled with its size. The large size makes possible an extensive *assortment* of merchandise (i.e. departments) but this varies widely among these retailers. In the membership warehouse stores, they are very "industrial" in their layout and look, with no special store design feature. Customers pick their own merchandise; there is no real sales force, just cashiers.

Catalog Stores. These stores are also large and multi-departmented, carrying electronics, housewares, furniture, appliances, tools (perhaps apparel). Again, they are not perceived as "department stores" for shopping center leasing purposes.

The Large Specialty Store. In recent years some specialty stores which started out in business as small in-line shops have expanded their merchandise mix and have occupied a much larger amount of GLA - exceeding 50,000 sq. ft. in some malls. Nevertheless, as attractive and successful as these retailers are, they are not perceived as "department stores" or even anchor stores, by reason of their satellite store origins. A supersized Limited store or a Limited, Inc. operation containing its numerous divisions under one umbrella lease would be examples.

In Glendale Center, LLC. vs. The Limited Inc., *et al*.(2002), the equity court rendered a questionable decision granting an injunction in favor of the landlord when The Limited sought to close its four stores in the shopping center, amounting to an aggregate of 25,223 square feet. The court found that The Limited stores, when considered in the aggregate was a "key tenant" - despite the fact that they were governed by four different leases with different commencement and expiration dates - whose closure would constitute an unacceptable hardship to the landlord.

Generic "Anchor" Stores. A dramatic change occurred in the industry in the 1980's. Developers had become concerned that they could not replace a dark department store site with

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[6] Webster's definition of department stores is **"a large retail store carrying several lines of merchandise and organized into various departments for sales and administrative purposes."**

another "true" department store in the face of bankruptcies or consolidations of various department store chains. Further, developers began to advance the idea that an anchor need not necessarily be a traditional department store but could also be represented (or replaced) by large, single user occupants whose presence would in theory exude the same drawing power as the department store. Hence the definition of an "anchor" was revised to include *any* large user, whether multi-departmented or not, that occupied a significant amount of space, originally on the magnitude of 75,000 – 80,000 square feet. In recent years that figure has decreased to as low as 30,000 square feet and occasionally to 25,000 or 15,000 square feet. Some lease forms unabashedly refer to the latter as "junior majors". The unfortunate impact upon the smaller tenant who signed a lease in reliance upon the presence of a Nordstrom's as setting the tone and fashion level of the shopping center would be to discover that its replacement anchor was a deep discount department store or a 30,000 square foot furniture or shoe store.

As landlords became more emboldened, the definition of "anchor" and what would replace then became more surreal. Following is an admixture of concepts taken from the lease forms of several developers and represents, in the author's view, the most startling and polar views on this concept:

Fig 1-1

Definition of Anchor

An Anchor means any tenant or other occupant of the Shopping Center which either (i) occupies a floor area in excess of 30,000 square feet in the Shopping Center, or (ii) occupies a floor area in excess of 15,000 square feet and is designated an Anchor in a notice to that effect given by Landlord to Tenant. [Emphasis added]

For purposes hereof, a Suitable Replacement shall be any one or a combination of the following: [Emphasis added]

(i) another Anchor (which for purposes hereof shall mean a national retailer or specialty retailer which occupies at least 30,000 square feet (or smaller if replacing a smaller designated anchor) within one set of demising walls, under one roof and under one trade name);

(ii) new, replacement or additional leasable square footage attached or adjacent to the Shopping Center with at least 30,000 square feet of space;

(iii) 2 restaurants of at least 6,000 square feet;

(iv) 2 big box users of at least 15,000 square feet, whether or not contiguous, or in the aggregate, 30,000 square feet or more; [Emphasis added]

(v) an entertainment facility;

(v) office space of 20,000 square feet; [Emphasis added]

(vi) a hotel; or

(viii) residential living spaces of at least 30 units. [Emphasis added]

It is astonishing to dignify any of the foregoing with the characterization of "anchor" [7] and in any way ascribe to them any similarity in drawing power to that of the anchor they are intended to replace.

§1.09 Definition of Anchor Store

§1.09-1 Where The Anchor Is A Traditional Department Store. Following is an outline of a proposed definition of a department store anchor:

Step 1: Begin with A Generic Definition of Department Store. One would begin with a *generic* definition of a department store and then deal with specific inclusions, exclusions and exceptions to that general definition:

a. Size – e.g. 75,000 square feet

b. Single tradename, operating within a single set of demising walls;

c. Multi-departmented carrying merchandise in the following lines:

x. apparel; apparel accessories; cosmetics and perfume; jewelry; ("Required Merchandise"), plus one of the following:

y. housewares, domestics and linens, electronics, home furnishings, appliances, furniture, floor coverings.

Step 2: Specifically Name All Approved Department Stores In Advance. The parties should have a list of specifically approved department stores without regard to any merchandise test or size (including the department store you are starting out with). This would eliminate definitional differences between full line stores (i.e. Sears) and more limited line stores (Nordstrom's) and between large department stores and smaller ones (e.g. Saks). The longer the approved list the better as the occasions for dispute are thereby reduced.

*Step 3: Specifically Name All **Un**-Approved Stores*. It is essential to have a list of specifically-named retailers who will not qualify as department stores for purposes of the co-tenancy clause despite the fact that such stores would otherwise literally meet the size, single-operation and merchandise tests of the generic definition offered above. Unless a prohibited list is created, certain retailers that the tenant does not regard as an acceptable anchor will be included in the definition of a replacement anchor. A tenant may find, much to its chagrin, that the Nordstrom's department store two doors away has been replaced by a Costco while the landlord continues to expect the tenant to operate and pay the negotiated rent based upon a Nordstrom's anchored center despite the dramatic change in the center's character. The

[7] The author *does* acknowledge however, with some bewilderment, that it is has become more common for retailers to accept restaurants, theaters and book sellers as legitimate "anchors". However, one can also argue that the well known specialty retailers themselves, i.e. the in-line satellite stores, exude no less drawing power (and probably more) than (i) a lunch and dinner Mexican restaurant, and (ii) a theater whose patrons come to the center to watch a movie and not to shop.

"unapproved" list is where the discount "department stores", large multi-departmented apparel stores and other multi-use large users would be enumerated. This is not to say that such stores have no proper place in a shopping center mix but that these stores simply would not qualify as "anchors" upon which the tenant's rent structure (or covenant to operate) would be predicated.

*Step 4: Exclude Certain **Types** Of Stores*. Certain *types* of stores should also be excluded from the definition of department store, such as large *drug stores, home improvement centers* and *price-club stores*. Aside from a few examples that could be included, this would avoid the chore of creating a long list of stores *by name* when a description by *type* would be sufficient. In addition, large specialty stores who are not traditionally viewed as department or anchor stores but occupy a large space, e.g. The Limited under a lease encompassing all of its divisions, must also be excluded. See discussion above of the case of Glendale Center, LLC. vs. The Limited Inc.

§1.09-2 Replacing Department Store Anchors With a Replacement Not On The Approved List. The real issue underlying this whole subject of defining anchors or department stores is not so much one of who the landlord has in its stable at the inception of the deal but who replaces the anchor as the economics of the shopping center change over time. The departure of some of the original anchors is a reality and the possibility that such departure will trigger a co-tenancy failure is a very real danger for a developer. Thus, defining "acceptable replacements" of the anchor is the real battleground.

Tenants will take a much stricter view about permitting the replacement of the department store anchors *prior to the beginning of the term* - i.e. as a deal contingency, a delivery of possession requirement, an opening requirement or "full rent" requirement - since the department stores that were initially promised as an inducement to come into the center may never materialize, having been switched for another, less attractive replacement. This serves to illustrate that the landlord didn't really have true commitments from the originally named department stores in the first place. In many cases no replacements will be permitted unless they are clearly an improvement over what was originally promised, e.g. a Nordstrom's being replaced by a Neiman's but not by a Macys.

Subsequent to the commencement date however, retailers recognize that landlords have little control over what the department stores do and will agree to a department store replacement in an on-going *continuous* co-tenancy clause.

