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DRAFTING LEASE TRANSFER CONSENT CLAUSES—IS YOUR LEASE LANGUAGE
SUFFICIENT?

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**A MODEL FOR ORGANIZATION OF THE LEASE TRANSFER CONSENT CLAUSE,
AND SAMPLE CLAUSES**

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The following model clause is a compilation of lease provisions giving the Landlord extensive rights in connection with consenting to an assignment of a shopping center lease. The clause is organized into provisions which would be used to prohibit any assignment (and for which the Landlord's consent would not be held to a "reasonableness" standard) [section 3], conditions imposed upon the tenant in the event of an assignment (again, conditions which would not be held to a "reasonableness standard) [section 4), procedures which must be followed by the tenant in obtaining consent [section 2] and, finally, more subjective standards that may be used by the landlord, in exercising the landlord's reasonable judgment, as to whether to accept the assignee [section 1].

In many leases, these sections are combined and all requirements are listed as bases upon which the Landlord's denial of an assignment is reasonable, or conditions that must be met in order for the landlord's consent to be held to a "reasonableness" test. Following this sample model clause are several examples of lease provisions which follow this more traditional outline. This author believes the organization of the following model clause, which focuses the "reasonable" test on the subjective issues, makes more sense. As with any "model" or "form," it is a starting point only and must be further tailored to the specific transaction at hand and to the laws of the applicable jurisdiction.

MODEL TRANSFER CONSENT CLAUSE

§1. Consent Required

Tenant shall not sell, assign, mortgage, pledge or in any manner transfer this lease or any interest herein, nor sublet all or any portion of the Premises, nor license concessions nor lease departments therein (all of such actions being hereinafter referred to as an “assignment” and the party to whom such transfer is made shall hereinafter be referred to as the “assignee”) without the Landlord’s prior written consent in each instance, which consent shall not be unreasonably withheld, conditioned or delayed. For the purposes of illustration and without limiting the other instances in which it may be reasonable for the Landlord to withhold its consent to any such assignment, the Tenant acknowledges that it shall be reasonable for the Landlord to withhold its consent in the following instances:

- (a) The Landlord’s reasonable determination that the assignee does not have a net worth comparable to the combined net worth of the Tenant and the Guarantors; or that the assignee does not have a net worth in excess of \$ _____; or that the assignee does not have adequate cash reserves to keep the Premises stocked with adequate inventory of first-class merchandise.
- (b) The Landlord’s reasonable determination that the assignee business reputation or business model is not conducive to the type of merchandising conducted by other tenants at the shopping center, or that the assignee’s business will be less attractive than the tenant’s business and/or not enhance the business mix of the shopping center, and could lead to reduced overall income for the center.
- (c) The Landlord’s reasonable determination that the assignee has less management and operational experience and ability than the Tenant.

§2. Required Procedure.

No assignment shall be permitted unless and until the Tenant gives the Landlord written notice and request for approval of such assignment, which request shall be accompanied by:

- (a) a copy of the instrument of conveyance to be executed in connection with such assignment;
- (b) current financial information (balance sheet and year-to-date financial statement) certified to be correct by the chief financial officer of the assignee, and audited financial information for the last two fiscal years (year-end balance sheets, financial statements and copies of signed tax returns) for the assignee, certified to be correct by the chief financial officer of the assignee and by a certified public accountant; and
- (c) a non-refundable processing fee of \$ _____ (which shall be in addition to the required reimbursement of Landlord’s out-of-pocket expenses described below).

The Landlord may, within 15 days after the receipt of the above-described submission, request additional information regarding the assignee and its intended operation of the Premises, and within 30 days after the receipt of the last of all such submissions, may elect to terminate the Lease as of a date to be specified in its notice of such election, no more than _____ and no less than _____ days after such notice.

Upon receipt of the above described submissions, if such assignment complies with all requirements of this Lease regarding the same and if the Landlord consents to the assignment, the assignee, Tenant and Guarantors shall sign an agreement with the Landlord, in form satisfactory to the Landlord, evidencing the assumption of, and direct liability of the assignee to the Landlord for, all obligations of the Tenant and Guarantors, and confirming the continued liability of the Tenant and the Guarantors. In addition to the non-refundable processing fee, the Tenant shall reimburse the Landlord for all expenses incurred by the Landlord in connection with the review, negotiation and documentation required in connection with the approval or disapproval of any such assignment.

§3. Conditions of Assignment.

