

**ASSIGNMENT AND SUBLETTING:
BALANCING LANDLORD AND TENANT INTEREST**

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ATTACHMENTS:

- Attachment 1 - “Winn-Dixie plays hardball on rent”, Shopping Centers Today, March 2002
- Attachment 2 - “Waiting for Kmart’s axe to fall”, Shopping Centers Today, March 2002
- Attachment 3 - Assignment of Tenant’s Interest in Lease form
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By Reid C. Wilson
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I. OVERVIEW

This article is intended to assist a real estate attorney advising a tenant whose economic difficulties result in it having excess lease space. The primary focus is on assignment and subletting, but an overview of other alternatives is provided. Both legal and practical issues will be reviewed. A checklist for representing the three parties to a transaction will be included: landlord, tenant/sublandlord and subtenant. These strategies apply to all types of lease space.

II. TENANT'S ALTERNATIVES

A tenant in economic duress often finds itself with liability under one or more leases for space which is no longer appropriate. This can be due to downsizing, such that the tenant has terminated business at various locations, or the tenant has reduced space needs in one or more leased locations. Further, the expensive Class A space once considered important for a tenant, may become an unnecessary economic drain when the cash-poor tenant determines it can just as easily operate its business in lower profile, less expensive premises.

Tenants have a number of practical and legal options under the foregoing circumstances.

A. Default.

In rare circumstances, a tenant may determine it is in its best interest to simply default under the lease and hope for the best. Perhaps the remaining lease time is relatively short and thus the damage to the landlord is such that the landlord is unlikely to pursue its legal remedies. Maybe the landlord is not a litigious type. Finally, the alternatives to default may not be practical, and the tenant simply must hope that if it is held to its legal obligations, the time for payment to the landlord will be sufficiently far in the future that the tenant has had an opportunity to regain its financial strength and that the protections of Texas law (such as the requirement for mitigation of damages) will result in a legal award of damages which is "reasonable".

In this situation, the attorney is counseling the tenant on the ramifications of its actions. Probably little or no legal action is required, other than perhaps a few letters to the landlord.

B. Lease Workout/Buyout.

In today's uncertain economic times, some landlords will work with the tenant to restructure a lease in a way which is economically acceptable to both landlord and tenant. Alternatively, the tenant might be able to buyout its lease. Landlords desire to maintain cash flow and if a lease workout/buyout is approached as a constructive "win-win" solution, they can be successful.

The attorney's involvement may be significant, as many workouts are directed by the attorneys for the parties. Then, the resolution will be documented by the attorneys and executed by the parties.

C. Bankruptcy.

When a tenant files bankruptcy, it has the absolute right to reject a lease and terminate liability, subject to a limited right for the landlord to recover damages.

Clearly this is a legally intensive area. The actual bankruptcy is beyond the scope of this article. The counseling by the tenant's attorney of the tenant's and landlord's remedies in bankruptcy is the only focus of this article. Although not a bankruptcy attorney, a real estate attorney should understand the impact of bankruptcy on a lease.

D. Assignment and Subletting.

Generally, a tenant's best solution for excess leased space is to either (i) market aggressively all of its premises for an assignment to a third party which will assume the remaining financial obligation (or at least a portion thereof), or (i) if not all of the premises is to be made available, to sublet a portion of the premises. Since a tenant undertaking the assignment or subletting task does not place any risk on the landlord, this alternative is often the landlord's suggestion when a tenant seeks a lease workout or buyout.

III. DEFAULT

A. Analysis of Lease Provisions and Applicable Law.

Before counseling a tenant regarding the consequences of default under a lease, an attorney must carefully review all lease documents. Care should be taken to obtain complete, legible and executed copies of the entire lease, plus all exhibits, together with all modifications and amendments. Any estoppel letters signed by the tenant for the benefit of the landlord, potential new purchasers, or mortgagees should be obtained. The lease should be reviewed, and if the transaction merits it, summarized or abstracted. The tenant should be questioned whether there are potential elements of landlord default. The attorney should consider the then current state of the law regarding landlord remedies and potential tenant defenses. Considering the lease, the facts and the law, the attorney should analyze the legal and practical implications of a default, then advise the tenant.