(a) *Department Store Replacement*. If the anchor is a department store, then a replacement for a department store could mean:

(i) a national retailer that meets the definition outlined in **§**1.09 and which operates in all or substantially all of the space vacated by the prior department store. It is not necessary for the replacement to occupy *all* of the space occupied by the former anchor, just a significant portion of it. Ninety percent (90%) of space of the original anchor is common so long as successive "downsizings" are not permitted (e.g. 90% of the immediately preceding anchor as distinguished from the original anchor). If the original anchor was, for example, 100,000 square feet, then the break-up of that space into smaller units would be acceptable so long as there was one that met the minimum size [90% of 100,000 = 90,000 square feet] and other requirements of the definition in **§**1.09 above; or

(ii) is another department store on the approved list regardless of merchandise mix or size (subject to subparagraph (b) hereinafter following).

(b) *Fashion Department Store Replacement– "Qualified Fashion Replacement"*. In the case of a department store anchor, the tenant may tie the co-tenancy requirements to a certain *quality* of department store or specifically-identified retailer, especially if the tenant was located close to the original fashion anchor. Using such a standard, a suitable replacement of a fashion department store would be a comparable national fashion department store meeting the definitional requirements of §1.09 and recognized in the industry as selling merchandise and at price points equal to or better than the named department store it is replacing. Replacements of lower tier stores with equal or higher tier department stores would be permitted, but not the reverse. Thus, a replacement department store may be on the approved list, it still may not be acceptable as a replacement for the previous department store.

A variation of the foregoing would be the case where the replacement need not meet the "fashion level' of the very store it is actually replacing so long as it met a "minimum fashion level" acceptable to the tenant. For example, if a center had a Sears, JC Penney, Macys and a Nordstrom's, it might be acceptable to a tenant that a replacement of Nordstrom's with a department store equal to or better than Macys might be sufficient for its purposes.

Other Replacements. It has become increasingly common for tenants to accept as replacements of department store anchors (or to establish such occupants as acceptable initial anchors in the first instance), occupants such as large booksellers, theaters and restaurants. Whether such occupants offer the tenant the drawing power or justify the rental being asked for the space is a matter of intense negotiation.

§1.09-3 Replacement of Any Anchor Space With Multiple Specialty Stores. A recent trend has been the tendency for landlord to advocate replacing an anchor store with a number of smaller retailers, arguing that the drawing power of a number of specialty retailers is equal to or perhaps better then the anchor being replaced. This argument has merit. What a tenant must do here is to (i) limit the number of anchors (or specifically identify the anchors) that may be replaced in this fashion, (ii) establish a minimum amount of space of the replaced anchor that must be occupied by the smaller retailers, (iii) identify what type of smaller retailers will qualify as substitutes. For this scheme to work, the original anchors and their sizes must be specifically identified. Following is a sample clause:

Fig 1-2

Conversion of Anchor Space Into Smaller Retail Spaces

Notwithstanding the foregoing, the parties agree that one (but only one) of the Anchor may be converted (a "Conversion") into a space or spaces occupied by any or a combination of restaurant, retail and/or theatre uses (herein "Lifestyle Tenants") offering merchandise or services of a quality at least equal to the following retailers as exemplified in each of the categories hereinafter set forth provided that at least ninety percent (90%) of the space of the original Anchor ("Minimum Size") is occupied by such Lifestyle Tenants who are open and operating. If the requirements for a Conversion

have been met, then such converted space shall qualify as a comparable replacement for the Anchor:

Apparel	**H&M; J. Crew; Coldwater Creek; Banana Republic; all other regular priced divisions of Gap Inc (excluding however Gap Outlet or Old Navy); C Wonder, Michael Kors**
Shoes:	**Ugg, Clarks, Jimmy Cho, Nine West**
Jewelry:	**Pandora, David Yurman, Kay, Zale's**
Cards:	**Papyrus**
Electronics:	**Apple, Microsoft, Sony**
Theater:	**AMC, Lowes,**
Restaurants:	**PF Chang, Cheesecake Factory, California Pizza, Zinburger, Shake Shack**
Books:	**Barnes & Noble**
Cosmetics:	**Sephora; Bare Escentuals; MAC, L'Occitane, Kiel's**
Accessories:	**Coach; Michael Kors, Solstice**
Kid's Use:	**American Girl, Lego, TCP, FAO, Gymboree, Build-A-Bear, 77 Kids**

To qualify as a Conversion of such anchor, Lifestyle Tenants may not include retailers commonly known as, or selling merchandise at, "discount", "off-price, "value price" or any outlet operation of any retailer.

Unless and until the Minimum Size of the space of the Anchor is occupied by such Lifestyle Tenants who are open and operating, the requirements for a Conversion shall not have been met and the former Anchor shall be considered as closed for purposes of determining whether cotenancy Condition has occurred. In addition, in such event and until such Conversion requirements have been met, the Floor Area of such Lifestyle Tenants (i) shall be deemed part of the Floor Area of the Center for purposes of determining whether the Satellite GLA Requirement has been met, and (ii) shall be included into the denominator of Tenant's proportionate share fraction for the purposes of determining Tenant's Share of Additional Rent pursuant to this Lease.

For purposes of this Section, the original Anchors and their gross leasable area are as follows:

Name	**Original Gross Leasable Area**
Macys [or other Anchor]	
Nordstrom's [or other Anchor]	
Sears [or other Anchor]	

§1.10 **The Satellite Stores**. The other part of the co-tenancy equation is the satellite store component - the gross leasable area of the non-anchor space. Traditionally, a minimum percentage of such space – 70% to 85% being the common range – was the custom. The satellite store element of this co-tenancy equation were usually known retailers to the tenant when it first

signed its deal and no doubt were part of the inducement to join the center but were almost always described in generic terms with no specific mention of individual names. It was historically recognized by the tenant seeking co-tenancy protection that the composition of the satellite stores could change over time and often for the worse, a situation over which the landlord had little control no matter how strict the operating and assignment clauses were in those other leases. Where the center started out with a population of high-end retailers, that population through gradual attrition could devolve into a warren of value priced stores and heavy discounter operations and food courts. This process could be accelerated by the loss of the high end department store and its replacement with a lower quality large space user.

More recently however, tenants have been demanding that *at least initially* certain portions of the satellite store co-tenancy population be composed of retailers of a certain quality and identity to justify the rent being asked of the tenant. Often, these clauses are structured as a requirement that the landlord obtain a certain percentage of specifically named retailers from a larger pool of specifically named choices. Increasingly we are seeing clauses in which subclasses of required specialty retailers are also being created, each with tighter (or looser) requirements. Following is an example:

Fig 1-3

[Opening (or full Rent) Co-Tenancy Requirements]

A "Co-Tenancy Failure" shall mean that the following retailers are not open for business on the date Tenant opens the Premises for business:

(i) Macy's, Robinson-May and Nordstrom's (collectively, the "Required Anchors") [or their Comparable Replacements (as defined herein)]; or

(ii) <u>each</u> of the following tenants (the "Mandatory Co-Tenants"): Apple, Anthropologie, Z. Gallerie, Coach, Brookstone, Sharper Image, Banana Republic, Williams Sonoma, Pottery Barn, Sephora, Coach, Tommy Bahama, Armani A/X, P.F. Changs; or

(iii) <u>at least</u> twelve (12) of the following list of "Key Co-Tenants": (1) Cole Haan, (2) Izod, , (3) Bebe, (4) Victoria's Secret, (5) The Gap, (6) J. Crew, (7) Urban Outfitters, (8) Smith & Hawken, (9) Ann Taylor, (10) Talbot's, (11) Lucy, (12) Urban Outfitters, (13) Joseph A. Banks, (14) Eddie Bauer, (15) Aveda, (16) Lucky Brand Dungarees, (17) Abercrombie & Fitch, (18) Victoria's Secret, (19) J. Jill, (20) Chico's, (21) California Pizza Kitchen, (22) White House Black Market, (23) Corner Bakery; (24) Cheesecake Factory; or

(iv) eighty - five percent (85%) of the retail tenant gross leasable area (excluding the Required Anchors but including the Mandatory Key Tenants and the Key Co-Tenants described above).

As noted in clauses (i) above, a replacement of the *initial* department stores, may or may not be allowed. If allowed, a "Comparable Replacement" would be described in accordance with the principles discussed above.