No assignment shall be permitted:

- (a) If the Tenant has defaulted in the payment of rent or in the performance or observance of any other requirements or conditions to be performed or observed by the Tenant or any Guarantor pursuant to the terms of this Lease or any Guaranty;
- (b) If the assignee's proposed use is prohibited by any restriction or exclusive granted in any lease to another tenant in, or found in any restriction applicable to, the shopping center, or in any applicable governmental code, ordinance or regulation.
- (c) If the assignee or an affiliate of the assignee is another tenant in the shopping center or a party with whom the Landlord has shown space or negotiated for space in the shopping center during the six months preceding the Landlord's receipt of notice from the Tenant of the proposed assignment.
- (d) If the assignment is for less than all of the Premises, or is for less than two years in duration (unless the assignment is for the entire remaining term of the lease).

§4. Effect of Assignment

Upon the consent of the Landlord to the assignment, such assignment shall be effective as of the effective date recited in the agreement among the Landlord, assignee, Tenant and Guarantors, subject to the following requirements (which shall be effective whether or not the same shall have been included in the agreement among the Landlord, assignee, Tenant and Guarantors, unless such requirements are specifically altered by such agreement).

The assignee shall be liable for the payment of all amounts to be paid by the Tenant, and shall be liable for the performance and observance of all terms and conditions to be performed and observed by the Tenant pursuant to the Lease.

The Tenant and the Guarantors shall not be released from any obligation or liability for the payment, performance and obligations required pursuant to the terms of the Lease and/or Guaranty or any amendment thereof which may be agreed to by the Landlord and the assignee;

The Tenant shall, promptly upon receipt of an invoice from the Landlord and in addition to the non-refundable processing fee referenced above, reimburse the Landlord for all costs and expenses incurred in reviewing, negotiating and preparing any required documentation for the approval of the assignment, including reasonable attorneys' fees.

There shall be paid to the Landlord, in addition to the Base Annual Rent and other charges due the Landlord pursuant to this Lease, any additional consideration the Tenant receives from the assignee and/or in connection with the assignment, whenever such additional consideration is received by the Tenant. Additionally, the Base Annual Rent shall be increased (but not decreased) to the greater of (i) the annual rent and other charges payable by the assignee; or (ii) the highest Base Annual Rent and Percentage Rent payable under the Lease by the Tenant during the three Lease Years immediately preceding such assignment. Such additional rent shall be paid to the Landlord concurrently with the payment of Base Annual Rent and both the Tenant and the assignee shall be jointly and severally liable for such payments.

At the option of the Landlord, any provisions of the Lease may be stricken, and shall be of no further force or effect, which grants to the Tenant one or more of the following: (a) any exclusive right to sell certain items in the shopping center; (b) any options to renew the Lease; and/or (c) any right of first refusal or right to expand into any additional space in the shopping center.

The consent to such assignment shall not release the parties from obtaining consent to any future assignment.

**ALTERNATIVE SAMPLE 1: LIST OF CONDITIONS, NO DEFINITION OF
“REASONABLENESS”**

Landlord’s consent to the proposed assignment or sublease (“transfer”) shall not be unreasonably withheld or delayed, provided and upon the condition that:

- (a) In Landlord's reasonable judgment the proposed transferee is engaged in a business and the premises, or the relevant part thereof; will be used in a manner which (i) is in keeping with the then standards of the Building, and (ii) will not violate any negative covenant as to use contained in any other lease of space in the Building;
- (b) the proposed transferee is a reputable person of good character and with sufficient financial worth considering the responsibility involved, and Landlord has been furnished with reasonable proof thereof;
- (c) if, Landlord has or expects to have available for leasing during the six (6) month period commencing on such date, space in the Building that is comparable in size to the, neither (i) the proposed transferee nor (ii) any person that controls, is controlled by, or is under common control with, the proposed transferee and is then an occupant or tenant of any part of the Building; the proposed transferee is not a person with whom Landlord is then, or shall have been during the previous six (6) month period, negotiating or offered to lease space in the Building;
- (d) the proposed assignment agreement or sublease agreement, as the case may be, shall be in form satisfactory to Landlord;
- (e) at no time shall there be more than one (1) occupant or entity occupying the premises;
- (f) the rental and other terms and conditions of the transfer are the same as those first furnished to Landlord;
- (g) Tenant shall not have: (i) advertised or publicized to the public in any way the availability of the premises without prior approval by Landlord, nor shall any advertisement state the name (as distinguished from the address) of the Building or the proposed rental, or (ii) listed the premises for subletting or assignment, with a broker, other than the then managing agent of the Building or other agent designated by Landlord, or otherwise at a rental rate less than the fixed rent and additional rent at which Landlord is then offering to lease other space in the Building;
- (h) the proposed assignment agreement or sublease agreement, as the case may be, expressly provides that the assignee's or subtenant's use of the Demised Premises or the portion(s) thereof being sublet, as the case may be, is expressly limited to the uses expressly permitted under this Lease.