B. Standard Events of Default and Landlord Remedies.

1. Notice and Opportunity to Cure. Many commercial leases provide a notice and opportunity to cure provision. The importance of this provision for a distressed tenant is that the landlord must give notice (following the specific notice provisions in the lease) of the default and an opportunity to cure. This may allow the tenant to be more bold in "testing" the landlord to see how the landlord will respond if the tenant goes into default.

2. Lockout. Virtually every commercial lease provides that in the event of default, the landlord may lockout the tenant. A prompt lockout by a landlord can have devastating effect upon a tenant where the leased premises houses a critical business function. *See* Tex. Prop. Code §93.002.

3. Termination of Right of Possession vs. Lease Termination. When a default occurs, landlords typically have a contractual right to terminate the tenant's right of possession, but not the lease, or, alternatively, to terminate the lease. The distinction is critical. Where the lease is terminated, the future liability of the tenant terminates and the tenant's liability has been liquidated to the total amounts due through the date of termination. Where the right of possession is terminated, but not the lease, the landlord may simply take possession of the premises, then may or may not attempt to re-lease it. Fortunately for tenants, landlords are now subject to both an implied and statutory duty to mitigate damages. *Austin Hill Country Realty, Inc. v. Palisade Plaza, Inc.*, 948 S.W.2d 293 (Tex. 1977), Tex. Prop. Code § 91.006. It is an open question whether this duty may be waived. The termination of right of possession is the worst of all possible worlds for a tenant, and the right most often elected by a landlord in a distressed market.

4. Landlord's Lien. Tex. Prop. Code §54.021 provides a statutory landlord's lien, whether or not referenced in a commercial lease. The statutory lien is automatically perfected, but only covers 12 months of rentals. Further, the statutory landlord's lien is only foreclosed judicially. Tex. Prop. Code §54.025.

Virtually every commercial lease specifically provides for a contractual landlord's lien. A contractual landlord's lien is simply a UCC security interest provided in a lease. It is perfected and foreclosed like any other security interest. The scope of property covered by a contractual landlord's lien is as broad as stipulated in the lease (and may cover items beyond those typically located within the leased premises such as furniture, fixtures and equipment). However, many landlords are sloppy and fail to file financing statements to perfect their contractual landlord's lien. In such event, the lien will be inferior to subsequently granted UCC security interests to a lender who has perfected their lien by proper filing. Where the landlord is not perfected and an intervening lender has priority, the impact of the landlord's lien is usually not critical in a lease workout situation. Fortunately for landlords, the UCC now allows a secured party to file a financing statement to perfect a security interest if authorization is provided in the security instrument. Tex. Bus. & Com. Code Section 9._____. All leases should provide this authorization. Then, if the landlord failed to perfect at _____, it may easily cure that deficiency later.

5. Security Deposits. Most landlords require a monetary security deposit. In a troubled tenant situation, the tenant should consider the security deposit as lost. The tenant almost surely will never see that money again. Since the typical security deposit is one month's rent, the loss of that amount is not typically so onerous as to enter into the consideration of whether or not to choose a particular strategy. If the security deposit is a letter of credit, the landlord will draw on it promptly after a default and apply the cash received to unpaid rent.

6. Additional Collateral. Landlords have learned to request additional collateral from tenants which are new, undercapitalized or in volatile industries. This was particularly true in recent years with high-tech and telecom tenants. Most commonly, the additional collateral is a letter of credit. However, sometimes landlords have failed to administer adequately the requirement for a letter of credit, in some cases forgetting to obtain the letter of credit, and in other cases, forgetting to obtain renewals for expiring letters of credit. An attorney should investigate the factual circumstances where a lease provides for a letter of credit to be posted as additional security, as it may be that the landlord has failed to protect its interest. In such event, a landlord may be more willing to work with a cash-poor tenant, once it determines it is unprotected.

7. Research Materials. For more in depth discussion of landlord's remedies in the event of a tenant default, see the following seminar materials:

- a. Todd R. Moore, "Remedies For Tenants' Breaches", University of Houston Law Foundation, Advanced Real Estate Short Course, 1997;
- b. Martin L. Camp and Amy Castle, "Leases: Remedies, Rents and Rights of First Refusal", State Bar of Texas Advanced Real Estate Drafting Course, 1998;

C. Guaranties.

The single greatest deterrent to a tenant defaulting, vacating and leaving a landlord to its remedy, is a lease guaranty. During the real estate downturn of the 1980's, every conceivable type of defense was asserted to the many guaranties of leases and loans affecting Texas real estate. Essentially, an appropriately drafted guaranty is enforceable and there are no "silver bullet" defenses. Even the bankruptcy of the tenant will not prevent the enforcement of a lease guaranty by a related party. *See*, _____.