In the case of the Mandatory Co-Tenants under clause (ii), no substitutions are allowed *initially*. This guarantees that the landlord has indeed secured, as promised, the high level of retailers represented by that class.

In the case of the Key Co-tenants under clause (iii), the landlord has some wiggle room as it has a broader universe from which to secure acceptable tenants.

In clause (iv), all of the satellite space, inclusive of the Mandatory Co-Tenants and Key Co-Tenants, must comprise at least 85% of the non-department store GLA. This still leaves landlord the freedom to have a vacancy factor of fifteen percent (15%).

Ongoing Co-Tenancy Requirements. Subsequent to the commencement date, the co-tenancy requirements usually convert to a simpler formula, in recognition of the fact that it may be unreasonable to require the landlord to maintain the initial quality level of the multiple classes of the satellite GLA requirement.

Fig 1-4

Continuous Co-Tenancy Requirements

If at any time during the Term of this Lease subsequent to the Commencement Date the following retailers are not open for business (the "Operating Co-Tenancy Requirements") a "Co-Tenancy Failure" shall be deemed to have occurred:

(i) Macy's, Robinson-May and Nordstrom's (collectively, the "Required Anchors") [or their Comparable Replacements (as defined herein)]; or

(ii) eighty - five percent (85%) of the retail tenant gross leasable area (excluding the Required Anchors).

Nevertheless, in some cases tenants will bargain for and obtain some continued assurance of retailer quality among the satellite stores in those cases where it is most important to them.

Fig 1-5

Continuous Co-Tenancy Requirements

If at any time during the Term of this Lease subsequent to the Commencement Date the following retailers are not open for business (the "Operating Co-Tenancy Requirements") a "Co-Tenancy Failure" shall be deemed to have occurred:

(i) Macy's, Robinson-May and Nordstrom's (collectively, the "Required Anchors") [or their Comparable Replacements (as defined herein)]; or

(ii) each of the following tenants (the "Mandatory Co-Tenants") or their Comparable Replacements (as defined herein): Apple, Anthropologie, Z. Gallerie, Coach, Brookstone, Sharper Image, Banana Republic, Williams Sonoma, Pottery Barn, Sephora, Coach, Tommy Bahama, Armani A/X, P.F. Changs.

A "Comparable Replacement" in the case of the Required Anchors shall mean a department store [meeting the requirements of §1.09 above] with products of a fashion level and price points similar to, or better than, those of the department store it is replacing and occupies at least ninety percent (90%) of the space occupied by the original department store for which it is a replacement (the "minimum size"). The reduction in size of the department store space to the minimum size in accordance with the preceding sentence can only occur once during the Term with respect to the department store space in question and there can be no further diminution in the minimum size of that department store space following the first replacement of the original Required Anchor (which results in a diminution in size).

A "Comparable Replacement" in the case of the Mandatory Co-Tenants shall mean any national or regional retailer of a quality in terms of quality of merchandise and price points and target customer equal to or better than, and occupying all of the space formerly occupied by, the Mandatory Co-Tenant it is replacing. [Emphasis added]

Note the addition of the qualifier "target customer" to the formula. While admittedly subjective (as is the rest of the formula) it is the tenant's attempt to preserve the rationale behind its insistence upon the presence of the Mandatory Co-Tenants in the first place – they symbolize the kind of customer the tenant hopes will patronize his store.

§1.11 Remedies for a Co-Tenancy Failure

Lease Signing Contingency. Upon a failure of the lease signing contingency, the remedy would be the right of the tenant to cancel. Whether this is a continuing right or one with a limited period for exercise is a matter for negotiation. In addition, whether the landlord would be required to reimburse the tenant for its expenses in designing the store and negotiating the lease would be part of those negotiations.

Delivery of Possession Requirement. If the landlord failed to produce the required leases by the time that physical possession of the space were to be delivered to the tenant, then "delivery of possession" is not deemed to have occurred nor does the tenant's construction period begin to run. Often the landlord will insist that after a period of time - 120 days to one year – the tenant must either (i) accept possession of the space notwithstanding the failure of the landlord to meet the leasing requirement, or (ii) terminate the lease. The period of time as well as any obligation of the landlord to reimburse the tenant for its expenses is a topic of negotiation.

Opening Requirement. Although the tenant could refuse to open until the opening co-tenancy requirements are met, that may not be an economical remedy for the tenant. The tenant would have already spent considerable sums building the store, merchandising it and hiring personnel; it would not make good business sense to not open and try to sell some merchandise. Thus, while the tenant is not required to open at all, if it does open it will pay a reduced rent with an ultimate termination right if the co-tenancy failure is not cured within a certain time.

Full Rent Requirement. Here, the tenant is required to open notwithstanding that the opening co-tenancy requirements have not been met. However, the remedies for an initial co-tenancy failure - whether as an *opening* requirement or a *full rent* requirement - are the same and are fairly standardized. Rent reduction will be its principal relief. After a period of time, the

tenant would also pick up a cancellation right if the co-tenancy failure was continuing. Following is such a clause:

Fig 1-6

Failure Of Opening Requirements

> **If upon the date Tenant opens for business in the Premises the Opening [or Full Rent] Co-Tenancy have not been met, then Tenant will not be required to pay full Minimum Rent or Additional Rent until such time as the Opening [Full Rent] Co-Tenancy is satisfied, and in lieu thereof, Tenant shall pay to Landlord one half (1/2) of the Minimum Rent and Additional Rent ("Alternate Rent") for each month until the Full Rent Co-Tenancy is satisfied. If failure to meet Opening [Full Rent] Co-Tenancy continues for more than twelve (12) months following Tenant's opening for business, then in addition to paying the Alternate Rent, Tenant shall have the continuing right thereafter to terminate this Lease upon sixty (60) days notice to the Landlord.**

Fish or Cut Bait. It is common for the landlord to insist upon a "fish-or-cut bait" requirement whereby the tenant, after paying alternate rent for a while (typically 12 months), must decide whether to terminate the lease or remain in possession and revert to full rent.

A right of the tenant to cancel after the *initial* 12 months of the term would not make economic sense after the expenditure of considerable sums to construct the store, purchase inventory and hire employees. Thus, this "remedy" is a rather hollow one. Of necessity, the tenant would then have to begin paying the full rental despite the continuance of the co-tenancy failure (which could be substantial). In such case, a periodic right to "revisit" the termination option should be available to the tenant for so long as the co-tenancy failure continues (see discussion below).

Ongoing Co-Tenancy Requirement. Upon a failure of the ongoing co-tenancy requirements it is common to see the following features negotiated into the clause.

i. *A "Waiting Period"*, typically one year in the case of the department stores and a shorter period in the case of the satellite stores. During the waiting period, either :

a. no co-tenancy failure can be deemed to exist, with no remedy for the tenant during the such period, or

b. A right to pay alternate rent would immediately accrue upon a co-tenancy failure but a cancellation right on the part of the tenant would not accrue until the end of this period.

ii. *The "Fish-Or Cut- Bait" Decision*. Here the tenant, after paying reduced rent for a specified time must decide whether to terminate the lease or revert to full rent.

Fig 1-7

Failure of Ongoing Operating Requirements

If at any time during the Term of this Lease subsequent to the Commencement Date the following have occurred (a "Co-Tenancy Failure"):

(i) Macy's, Robinson-May and Nordstrom's (collectively, the "Required Anchors") have closed and a Comparable Replacements (as defined herein) has not opened within one year from such closure; or

(ii) eighty - five percent (85%) of the retail tenant gross leasable area (excluding the Required Anchors) are not open and operating for a continuous period of three months,

then Tenant shall have the right to pay Alternate Rent until the Co-Tenancy Failure has been cured. If the Co-Tenancy Failure continues for a period of twelve (12) months, Tenant may terminate the lease. If Tenant has not terminated the lease after eighteen (18) months from initial Co-Tenancy Failure, Tenant must elect within thirty (30) days thereafter to terminate the Lease upon thirty (30) days notice to Landlord or revert back to full rent obligations, effective as of the end of the eighteen month period aforementioned. [Emphasis added].