**ALTERNATIVE SAMPLE 2: LIST OF CONDITIONS, NO DEFINITION OF
“REASONABLENESS”**

Landlord shall not unreasonably withhold, condition or delay Landlord's consent to Tenant's consummating a transfer (that is, a sublease or assignment or other transfer), provided that:

- (A) Tenant has theretofore instituted the recapture procedure for such transfer;
- (B) Landlord's right to elect to consummate a recapture sublease or a recapture termination (as the case may be) with respect to the proposed transfer has lapsed;
- (C) the transfer is on terms that are no more favorable to Tenant than the transfer notice theretofore given by Tenant to Landlord;
- (D) the transfer occurs no earlier than the thirtieth (30th) day before and no later than the thirtieth (30th) day after the effective date proposed therefor;
- (E) Tenant submits to Landlord a counterpart of all documents to consummate the proposed transfer, which have been executed and delivered by Tenant and the proposed transferee;
- (F) the premises (or the applicable portion thereof) has not been publicly advertised at a rental rate that is less than the prevailing rental rate set by Landlord for comparable space in the building, or, if there is no comparable space, the prevailing rental rate reasonably determined by Landlord;
- (G) no default by Tenant exists;
- (H) the proposed transferee has a financial standing that is reasonably satisfactory to Landlord;
- (I) the proposed transferee is of a character, is engaged in a business, and proposes to use the premises (or the applicable portion thereof) in a manner that in each case is in keeping with the standards of a first-class major modern building in the vicinity of the building;
- (J) the proposed transferee, or any affiliate of the proposed transferee, does not occupy any space in the building;
- (K) neither the proposed transferee, nor an affiliate of the proposed transferee, is a person with whom Landlord has within six months engaged in negotiations regarding the leasing or subleasing of space in the building;
- (L) if the transfer constitutes a sublease, then the term thereof shall be for no less than two (2) years (unless such term commences less than two (2) years before the fixed expiration date);
- (M) if the transfer constitutes a sublease of a portion of the premises, then such portion of the premises shall consist of at least _____ contiguous square feet;

- (N) Tenant, and the transferee, executes and delivers to Landlord a consent to the transfer in a form reasonably designated by Landlord;
- (O) if the transfer constitutes an assignment of the tenant's interest under this lease, the assignee has expressly assumed all of the obligations of Tenant hereunder to the extent accruing from and after the date that the transfer is effective; and
- (P) if the transfer constitutes a sublease, such sublease provides expressly that (i) such sublease is subject and subordinate to the lease (and to the terms thereof), and (ii) if this lease terminates, then Landlord, at Landlord's option, may take over all of the right, title and interest of Tenant under such sublease, and the transferee, at Landlord's option, shall attorn to Landlord pursuant to the then executory provisions of such sublease.

ALTERNATIVE SAMPLE 3: LIST OF CONDITIONS, NO DEFINITION OF “REASONABLENESS”

Within thirty (30) days of the giving of such notice, Landlord's consent to the proposed assignment or sublease shall not be unreasonably withheld so long as:

- (1) The proposed assignee or subtenant and its owners each is reputable, and with sufficient financial worth considering the responsibility involved, and Landlord has been furnished with reasonable proof thereof;
- (2) Neither (a) the proposed assignee or sublessee nor (b) any person which, directly or indirectly, controls, is controlled by, or is under common control with, the proposed assignee or sublessee, is then an occupant of any part of the Building;
- (3) The proposed assignee or sublessee or its owners is not a person with whom Landlord has within the preceding 180 days been negotiating to lease space in the Building;
- (4) At the time of the giving of such notice and as of the commencement date of the proposed assignment or sublease, Tenant shall have observed, performed or fulfilled all of the terms, provisions and conditions of the Lease which theretofore required performance;
- (5) In the case of a sublease, prior to its commencement date, Landlord if it has approved, Tenant and subtenant shall execute a written consent, in form satisfactory to Landlord, which provides, inter alia, that liability insurance coverage in the amount provided for in the Lease shall be maintained by subtenant throughout the term of the sublease with the Landlord under the Lease named as an additional insured;
- (6) In the case of an assignment, prior to its commencement date, Landlord, Tenant and assignee shall execute a written consent, in form reasonably satisfactory to Landlord;