However, an attorney should review carefully the lease documentation, as an intended guaranty might not have been actually signed and submitted to the tenant, or the guaranty document may have been inappropriately drafted.

D. Non-Legal Effects of Default.

Many tenants must consider non-legal aspects of going into default under a lease, especially a significant lease, particularly where the tenant intends to continue in business in the area. First, the public perception of the default may be critical. Second, the lease default may cause a breach of covenants in loan documentation. However, both of these issues could be addressed by an affirmative action plan. However, if left to chance, there could be dire consequences exacerbating an already difficult situation for the tenant.

E. Choosing to Default.

After a careful review of the lease documentation, the landlord remedies, the type of landlord (and its likelihood to pursue aggressively various available remedies) and the tenant's ability to implement alternative strategies, a tenant's best (on rare occasion) or only alternative is to allow a default to occur under the lease. The tenant will likely have to vacate (hopefully evading a lockout) and suffer the consequences of landlord remedies under the lease and Texas law. Attached is an article about Winn-Dixie choosing such an aggressive strategy.

Even where default is not likely to be an option, an attorney is often called upon to educate a tenant about the consequences of default. This education is often needed to deter a tenant's tentative (and perhaps ill-advised) strategy to default without being aware of other alternatives.

IV. LEASE WORKOUT/BUYOUT

A. Assessing the Practicality.

1. Landlord. Before commencing a lease workout, the tenant's attorney must learn as much as possible about the landlord in order to provide the tenant the best legal representation in negotiating an equitable resolution. Factors to be investigated include the following:

- a. Type of Landlord. Smaller, entrepreneurial landlords, particularly those who have a long term personal relationship with the tenant, may have a different approach than a national, institutional landlord working through a layer of property managers, leasing agents, asset managers and committees. The financial condition of the landlord may be significant. A local landlord may take an aggressive, hands-on approach to working out a reasonable solution in a timely manner. An out of town institutional landlord may or may not have empowered its local representative (if there is one) to work out difficult problems in a practical, timely way. More entrepreneurial landlords may have more creativity and flexibility in resolving problems. An experienced landlord (or landlord representative, particularly one old enough to have lived through the 1980's) will likely give more positive consideration to multiple alternatives in lease workouts.

- b. Prior Dealings with the Landlord. Generally, a tenant with a positive working relationship with the landlord is likely to be more successful than one who has had an adversarial relationship. Further, the tenant's attorney may have had prior experience with the landlord (and its attorney), and be able to draw upon that experience in advising a tenant on potential workout strategies.
 - c. Anticipated Flexibility of Landlord. The landlord's financial circumstances, particularly the debt situation of the project where the leased premises is located, could have a material impact on a lease workout. The tenant's attorney may wish to have a title search done to obtain a copy of any deed of trusts encumbering the landlord's project and determine the degree of leverage. The less the monthly debt service, the more flexible the landlord. Sometimes a well-capitalized landlord may be more difficult if it feels it would be able to withstand the financial drain of a default. At the same time, a less financially strong landlord may be mortified by the loss of all its rental stream, and thus be willing to negotiate a reduction in return for assurances that a potential for reduced rental stream will continue (*See Winn-Dixie article*).
 - d. Practicality of Landlord's Legal Remedies. Depending on the factual circumstances, the landlord's legal remedies may be unattractive . . . for practical reasons. Sometimes this is true when the tenant is weak, particularly where it does not have significant unencumbered assets. Where the tenant's attorney can represent to the landlord or its attorney that pursuing the landlord's legal claim will likely result in either a bankruptcy or an uncollectible judgment, a lease workout will often proceed, provided the ongoing operations of the tenant are likely to produce sufficient cash flow for rent payment. Where the landlord has a lease guaranty from a substantial party, a large security deposit, a letter of credit or the tenant has significant assets (although perhaps poor cash-flow), the landlord's access to legal remedies will significantly impact the lease workout process.
 - e. Mortgagee Rights. Any SNDA signed by the tenant should be reviewed. It may require mortgagee consent to any change in the lease terms.
2. Tenant. The tenant's attorney must realistically analyze its tenant client before undertaking a lease negotiation. Factors to review include the following:
- a. Financial Condition. Some tenants simply have a current cash flow problem. Others have expense or income related problems. A knowledgeable landlord will request current financial statements, including income statement and balance sheet. A tenant's attorney will need to know what those look like before agreeing to provide them to a landlord and should either review those statements or counsel the client what to expect from a landlord's review.
 - b. Future Aspects. Perhaps one aspect of a tenant's business is profitable, where another is not. Often tenants in financial trouble have made ill-advised investments. Where a tenant's attorney can convince a landlord and its attorney that the "core business" of the tenant is strong, the tenant is more likely to have a successful lease workout. A tenant may have lost a major client and simply needs to regain sales. Sometimes, the loss of a key employee hurts tenant sales or operations. In other circumstances, the overall prospects in the tenant's industry have declined, and the tenant needs to downsize in recognition of new economic realities. In addition to providing financial statements to a landlord, a knowledgeable landlord will require a business plan reflecting a return to profitability.
 - c. Business Plan. The landlord will expect a clear, logical, and practical business plan to promptly and realistically address the issues dragging down the tenant's formally successful core business. The tenant's attorney may need to recommend appropriate professionals to assist the tenant in providing a professional business plan. Often, landlords will not believe the tenant is serious unless they show