Right to Revisit. Although the duration of the waiting periods, if any, are subject to much negotiation, the "fish-or-cut bait" feature has become almost universal. However, this presents a dilemma for the tenant. At the time the tenant is required to make that final, irrevocable decision, it may not be prepared to cancel as its store may still be profitable despite a downward trend resulting from the co-tenancy failure.

A fair solution is one where the tenant may elect to revert to full rent but reserve the "right to revisit" the issue of cancellation at regular intervals in the future (e.g. 6 month or 1 year intervals) for so long as the co-tenancy failure endures. In this manner, while the Landlord will be receiving full rent, the tenant can reassess at the end of the next interval whether termination is the proper course at that time, so long as the co-tenancy failure has continued. To achieve this, the following provision would be added to Fig 1-6 above:

Fig 1-8

Right to Revisit

Notwithstanding the foregoing, however, Tenant's right to terminate shall be available every six (6) months thereafter, for a period of thirty (30) days) provided that the Co-Tenancy Failure has continued throughout such periods.

No Permanent Waiver. The way some co-tenancy clauses are written, once the tenant elects to waive its cancellation right and revert to full rent, the tenant waives *all* future co-tenancy

protection for the rest of the term. This is unfair and inappropriate and a right to revisit would be the solution. The clause must also provide that if the co-tenancy failure is *cured* and thereafter subsequently fails again, the tenant still has all of its rights for a co-tenancy failure in accordance with the procedures that applied during the first co-tenancy failure. Fig 1-9 would also be added to the foregoing:

Fig 1-9

Co-Tenancy Remedies Continue

If a Co-Tenancy Failure is cured (and Tenant has not terminated this Lease) and thereafter another Co-Tenancy Failure occurs, Tenant shall have all of its rights and remedies provided in this Article, including, without limitation, the right to pay Alternate Rent and the right to terminate in accordance with the above provisions.

§1.12 **Forms of Rent Relief** . Alternate Rent can take several forms:

a. The tenant pays a percentage of the regular minimum rent (e.g., 50%); or

b. The tenant pays the *lower* of (i) the monthly minimum rent, and (ii) a percentage of its monthly sales; or

c. The tenant pays a percentage of its sales in lieu of the regular rent and charges. This mechanism should only be used if the lease contains a percentage rent clause. If the tenant's sales remain above the breakpoint despite the co-tenancy failure, the landlord will still receive its bargained-for rent. If the tenant's sales fall below the breakpoint, the tenant only pays on the basis of what is actually sold at the store, rather than paying minimum rent.

If the lease contains no percentage rent clause, option (a) or (b) above is the better solution. Otherwise, if the tenant were to pay a straight percentage rent as in (c), the landlord may receive more rent than it bargained for, if the tenant's sales are high despite the co-tenancy failure.[8]

Landlords have argued that such rent reduction formulas are an enforceable penalty and not a liquidated damages provision. Generally however, the courts have found that this was a negotiated rent adjustment or a bona-fide liquidated damages provision upon the occurrence of a co-tenancy failure inasmuch as the landlord's actual damages were incapable of ascertainment. See Old Navy, LLC vs. Center Developments, Oreg. (2012) where the court held that the provision for alternate rent was not even a liquidated damages provision but rather a clause which altered a rate of payment if a contract term occurred, i.e. a co-tenancy failure. The co-tenancy

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8 In this scenario, the landlord will argue that the tenant is not hurt, despite the co-tenancy failure. The tenant will argue that a landlord failure to meet the negotiated co-tenancy requirements should reflect a diminution of rent as the shopping center is dramatically different from the one upon which the full rent was predicated. The landlord should not be rescued from its obligation to meet such requirements to justify the negotiated rent, simply because the tenant may still enjoy high sales despite such failure. See also the discussion under Section 1.14`, *infra*.

failure itself was not a "default" by the landlord, which would otherwise have required examining the alternate rent remedy in the context of a valid (or invalid) liquidated damages provision.

Further, in Hickory Grove, LLC vs. Rack Room Shoes, Inc. (Tenn. 2010) the landlord claimed that the alternate rent provision was an unenforceable penalty as it bore no relation to the actual damages suffered by the tenant; in fact, the tenant's sales continued to increase despite the co-tenancy failure. Nevertheless, the court held that "the clear unambiguous language of the Lease, however, describes the conditions that must be satisfied for a party to invoke the co-tenancy provision. Neither Section 1.06 nor 1.07 requires Defendant to show decreased sales in order to invoke the co-tenancy provision."

§1.13 Right to Go Dark. Upon the occurrence of a Co-Tenancy Failure, the tenant may reduce its losses due to poor sales performance by closing the store and limiting its operating expenses to paying just the minimum rent and other occupancy costs. If there had been no operating covenant in the Lease in the first instance, and the tenant had already closed (pursuant to its right to do so) before the co-tenancy failure had occurred and was paying full minimum rent, the tenant would commence paying substitute rent as described in the preceding Section.[9] Some landlords argue for the proposition that in order to "earn" the right to pay alternate rent, the tenant must be open and operating. There is merit to this position and it is a negotiated item.

Landlord's Response – Right to Cancel. "Going dark" for a specified period of time often triggers a landlord termination right (which may be a welcome result for the tenant). The landlord may have another prospect for the space and want to recapture it quickly. In addition, if the tenant is doing poorly the landlord may want to recover possession of the premises before the tenant files for bankruptcy. In either event, the tenant will want the landlord to reimburse it for the unamortized costs of its leasehold improvements (excluding any construction allowance), while the landlord may insist that the tenant reimburse the landlord for the unamortized portion of the construction allowance or the cost of landlord's work if the landlord delivered a turnkey store.

The "go dark" period usually falls within the range of 60-120 days of continuous closure. Closures for legitimate purposes do not count against the tenant. Indeed, closures for these purposes usually indicate an intention to continue in business, as distinguished from an abandonment. Following is such a clause.

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9 The landlord will argue that since the tenant had already closed prior to the co-tenancy failure and paying full rent, it should continue to do so after the co-tenancy failure and the landlord should not be further penalized. From the tenant's viewpoint, it had the right to close at any time and pay full rent. However, if a co-tenancy failure occurs subsequently, (i) the condition for invoking the co-tenancy provision has occurred, and (ii) there is a corresponding diminution of *rental value* justifying the payment of substitute rent during the co-tenancy failure. If the tenant had been open and a co-tenancy failure occurred subsequently, the tenant would have been entitled to close and pay substitute rent. Once a co-tenancy failure occurs, the result should be the same whether the tenant closed prior to or subsequent to the co-tenancy failure.

Fig 1-10

Excused Closures

An "Excused Closure" is a temporary closure due to or in connection with: (i) an event of force majeure as defined in this Lease; (ii) a casualty to or a taking of the Premises; (iii) a period not to exceed seventy-five (75) days in the event of an assignment or sublease transfer made in accordance with this Lease; (iv) the making of repairs or for remodeling or renovation work; (v) closures for special events and preparation for new product launches, (vi) four (4) days per year for the purpose of taking inventory in the Premises (vii) Easter Day, Thanksgiving Day, Christmas Day or New Year's Day or other nationally, regionally or locally recognized holiday (a "Holiday"), (viii) when to do so would violate any legal requirement, criminal or civil, or subject Tenant or its employees to a fine or penalty, whether criminal or civil in nature.

Reinstatement By Tenant. In many cases, the tenant may want the right to nullify the landlord's cancellation and reinstate the lease by reopening within a certain period. The landlord may object to the reinstatement, however, if the landlord has already made a deal with someone else while the tenant was closed; the landlord will insist on the right to pursue its other deal. In such case, the tenant might agree to relent if the landlord actually shows proof that it has another deal in the wings and would be prejudiced by the tenant's reinstatement. Following is a clause that addresses this point.

Fig 1-11

Landlord May Nullify Reinstatement

If Tenant elects to reinstate this Lease, Landlord shall have the right, for a period of ten (10) days following receipt of the Reinstatement Notice, to notify Tenant that it has signed a lease with another tenant for the Premises, as evidenced by a fully executed copy thereof between Landlord and such other tenant. In such event, Tenant's reinstatement of this Lease shall be ineffective and the term hereof shall expire upon the original termination date specified in Landlord's cancellation notice.