- (7) In Landlord's judgment the demised premises will be used in a manner, which (a) is in keeping with the then standards of the Building, (b) is limited to the use of the demised premises provided for herein, and (c) will not violate any negative covenant as to use contained in any other lease of space in the Building;
- (8) The form of the proposed sublease or instrument of assignment shall be in form reasonably satisfactory to Landlord;
- (9) The demised premises shall be sublet to only one (1) subtenant or assigned to only one (1) assignee at any time;
- (10) Tenant shall reimburse Landlord on demand for the reasonable costs that may be incurred by Landlord in connection with said assignment or sublease, including without limitation, the costs of making investigations as to the acceptability of the proposed assignee or subtenant, and reasonable legal fees payable by Landlord to its counsel in connection with the granting or withholding of any requested consent;
- (11) The proposed subtenant or assignee shall not be entitled, directly or indirectly, to diplomatic or sovereign immunity and shall be subject to the service of process in, and the jurisdiction, of the courts of New York State.
- (12) Upon the occurrence of any such assignment or subletting, an additional one (1) month's Base Rent security shall be deposited with Landlord.
- (13) In Landlord's sole and exclusive discretion, in lieu of consenting to an assignment or a sublease of the demised premises, within the aforesaid thirty days period to respond to Tenant's request Landlord may instead elect by written notice to cancel and terminate this Lease and the term hereof as of the date contemplated by Tenant for the effectiveness of the assignment or subletting, and on such date this Lease shall come to an end and expire with the same force and effect as if that were the date originally set forth herein for the expiration of the term hereof.

ALTERNATIVE SAMPLE 4: INCLUDES LIST OF CONDITIONS IN DEFINITION OF "REASONABLENESS"

4.3 Conditions for Subleasing or Assignment. Tenant may assign this Lease or sublease the Premises hereunder only with the prior written consent of Landlord, which shall not be unreasonably withheld, it being expressly understood and agreed, without limiting the generality of the foregoing, that it shall be reasonable for Landlord to condition its consent upon any of the

following factors and to deny its consent to any sublease or assignment if any of the following requirements are not met to the reasonable satisfaction of Landlord.

(a) The business of the proposed assignee or subtenant and its use of the Premises shall (i) be entirely consistent with the class and character of the Building and the character and nature of all other tenancies in the Building, (ii) not conflict with any exclusive rights of any other tenants or occupants of the Building, or (iii) not conflict with any other terms or conditions of this Lease, including, but not limited to, any certificates of occupancy then in effect with respect to the Building or any Rules and Regulations then in effect with respect to the Building.

(b) The proposed assignee or subtenant must be a reputable person or entity of good character, having sufficient assets and income, in Landlord's reasonable judgment, to bear the financial responsibilities of Tenant under this Lease, it being understood that Landlord must be provided with reasonable evidence thereof;

(c) Neither the proposed assignee or subtenant, nor any person who directly or indirectly controls, is controlled by, or is under common control with, the proposed assignee or subtenant or any person who controls the proposed assignee or subtenant, may then be an occupant of any part of the Building;

(d) The proposed assignee or subtenant shall not have negotiated with Landlord to lease space in the Building within 6 months prior to the date Tenant requests Landlord's consent pursuant to the terms hereof; (it being expressly acknowledged and agreed that the term "negotiated" shall not include the mere showing of space, but shall include, without limitation, the delivery of a written business proposal to said proposed assignee or subtenant).

(e) The proposed form of sublease or assignment and assumption agreement shall be reasonably satisfactory to Landlord, shall comply with all applicable provisions of this Article 4,

and shall evidence the agreement of the proposed subtenant or assignee to faithfully perform all terms, conditions, covenants, conditions, provisions and agreements of this Lease except to the extent the Lease may be modified by any such sublease or assignment approved by Landlord.

(f) Prior to the effective date of any sublease or assignment, Tenant shall reimburse Landlord for all actual and reasonable attorneys' fees and expenses incurred in connection with Tenant's request for Landlord's consent hereunder (which shall not exceed \$1,000.00 per transfer), and Landlord shall receive a duplicate original of the sublease or assignment and assumption agreement executed by the approved subtenant or assignee. Tenant expressly understands and agrees that Landlord's consent to a proposed assignment or sublease shall not be construed to relieve Tenant (or such subtenant or assignee) from the obligation to strictly comply with the terms and conditions of this Article 4 with respect to any other or future assignment or sublease, nor shall it be construed to release Tenant from any liability, whether past, present or future, with respect to Tenant's obligations under this Lease.