the commitment of hiring a qualified third party business advisor. Sometimes it is appropriate to seek advice from the landlord for informal “approval” of the appropriate advisor.

B. Analysis of Tenant’s Space Needs.

Before contacting the landlord on a lease workout, the tenant must realistically determine its space needs.

1. Short Term/Long Term. Tenant must initially determine if it has a short term need to downsize, and then the desire to expand back into its previous space. Perhaps the tenant has determined it no longer needs any of its expansion options, the release of which would benefit the landlord. Finally, the premises may be too big for the tenant.

2. Tenant’s Desire To Remain In Current Space/Building. Some tenants have a strong need to stay in the same project and/or the same office space due to public perception or marketing needs. In other circumstances, tenants are simply seeking to maximize the economic benefit to their company and are willing to relocate (in the building/ project or elsewhere) in order to reduce expenses.

3. Marketability Of Space. Tenant must determine whether the space is marketable only as a single unit or whether there are areas which could be carved out and subleased. Sometimes the tenant may need to take the least desirable space and sublet the most desirable space (in an office space, this would include elevator exposure, and in a retail space, the most visible portion, such as the endcap).

4. Historic vs. Current Issues. The tenant must determine if the portion of the current space which could be retained by the tenant after subletting really works best for the tenant in order to achieve its long term business results. Sometimes the space never was particularly efficient, but had been selected by the tenant based on non-business determinations of convenience to executives, prestige, former business relationships, etc. Under a stressful circumstance, it may be best for the tenant to vacate and obtain new space.

C. Workout Options.

Generally, there are three broad options in working out leases.

1. Keeping the Space and Modifying the Rent. Some tenants decide for a variety of reasons to maintain control of all of their leased premises and seek a lease workout which will address cash flow concerns. Among the alternatives are the following:

- a. Reduce rent to current market;
- b. Rent waiver for unused space until tenant expands back into that space;
- c. Reallocation of rent to the backend of the lease term (i.e. step rate); and/or
- d. Release of expansion, termination or renewal options, in return for any of the foregoing.

2. Lease Buyout. Landlord’s business is owning and leasing real property; most tenants’ business are not. Therefore, for many tenants it is best to “bite the bullet” and make a payment to the landlord in return for a release of liability for all or part of excess space. This places the space in the hands of the party best able to handle re-tenanting it. Most parties have a strong desire for finality regarding business problems. The tenant paying a fixed amount to be rid of its problem and the landlord having immediate control over the property without pursuing any legal process is always an option to consider strongly.