Tenant's Rights After Reinstatement. Many landlords take the position that once the tenant makes the decision to reinstate, the tenant waives all cotenancy protection forever after. This is too extreme. The tenant's decision to reinstate is based on a business decision predicated on the business circumstances at that moment in time. If the tenant does reopen, it is most likely based upon the fact that the tenant now feels it can operate profitably and is willing to give it another try. It is appropriate however, to limit its rights in some fashion for the immediate future to prevent an endless cycle of closings, terminations and reinstatements.

Moratorium. An acceptable clause would be a prohibition from going dark or paying alternate rent for a period of one year from the reinstatement regardless of any cotenancy failure, with the tenant to have its full panoply of remedies thereafter for the then existing or any new cotenancy failure. Further, if the tenant closed a second time by reason of the *same* co-tenancy

failure and the landlord again terminates the lease, the tenant's right to reinstate would be eliminated.

§1.14 Sales Test As a Prerequisite to Any Co-Tenancy Failure Relief. Many landlords argue forcefully that the tenant should be required to demonstrate a sales decline (e.g., a 10% - 20% drop), before the tenant can avail itself of *any* of its co-tenancy remedies, arguing that there must be a direct causal relationship between the co-tenancy failure on the one hand and a loss of business on the other. If the tenant has not suffered a sales decline, then the rule of "no harm, no foul" should apply. The landlord, with some persuasiveness, argues that the tenant is unfairly taking advantage of a breakup of the co-tenancy requirements when it has suffered no economic harm.

This argument, however, overlooks a fundamental element of the leasing transaction. When landlord first induced the tenant into the shopping center, it was on the premise that the shopping center held the promise of a healthy and viable economic macrocosm, with thriving attractive department stores (or anchors) and high-end retailers. It was that environment that drove the rentals the landlord was demanding. If that economic climate deteriorates, is the rental value of its space the same to that tenant when Nordstrom's is replaced by Target or Barnes and Noble (or with no one) or the center is largely vacant, even if its sales have not yet materially declined? If the tenant were first asked to lease space in the center as it now appears (g.g. with a Target of Barnes & Noble as the anchor or a reduced satellite store population), would it pay the same rent for that location, even if its projected sales were about the same? Probably not. It comes down to a question of *rental value* of the space. This is not driven by the tenant's sales but by the quality of the location, as defined by the population of surrounding retailers. If the co-tenancy failure did not hurt the tenant, then compliance with the co-tenancy requirements didn't help him either, the landlord contributing little to the equation.

It should be noted that many landlord lease forms provide for an *increase* in rent when another "anchor" opens in the center – a presumed increase in the rental value of that center. Therefore, the rental value equation must also work in reverse – the loss of anchors and the level of satellite store GLA drives down the rental value of that center, regardless of what the tenant's sales are at any given time.

If the Landlord still wants a bright line test to determine when the tenant is sufficiently injured to merit a resort to its co-tenancy remedies, then a *sales threshold* test would be more appropriate. So long as the tenant's sales are above that threshold, the tenant would not exercise its co-tenancy remedies. If its sales fall below the threshold, the tenant is entitled to have recourse to its co-tenancy remedies for so long as the co-tenancy failure endures and its sales remain below the sales threshold. A clause encompassing this concept follows.

Fig 1-12

Sales Threshold Test for Co-Tenancy Remedies

If, upon the occurrence of a Co-Tenancy Failure or upon the first day of any calendar month subsequent thereto (and for so long as the Co-Tenancy Failure continues) Tenant's Gross Sales for the immediately preceding twelve (12) full calendar months are less than $_____(the "Threshold Amount"), then for so long as (i) the Co-Tenancy Failure is

continuing, and (ii) Tenant's Gross Sales at the Premises for the immediately preceding twelve (12) full calendar months are less than the Threshold Amount, Tenant shall be entitled to pay to Landlord, in lieu of Minimum Rent and additional rent, an "Alternate Rent" equal to fifty percent (50%) of the Minimum Monthly Rent that would otherwise be due hereunder, effective from the date that the foregoing conditions of clauses (i) and (ii) are met.

Further, (x) if there is a Co-Tenancy Failure for a period of twelve (12) consecutive calendar months, and (y) if at the end of such twelve (12) calendar period or thereafter and while such Co-Tenancy Failure is continuing, Tenant's Gross Sales for the Premises for the immediately preceding twelve (12 full calendar months) are less than the Threshold Amount, then for so long as such Co-Tenancy Failure continues Tenant may elect to terminate this Lease upon thirty (30) days prior written notice to Landlord, which termination notice, if given, shall be given no earlier than the expiration of the initial twelve (12) month period during which a Co-Tenancy Failure was occurring and must be given prior to the time that the Co-Tenancy Failure ceases to exist.

§1.15 Effect of Options to Extend. Landlords often insist that if the tenant exercises an option to extend while a co-tenancy failure exists, then either (a) tenant's co-tenancy remedies cease, or (b) the reduced co-tenancy that existed when the tenant exercised the option becomes the new co-tenancy requirement. This rationale is obvious as the tenant accepted the reduced co-tenancy environment by electing to commit for a longer term. Fairness requires that the tenant should not be allowed to continue to pay substitute rent through the option period. This may be acceptable if the co-tenancy failure occurs at least a year before expiration of the lease term. If this is not the case, the tenant will have little time within which to make such a major business decision. A solution is to extend the term and the deadline for the exercise of the option in order to give the tenant sufficient time within which to consider the effect of the co-tenancy failure on its business.

§1.16 Transition From Opening Co-Tenancy Requirements to Ongoing Co-Tenancy Requirements. A point often overlooked by deal makers is that they often negotiate *initial requirements* which are more relaxed than the *on-going co-tenancy requirements*. An example would be as follows:

Fig 1-13

Opening [or Full Rent] Requirements

Tenant shall not be required to initially open the Premises for business [or pay full Rent for the Premises] until the following occupants are open for business in the Shopping Center:

a. Sears, Macys & Nordstrom's, and

b. 65% of the gross leasable area of the shopping center (exclusive of the department stores)

On-Going Operations Requirements

Tenant's obligation to remain open for business and to pay the Minimum Rent set forth herein shall be conditioned upon the following occupants continuing to be open and operating in the Shopping Center:

a. Sears, Macys & Nordstrom's (or a Suitable Replacement), and

b. 75% of the gross leasable area of the shopping center (exclusive of the department stores)

In the case of the *anchor* stores, the tenant was holding the landlord to the promise it made when it induced the tenant to come into the center. But if one of those named anchors never opens, the landlord is in a continual state of initial co-tenancy failure. When does it end? It can only end if the tenant agrees that unless the opening co-tenancy requirements are not met within a certain time, and provided the tenant has not elected to terminate pursuant to the above provisions, then the opening co-tenancy clause becomes null and void and the ongoing co-tenancy requirements clause goes into effect. See Figure 1-14 below for such a clause.

Also, with respect to the satellite store element of the equation, if the landlord achieves the 65% level, then he has met the initial opening or full rent requirement and that clause is retired. But then is landlord in immediate co-tenancy failure under the ongoing co-tenancy provisions for failure to have 75% of the GLA open? The obvious answer here is to allow landlord a period of time, typically six months, to get the levels from 65% to 75%.

Fig. 1-14

Transition From Opening Requirements to Ongoing Co-Tenancy Requirements

If the Opening Requirements are not met for a period of _____months and Tenant has not terminated this Lease as provided in this Section, then effective as of the day next following the expiration of such _____month period, the provisions of this Section _____ [Opening Co-Tenancy Requirements] shall become inoperative and Tenant's rights with respect to the obligation to operate in the Premises, the payment of rent and the right to terminate this Lease shall be exclusively governed by the provisions of Section ____ [Ongoing Co-Tenancy Requirements].

§1.17 Unavoidable or Justifiable Closures of the Co-Tenants. The tenant may not invoke its remedies until the cotenancy requirements have failed. But it is not always clear when this occurs. What if the department stores or satellite stores are closed for *force majeure* reasons or for remodeling or taking inventory? How long should the tenant have to wait before availing itself of its co-tenancy remedies?