A lease buyout may be for the entire premises or for a portion. There are no “rules of thumb” for a lease buyout. However, the tenant’s lawyer should suggest that before negotiating a lease buyout, the tenant

investigate the marketability of the returned space, including rent rates, re-tenanting costs (commission, tenant improvements, free rent and other inducements), and the estimated time to relet. A financial analysis should be undertaken to determine what will be the lost stream of income to the landlord. That stream of income should then be brought to a current lump sum amount using a net present value analysis. Based on that financial analysis, the tenant should seek to offer a reasonable amount to cover a portion of the loss.

If the lease buyout figure becomes too steep, the tenant should focus on the alternative of assignment or subletting discussed below. The tenant will want to determine its likely financial loss if it must assign or sublet the premises. A lease buyout should be a reasonable middle ground.

Payment for an agreed upon lease buyout will often be a lump sum, but sometimes can be a payout evidenced by a promissory note and secured by whatever collateral is available. Essentially, the former landlord becomes a lender to the former tenant. One significant potential remedy for the landlord if the tenant defaults under the lease buyout would be a provision providing for the reinstatement of the lease, whereupon the landlord would then have all of its remedies under the defaulted lease. Clearly, the tenant should strenuously object to this proposal and insist that the promissory note and related collateral should stand alone. The landlord will argue that this remedy simply puts the landlord back where it started.

3. Combination. Sometimes the tenant can surrender some space and continue in the remaining space, perhaps with a modification of the lease term. This alternative includes the issues of both 1 and 2 above.

D. Research Materials.

The following are research materials relating to lease workouts (note the dates):

- a. David A. Brooks and Mel Smith, "Creative Workouts of Commercial Leases", State Bar of Texas Advanced Real Estate Course, 1988;
- b. J. William Boyer and Jonathan Peckham, "Selected Topics in Commercial Leasing and Lease Workouts", South Texas College of Law, Advanced Real Estate Short Course, 1987.

V. BANKRUPTCY

In an extreme situation where either (i) the lease liability is the primary financial downfall of the tenant or (ii) the tenant has widespread financial problems, filing bankruptcy under the Federal Bankruptcy Code can be a tenant's best solution for unnecessary lease space. Under Federal Bankruptcy Law, a tenant has the absolute right to reject any and all leases. Bankruptcy Code §364(d)(4), 11 USCA §365(d)(4). *See* article attached about KMart's bankruptcy filing. Unless a tenant accepts or rejects a lease within sixty (60) days after filing for bankruptcy, all leases where it is a tenant will be deemed rejected. *Id.* The rejection of the lease does not terminate the lease, but instead creates a breach of the lease. In the matter of *Austin Development Company*, 19 F3d 1077, 1081 (CA -5th Cir. 1994). After the lease rejection, the rights of a mortgagee, assignee or subtenant will be decided by non-bankruptcy law, as the bankruptcy court no longer has any interest in the transaction. *Id.* at 1084.

In certain circumstances, the threat of a bankruptcy filed for the primary purpose of rejecting one or more leases could be used as a leverage to reach a non-bankruptcy lease workout. (*See* Winn-Dixie article).

Legal resources relating to leases in bankruptcy are available as follows:

- a. Evelyn H. Biery, "Hot Topics in Retail Leasing", State Bar of Texas Advanced Business Bankruptcy Course, May 1997;

- b. David G. Epstein, “Real Property Lease Issues”, University of Texas Bankruptcy Conference, November 1994.

VI. ASSIGNMENT AND SUBLETTING

When a tenant with excess space has rejected the alternatives of default and bankruptcy, and has determined that a lease workout on acceptable terms is unavailable, then its solution is to either assign or sublet the leased premises.

A. Assignment and Subletting Contrasted.

1. Assignment. An assignment is the transfer of the **entire** interest of the tenant without the tenant retaining any reversionary interest. *Amco Trust, Inc. v. T.C. Naylor*, 317 S.W.2d 47, 50 (Tex. 1958). An assignment creates privities of estate and contract between the assignee and the landlord. *Id.* Therefore, an assignee is legally responsible to the landlord for compliance with all terms of the assigned lease and may be sued by the landlord directly in the event of any non-compliance. *Id.* The assignor continues in privity of contract with the landlord and therefore, continues to be liable on the lease. *Interstate Fire Insurance Company v. First Take, Inc.*, 817 S.W.2d 142, 144 (Tex. App. – Houston, 1st Dist. 1991, writ denied). It is the substance, not the form of a document which determines whether it is an assignment. *718 Associates, Ltd. v. Sunwest N.O.P., Inc.*, 1 S.W.3d 355, 361 (Tex. App. – Waco, 1999, pet. denied). So long as the entire lease term and the entire estate or interest held by the tenant is assigned, such that there is no reversionary interest of any type, an assignment has occurred. *Id.* The title of the document (e.g. “Sublease”) is irrelevant. *Id.*