The landlord may want to provide for different grace period times for different situations. For example, a renovation or restoration of a department store will take longer than that of a satellite store. These differences should to be recognized provided the tenant puts an ultimate time limit on them. Although the real time it may take to complete these operations may often exceed those limits, the question the tenant must face is how long must it endure the cotenancy failure by reason of such occurrences, regardless of whether the closures are unavoidable or justified. A provision such as the following would work:

Figure 1-15

Excused Closures Not Constituting Co-Tenancy Failure

Notwithstanding the foregoing, the closure of any Department Store or Satellite Store by reason of the following causes shall not be deemed a Cotenancy Failure nor give rise to any right of Tenant to pursue any of Tenant's remedies unless such closure continues beyond the periods hereinafter set forth:

a. Fire or other casualty: Department Stores - 180 days; Satellite Stores - 60 days;

b. Remodeling: Department Stores - 90 days; Satellite Stores - 60 days;

c. Taking inventory: Department Stores - 10 days; Satellite Stores - 5 days;

d. Force Majeure (other than fire or other casualty): Department Stores - 30 days; Satellite Stores - 30 days.

§1.18 Other Drafting Considerations. Assume that the business representatives of the landlord and tenant have agreed that the tenant's ongoing operating requirement is to be tied to a department store and a certain percentage of satellite store GLA. Unhappily, one still sees clauses like the following issuing out of the landlord's lawyer's offices:

Figure 1-16

Tenant's Requirement to Operate - Cotenancy

Tenant shall be required to operate during designated days or hours provided that the ABC department store (or its successor) is required to operate and 75% of the tenants (including Tenant) are required by their leases to be open during such days and hours. (Emphasis added)

To the tenant, such a clause is a travesty of the agreement between the business people and a mockery of the tenant.[10] From a tenant's perspective, such a provision should be modified in accordance with the following principles.

a. *The Anchors*. The anchors and the manner of designating their successor has been exhaustively examined above;

b. *"Actually Open" vs. "Required to be Open"*. To state the condition in terms of being **"required to be open"** is discounting the tenant's prime motivation. The presence or absence of an operating covenant in the department store's lease or REA is not the controlling factor for the tenant. The only thing that matters to the tenant is whether or not the department stores are actually open.

When applied to the satellite stores, the "required to be open" test is especially problematic. It is unlikely that the condition could ever fail because every satellite lease contains an operations covenant, even if it is coupled with a cotenancy provision. Indeed, if those tenants went dark in violation of their leases, the landlord would still have met the test simply because there was a clause in their leases requiring them (in some form or another) to be open, whether or not they were actually open.

The only thing that matters to the tenant is how many other retailers are actually open, regardless of what their leases say. A landlord's willingness to use all reasonable efforts to enforce the operating clauses of those other leases is not especially helpful because specific performance is difficult to obtain and termination of the other tenant's lease does not increase the number of other stores that are open.

c. *Percentage of the **Tenants** Being Open.* If the shopping center is only 80% leased then the landlord's requirement is diluted to merely 75% of 80% or 60%. This provision would allow the landlord *not to require* an operating covenant in 40% of its leases while still requiring the tenant to operate. The cotenancy requirements must be tied to a percentage of the gross leasable area of the center being open, not just a percentage of the tenants the landlord happens to have.

d. Is The Premises Included In The Count? If the total satellite store gross leasable area ("GLA") was 100,000 square feet and the tenant occupied 5,000 square feet, the landlord would argue that the 75,000 square feet (75% of 100,000) includes the tenant's store itself as being counted towards meeting that total. This means that the landlord only has to have 70,000 square feet of other space open - 70% of the 100,000 square foot total GLA - in order to require the tenant to open.

From a tenant's perspective, it is interested in what the *other* stores are doing before the tenant itself can be required to be open or pay full rent; its own store should not be included. What the tenant intends is that 75,000 square feet of other stores be open before tenant is required to be open and that 75,000 square feet is calculated as 75% of the total GLA of the center, even if that total includes the area of the Premises.

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10 "No poet ever interpreted nature as freely as a lawyer interprets truth". *Jean Giradoux.*

Which one is the correct answer? It's a legitimate area for negotiation. If the tenant's space is small, the impact to it may be very little and he can concede the point. However if the tenant's space is a large one, then the pendulum will swing in its direction and the landlord may have to concede the issue.

2.00 COVENANTS TO OPERATE

§ 2.01 Covenant to Operate/Express v. Implied. Shopping center lease forms, as they first developed, generally did not contain an express covenant of the tenant to operate. While many of these leases did include percentage rent clauses, few contained an express covenant of the tenant to operate in order to ensure that the tenant would be generating sales. There is a substantial body of case law wherein the covenant of a tenant to operate has been *implied* by the courts from a variety of factors including the presence of other operating requirements in the lease,[11] the terms of the use clause, the presence of an exclusive clause, the provisions of the assignment clause and the adequacy of the minimum rent being paid as compared to the percentage rent provisions. [12]

This last factor - the adequacy of minimum rent - has been the most influential in determining whether a continuous operations covenant will be implied. If the court found that the minimum rent was nominal, it often concluded that the parties intended that the landlord also rely on the percentage rent generated from tenant's sales to ensure an adequate rental return from the premises. Conversely, if the minimum rent was found to have been adequate -- when viewed at the time of lease execution, not at the time of the lawsuit-- then no covenant would be implied, the court refusing to protect the landlord from its own imprudence in failing to include an express covenant to operate or to provide for rent increases over the term.

In modern shopping center leasing practice landlords rely principally upon the *express* covenant to support the tenant's obligation to operate the store and produce percentage rent.

§ 2.02 The Obligation: General Obligation v. Specific Hours Requirement. As shopping center leases evolved, they began to include a very general covenant of the tenant to operate from the premises such as the following:

Figure 2-1

General Covenant to Operate

> **Tenant agrees to continuously and uninterruptedly occupy and use during the term the entire Premises for the Permitted Use and to conduct Tenant's business therein in a reputable manner.**

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[11] E.g., provisions requiring a tenant to keep the store continually stocked and staffed, a covenant to use its best efforts to maximize sales and a requirement that the tenant staff the store with a sufficient number of employees.

[12] For an exhaustive discussion of cases examining the various factors considered by the courts in determining whether (or not) to imply a covenant of continuous operation, see Martin Orlick and Nina Kampler, *The Enforcement of Operating Clauses Revisited – A National Perspective and Effective Remedies; What Really Happens when a Tenant Walks From its Lease: Exploring Practical and Legal Consequences*, presented at the International Council of Shopping Centers Law Conference, Phoenix, AZ, October, 2009. (hereinafter *Orlick and Kampler*).

A slightly more specific clause, like the one which follows, was also found in early leases (including the ancestral version of the International Council of Shopping Centers' standard form) and referred to hours of operation in a general way:

Figure 2-2

General Reference to Hours of Operation

> **Tenant agrees to remain open for business during the usual days and hours for such business as are customary in the vicinity of the Shopping Center.**

Today, most shopping center leases include rather specific requirements, with the right of the landlord to change hours from time to time, such as the following clause:

Figure 2-3

Specific Reference to Hours of Operation

> **Tenant will operate Monday through Saturday from 10:00 A.M. until 9:00 P.M., on Sundays from 12:00 Noon until 6:00 P.M. or during such other days and hours as are designated by Landlord.**

In modern practice and in response to the increasing pressure from tenants to link their operations covenant to a co-tenancy requirement, landlords have included a cotenancy requirement in their lease in the following form:

Figure 2-4

Reference to Operation of Other Tenants

> **Tenant will operate during such days and hours that the ABC Department Store plus seventy five percent (75%) <u>of the tenants</u> of the Shopping Center are open and operating.** (Emphasis added).

Another variation of the clause follows:

Fig 2-5

Reference to Other Tenants Operating during Specified Days and Hours

> **Tenant will operate during those days and hours specified by Landlord ("Specified Times") provided that the ABC Department Store and seventy-five percent (75%) of the tenants of the Shopping Center are also operating during the Specified Times.**

The problem from the tenant's viewpoint, is that the tenant's obligation to operate is tied only to those existing tenants that happen to be open and only 75% of that group instead of all of them. The tenant will want to ensure (i) that there is a critical mass of other occupants against which the tenant will measure its obligation, and (ii) that in no event shall the tenant be required to operate during hours that do not make sense for its business.

A tenant does not bargain for an obligation to be open simply because many of the other tenants are open during *some* days and hours, if those days and hours don't make any sense for the tenant - e.g. 11:00 a.m. to 3:00 p.m. Nor does the tenant bargain for the privilege of being allowed to close early (e.g. 3:00 PM) simply because the landlord could only maintain the cotenancy requirement up until that time. From a tenant's perspective, its obligation to open for business *at all*, as well as its obligation to operate during specified days and hours, should be treated as one, directly tied to the cotenancy requirement.

§ 2.03 Tying Tenant's Obligation to Operate to Minimum Co-Tenancy. The **t**enant will want to link its obligation to operate to similar compliance by a critical mass of tenants which comprise the ongoing co-tenancy requirements discussed above in **§§**1.01 et. seq. In addition, the tenant will want the additional protection that the "specified hours", even if observed by the required cotenants, will not obligate the tenant to operate during unusual hours. Consider the following clause.

Fig. 2-6

Tenant Only Obligated to Operate Minimum Times

Tenant shall be required to operate its business during those hours that the tenants or occupants which comprise the Co-Tenancy Requirements of Section ___ are open and operating, provided however that Tenant shall not be required, by reason of the foregoing to operate:

a. longer than the hours of 10:00 am - 9:00 pm Monday through Saturday, 11:00 am to 7:00 pm Sundays (the "Maximum Times"), nor

b. less than the hours of 10:00 am - 6:00 pm Monday through Saturday, 12:00 Noon to 6:00 pm Sundays (the " Minimum Times").

If less than the tenants comprising the Co-Tenancy Requirements are operating during the Minimum Times, then Tenant shall have no obligation to operate at all and may close the Premises (but shall continue to perform all other obligation arising under this Lease and applicable to a vacant premises) for so long as the foregoing requirements are not met.

In this way the tenant has protected itself against having to operate during days or hours that are not suitable for its business simply because the cotenancy requirements are being maintained during unusual times. Also, this protects the tenant from having to operate during unusual or additional hours if the same would be burdensome to the tenant, such as Black Friday hours or round-the-clock hours during the Thanksgiving holiday season.

Exemption for Restaurants and Other Special Retailers. For purposes of these "hours co-tenancies", the landlord will want to exclude from this population restaurants, theaters and other users whose normal business hours do not coincide with the typical hours of retailers in general.

Right of Tenant to Stay Open During Additional Hours. Now that the tenant has ensured that it is not *required* to be open during additional hours, it will want the *right* to open during extra hours if other tenants in the mall are open. In negotiating this point the landlord may again wish to exclude tenants such as theaters or restaurants from consideration and permit the tenant to open during additional hours only if other retailers who otherwise maintain regular business hours are also open during the later hours. Landlord may also want the tenant to pay its share of the costs of operating the shopping center during those additional hours, allocated among the square footage of those tenants that are actually participating.

§2.04 Landlord's Remedies for Violations of Operating Covenant. A breach of the operating covenant constitutes a material breach of the terms of the lease, entitling a landlord to exercise all of its rights under the lease and at law to terminate the lease and regain possession. Injunctive relief for failure to operate may also be available in certain states. Providing for an additional remedy, such as the liquidated damages payment contained in Figure 2-7 below, may be important to address situations where the termination of the lease for default is too drastic a remedy in the case of a tenant who is otherwise a productive part of the shopping center but refuses to operate during shopping center hours. The liquidated damages provision may be preferable to injunctive relief because it can be invoked immediately, without significant cost, and without the requirement of initiating a court proceeding.

§2.04-1 When Has The Tenant Violated The Covenant? As in other cases of a failure of performance under the lease, there should be a cure period after notice before a tenant is deemed to be in default. In other cases, a failure of performance by the tenant may be so minor or impossible to cure that to unleash all of landlord's remedies would be disproportionate to the offense. For example, opening early or closing late or failing to be open for a single day are incurable defaults. They have already been committed and cannot be cured. In such a case, only numerous repetitions of the offense should precipitate a default. Following is an appropriate clause:

Figure 2-7

When Failure to Operate is a Default

a. Failure to Open. An Event of Default will be deemed to occur upon the failure of the Tenant to be open for business at all - when otherwise required by Section _____or other provisions of this Lease to do so - on a fourth (4th) occasion during any one Lease Year provided that on each of the previous three (3) occasions during said Lease Year Tenant had received written notice from Landlord of such failure and has been accorded on each such occasion five (5) business days in which to correct such failure and reopen for business.

b. Opening Late/Closing Early. In the case of a failure of performance under Section _____ which is incurable by notice because such failure has already occurred – e.g. where Tenant has failed to maintain the minimum

number of hours required by that Section on a particular occasion – an Event of Default will be deemed to occur on the fourth (4th) such occasion during a Lease Year provided that on each of the previous three (3) occasions of a failure of like nature during said Lease Year Tenant had received notice of such failure from Landlord.

A default under (a) is curable. The tenant must have committed this breach on a 4th occasion during the Lease Year provided that on the 3 previous occasions tenant was given 5 days to reopen.

A default under (b) is not curable. Once the tenant has failed to open in time or closes early, the deed is already done. The tenant must have committed this breach on a 4th occasion during the Lease Year provided that it received notice of the prior breaches on all 3 of the previous occasions.

§2.04-2 Lease Termination. As in any default situation, the lease or the tenant's right to exclusive possession is subject to forfeiture in cases where the tenant violates the operating covenant. While this may be what the tenant wants, it must be remembered that in such a case the tenant also will be subject to the whole range of damages which are provided for in the lease and at law following a default.

A. *Rent Damages - Monthly Accounting and Deficiencies*. A landlord may elect to collect the rent monthly from the tenant or hold the tenant liable for the difference between the lease rent and the rentals landlord may be able to collect on a reletting.

B. *Rent Damages (Accelerated)*. As an alternative to collecting monthly rent (or any deficiencies thereof) for the rest of the term, the landlord may accelerate the rent, i.e., declare as immediately due and payable the difference between the rent reserved for the balance of the term less the fair rental value of the premises for that period, discounted to present worth. Thus, the tenant may be facing an enormous monetary obligation if it goes dark to alleviate the current financial burden of operating every day at a loss. In addition, the tenant may be subject to substantial general damages flowing from his default.

C. *Other Damages*. The tenant who has violated the operations covenant and gone dark will also be liable for the landlord's expenses in retaking possession, preparing the premises for reletting and broker's commissions.

§2.04-3 Damages (Other Than Rent), With or Without Termination.

A. *Extraordinary Damages*. Aside from the rent damages discussed above, the normal rules on damages apply in a case where a tenant violates its covenant to operate. Depending on the tenant's relationship to the rest of the center, the damages flowing from its breach may be enormous. In Hornwood v. Smith's Food King No. 16, 772 P. 2d 1284 (Nev 1989), a supermarket tenant breached its operating covenant and the landlord sought consequential damages based on the diminution in value of the shopping center. The court found that the tenant, as an anchor, (1) drew the largest amount of customers, (2) attracted other satellite

tenants, and (3) was essential for long term financing. When the anchor tenant left, the rental value of the shopping center immediately decreased by virtue of the vacancy, discouraging replacement tenants and customers and thereby decreasing the overall value of the center. The court awarded the landlord "diminution in value damages" in excess of one million dollars stating:

> "Smith's is a sophisticated business entity. Smith's knew that its presence as the anchor tenant had a critical impact on the shopping center's success. Without an anchor tenant, obtaining long term financing and attracting satellite tenants is nearly impossible for a shopping center. Perhaps more importantly, the anchor tenant insures the financial viability of the center by providing the necessary volume of customer traffic to the shopping center. Therefore, we find that the district court clearly erred in concluding, as a matter of law, that the diminution in value of the Hornwoods' shopping center was unforeseeable."