Where an “assigning” tenant retains the right to re-enter the premises if the assignee fails to pay rent or otherwise perform under the assignment, as a remedy to protect the tenant, then the tenant has a reversionary interest, thus creating a sublease rather than assignment, notwithstanding that the entire lease term and all of the tenant’s rights were transferred to the assignee. *Novasad v. Clary*, 431 S.W.2d 422, 426 (Tex. App. – Houston, 1st Dist. 1968, writ dismissed). A mortgagee in possession is not an assignee, although the mortgagee of a leasehold estate which forecloses on the leasehold interest and takes possession would be an assignee. *Amco Trust, Inc.* at 51. An assignee has the right to exercise a purchase option or renewal option in a lease. *718 Associates, Ltd.* at 365.

It is unclear the extent to which an entity tenant can modify its ownership structure without being deemed to violate the prohibition against assignment. Adding a partner to a partnership has been held not to violate a prohibition against assignment. *Denning v. Republic National Bank Bldg. Co.*, 294 S.W.2d 898 (Tex. Civ. App. – Dallas, 1956, writ refused n.r.e.). However, the liquidation of a partnership and the assignment of all the rights of one partner to the other partner was held to violate a lease requiring consent to assignment. *Heflin v. Stiles*, 663 S.W.2d 131, 134 (Tex. App. – Ft. Worth, 1983, no writ). It also appears that a substitution of partners would be considered a violation of an anti-assignment clause. To be safe, a partnership tenant should not expect it can do anything other than add partners without landlord consent. See B. Dow, *Assignment, Subleasing, Expansion Option and Right of First Refusal Aspects of Commercial Leases*, Real Estate Law: Leases in Depth, SMU School of Law, 1991 for a detailed discussion of the ability of an entity tenant to be sold without violating an anti-assignment clause.

2. Sublease. Any transfer of rights by a tenant which does not meet the strict requirements for an assignment is a sublease. *Amco Trust, Inc.* at 150, *718 Associates, Ltd.* at 360. The title and form of the transfer document (e.g. “Assignment”) is not relevant. *718 Associates, Ltd.* at 361. If the tenant retains any reversionary interest, the transfer is a sublease. *Amco Trust, Inc.* at 150. With a sublease, there is no privity of estate between the subtenant and the landlord. *Id.* The subtenant is not liable to the landlord to comply with the lease or sublease unless it specifically assume the obligation to perform the lease. *Id.* A landlord has no rights to enforce a sublease directly against a subtenant, even if the landlord consented to the sublease.

Parr v. Farmers State Bank of Orange Grove, 659 S.W.2d 883, 884 (Tex. App. – San Antonio, 1983, no writ). However, where the landlord consented to the sublease and the sublease provided that the subtenant assumes all of the tenant’s liability under the lease, then the landlord is a third party beneficiary and can directly enforce the lease against both the tenant and subtenant. *Manges v. Willoughby*, 505 S.W.2d 379, 384 (Tex. Civ. App. – San Antonio, 1974, writ ref’d. n.r.e.).

A subtenant may **not** exercise a purchase option or renewal option. *Novasad* at 427, *718 Associates, Ltd.* at 365.

An excellent discussion of the distinction between assignments and subleases, and the relative rights for the parties, is contained in *718 Associates, Ltd.*, 1 S.W.3d 355.

3. Statutory Prohibition of Assignment and Subletting. Tex. Prop. Code §91.005 states as follows:

“During the term of a lease, the tenant may not rent the leasehold to any other person without the prior consent of the landlord.”

This prohibition applies both to assignments and subleases. *718 Associates, Ltd.* at 360. As a matter of public policy, this prohibition is incorporated into all leases by operation of law. *Id.* This statutory prohibition can be avoided if the lease clearly expresses such an intent. *Id.* A statement in a lease that the tenant has the right to “assign or transfer this lease or to underlease or sublease the whole or any part of said lease premises” is sufficient to evidence a landlord’s authority for a tenant to assign or sublease a lease. *Id.* at 363.