While the withdrawal of a satellite tenant is not likely to have the same impact as that of an anchor resulting in damages calculated in accordance with the *Hornwood* case, the courts will apply a different measure of damages. For breach of an covenant to do business, the measure of damages ordinarily is the amount the landlord would have received from its share of the proceeds from the business (i.e. the percentage rent) has the tenant operated it in its usual and customary manner. This measure of damages is used when the tenant has moved to another location and is still in operation at its original location. The court could award damages by attributing a percentage of the sales made at the new location.[13]

Avoidance of unforeseen and catastrophic damages may be achieved by the inclusion of a properly drafted liquidated damages provision.

B. *Liquidated Damages*. Most shopping center leases today contain a liquidated damages provision such as the following:

Figure 2-8

Failure to do Business

The parties covenant and agree that because of the difficulty or impossibility of determining Landlord's damages by way of loss of the anticipated percentage rent from tenant or other tenants or occupants in or adjoining the shopping center, or by way of loss of value in the shopping center because of diminished salability or mortgagability or adverse publicity or appearance by tenant's actions, should Tenant (a) fail to take possession of the Premises on the Delivery of Possession Date for the purposes of commencing Tenant's Work or, (b) fail to open for business in the Premises fully fixtured, stocked and staffed on the commencement date, (c) vacate, abandon or desert the Premises, or (d) cease operating or conducting its

[13] See Orlick and Kampler, *supra* at note 13. The article also discusses several cases that followed (or departed from) the *Hornwood* measure of damages.

business therein, (except during any period the Premises are rendered untenantable by reason of fire, casualty, permitted repairs or alterations) or (e) fail or refuse to maintain business hours on such days or nights or any part thereof as provided in Paragraph ____ hereof, then and in any of such events (hereinafter collectively referred to as "failure to do business"), Landlord shall have the right, at its option, and as liquidated and agreed damages (and not as a penalty) due to the difficulty of ascertaining actual damages, (i) to collect not only Fixed Minimum Rent and other rents, charges and sums herein reserved, but also an amount payable as additional rent equal to the [___%] of the Fixed Minimum Rent reserved for the period of Tenant's failure to do business, computed at a daily rate for each and every day or part thereof during such period; and Landlord and Tenant agree that such additional rent shall be deemed to be their best estimate of the damages which will be suffered by Landlord as a result of Tenant's defaults as set forth in (a), (b), (c), (d) and (e) of this sentence and such amount shall be payable as liquidated damages in lieu of any percentage rent that might have been earned by Landlord during such period, and (ii) to treat such failure to do business as an "Event of Default" within the meaning of Paragraph __ of this Lease. Landlord's claim that Tenant has vacated, abandoned or deserted the Premises shall not be defeated solely because Tenant may have left all or any part of its trade fixtures or other personal property in the Premises." (Emphasis added)

Liquidated Damages - Compensation or Penalty? When negotiating a liquidated damage provision in the lease for a violation of the operating covenant, the tenant should establish a figure which is a realistic estimate of what the landlord's probable loss will be. In other words the tenant will want to make the number *compensatory* rather than *punitive*. If the tenant does not have a percentage rent clause, then the landlord's damages may be predicated on the reduced percentage rent received from others, resulting from the negative effect of such closure upon the surrounding retailers. Such damages are uncertain and ripe for such a clause. A figure of 15% - 20% of the daily minimum rent (for a brand new store which fails to open on the commencement date) and, in the case where the tenant pays a percentage rental, an average of the most recent percentage rent (over an agreed upon period) for an existing store would be a reasonable solution.

The importance to a tenant of a reasonable liquidated damages provision is underscored by the Hornwood case described above.

Liquidated Damages - The Clause is Not Applicable During a Cotenancy Failure. If the tenant has gone dark because the operating requirements have failed, then the tenant should not be required to pay the "failure to do business" penalty. Therefore, the tenant must insert, where appropriate, into a clause like Figure 2-8 the following phrase: **"except when such closing or cessation of business is otherwise permitted by this Lease."**

Liquidated Damages Provision - Security For Performance or Alternate Performance As a Bar to Injunctive Relief? While one might speculate that a liquidated damages provision precludes the ability of the landlord to obtain an injunction because its remedy at law (the liquidated damages) was deemed adequate by the landlord's own admission, this is not the case. A preponderance of courts have held that the right to specific performance is not determined by

whether the provision is one for a penalty on the one hand or for liquidated damages on the other; rather, the question is whether the provision was intended merely as security for performance of the obligation or was intended as an alternative to the obligation giving the tenant the option either to perform the obligation (operate the store) or to pay or forfeit the penalty or liquidated sum. If it appears that the parties intended that the covenant be performed and that the provision for liquidated damages was merely security for such performance, then specific performance generally will not be denied on the "adequacy" ground. It is only when the lease stipulates for one of two options in the alternative -- the performance of the covenant or the payment of a sum in lieu thereof-- that equity typically will not decree specific performance. In a shopping center lease it is more likely that the liquidated damages provision will be construed as *security*, not *alternate performance*, and will not in itself serve as a bar to the landlord's suit for specific performance. But see Lippman v. Sears, Roebuck & Co., 44 Cal.2d 136, 280 P.2d 775 (1955), where the court reached an opposite result.

§2.04-4 Specific Performance or Injunctive Relief. The landlord's most effective remedy is specific performance of the covenant requiring the tenant to operate (or reopen) or an injunction preventing the tenant from closing. While a violation of the operating covenant will entitle the landlord to all of its usual *legal* rights and remedies-- forfeiture of the lease, eviction and damages resulting from the breach - the question of whether a court will consider *equitable* relief to be more appropriate and force the tenant to remain open is a crucial one. To a tenant, the compulsory continuance of a business that is suffering losses each day may be more onerous than eviction and damages.

The two most important obstacles that the landlord will encounter in securing specific performance of a continuous operations covenant are (1) establishing that the landlord's remedy at law for damages is inadequate, and (2) the judicial doctrine against burdening the equity court with ongoing and continuous supervision of its decree. While several courts recognize that the unique nature of a shopping center will support the conclusion that damages are an inadequate remedy and would otherwise have normally been disposed to grant specific performance, these courts nevertheless generally have declined to do so because of a judicial policy against issuing a decree that will require continued judicial supervision and special skills to ensure its enforcement.[14]

A increasing number of jurisdictions (but still a minority of them) have granted specific performance or injunctive relief to the landlord and have not been troubled by the traditional reluctance of equity courts to involve themselves in the supervision of its decree. The prevailing majority view, however, would deny the landlord relief on this ground.

§2.04-5 Landlord's Express Reservation of the Right to Injunctive Relief. Typically, the following clause appears in a landlord's lease form:
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Figure 2-9

Landlord's Right to Injunction

In the event of any breach or threatened breach by Tenant of any of the terms and provisions of this Lease to be performed and observed by Tenant, Landlord shall

[14] Orlick and Kampler, *supra*, at note 13.

have the right to injunctive relief and declaratory relief or any other equitable relief as if no other remedies were provided for herein.

This language would appear to suggest that the tenant has stipulated that the landlord's remedy at law was inadequate. Regardless of whether the parties can contractually confer equitable jurisdiction to a court (given the broad discretionary power of an equity court) and relieve the landlord of the duty to plead and establish it, the tenant should avoid any implication that the lease does so. The clause should be modified as follows:

Figure 2-10

Landlord's Right to Injunction - Modified by Tenant

In the event of any breach or threatened breach by Tenant of any of the terms and provisions of this Lease to be performed and observed by Tenant, Landlord shall have the right to seek injunctive relief and declaratory relief or any other equitable relief ~~as if no other remedies were provided for herein~~.

Another way to achieve this result would be the following clause:

Figure 2-11

Landlord's Right to Injunction - Modified by Tenant [Alternate]

In the event of any breach or threatened breach by Tenant of any of the terms and provisions of this Lease to be performed and observed by Tenant, Landlord shall have the right to injunctive relief and declaratory relief or any other equitable relief as if no other remedies were provided for herein provided however that the foregoing shall not be deemed to relive Landlord of the obligation to establish its entitlement to injunctive relief, including, without limitation, that its remedy at law is inadequate

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