4. Landlord Consent. Landlord consent is always required, unless the lease specifically authorizes a tenant to assign or sublet the leasehold premises. *Id.* In practice, most leases will specifically prohibit assignment or subletting without landlord consent, unless the tenant has significant negotiating power.

Unfortunately for tenants, a landlord need not act reasonably in withholding consent, as there is no implied duty of good faith and fair dealing in Texas applied to the landlord/tenant relationship. *Trinity Professional Plaza Associates v. Metrocrest Hospital Authority*, 897 S.W.2d 621, 625 (Tex. App. – Eastland, 1999, pet. denied). This is true even if the lease is a long term ground lease. *Id.* The court will not consider the fact that the landlord’s refusal to consent to an assignment or sublease creates the practical equivalent of a restraint on alienation. *Id.* If a tenant desires to require a reasonable standard for a landlord’s consent, it must be clearly included in the lease. *Id.*

Where a landlord consent to an assignment or subletting is “not to be unreasonably withheld,” there is no clear standard from Texas cases. One case struggling with an appropriate standard for a landlord consent used the following words and phrases to describe the elements of unreasonableness in the act of withholding consent:

- arbitrary
- without fair, solid and substantial cause or reason
- capricious, despotic, tyrannical, bound by no law
- without regard to principles
- irrational
- beyond the bounds of reason or moderation
- immoderate
- exorbitant
- irrational, foolish, unwise, absurd, silly, preposterous, senseless and stupid
- no room for difference of opinion among reasonable minds.

Mitchell's, Inc. v. Nelms, 454 S.W.2d 809, 813 (Tex. Civ. App. – Dallas, 1970, writ ref'd. n.r.e.). Ultimately, the court looked to the language of the lease in determining whether the landlord's refusal to consent to a sublease was reasonable.

The Fifth Circuit, applying Texas law, held that the reasonableness of a refusal to consent to an assignment or sublease was determined by reference to the terms and conditions of the prime lease, noting this is consistent with the Second Restatement of Property. *EMB Corporation v. McMahan's Valley Stores*, 867 F.2d 865, 869 (CA - 5th Cir., 1989). The court held that it would be unreasonable for a landlord to condition consent to a transfer on a change in the terms and conditions of the prime lease. *Id.* Reasonableness is to be determined by reference to the prime lease, not by what the landlord later finds out is most economically advantageous, therefore a demand for higher rent would not be reasonable. *Id.* Specifically, a landlord could not withhold consent based on concerns that the assignee tenant would not pay the same amount of percentage rent, unless the prime lease contained a covenant that the tenant maximize the percentage rent. *Id.*

The requirement for consent to an assignment or subletting can be simply waived by the landlord accepting rent from the assignee or subtenant. *Nardis Sports Wear v. Simmons*, 218 S.W.2d 451, 614 (Tex. 1949).

Since the tenant will remain liable on the lease and the landlord cannot (without specific authority from the lease) either demand an increase in rent or withhold consent based on concerns about the amount of future percentage rent, the landlord is left to focusing on specific contractual provisions contained in the lease as a basis for denying or withholding its consent.

Most landlord forms specifically deal with the payment of excess rent in the event of a sublease, providing either (1) that all of the excess rent should be paid to the landlord (without deduction of any type), (2) that one-half of the excess rent will be paid to the landlord (without any deduction), or (3) in leases aggressively negotiated by tenants, one-half of the rent net reasonable expenses of reletting.

Many lender documents for loans on income producing property require lender consent to lease changes and the language may be expansive enough to cover assignment or subletting. Landlord consent from institutional lenders can be problematic, particularly where the servicing is handled by a third party.

5. Construction. Subleases and assignments will be construed against the sublessor/assignor. *Ford v. B&B Vending Co.*, 512 S.W.2d 702 (Tex. Civ. App. – Amarillo, 1974, no writ).

6. Bankruptcy. The rejection of a lease by a bankrupt sublessor is also a rejection of the sublease. The lease is not automatically terminated, rather the rejection is considered a breach. The sublessee's rights are then determined by applicable non-bankruptcy law. *In Re: Austin Development Co., Id.* at 1084.

Rejection of a sublease by a bankrupt sublessor cancels the sublessor's covenants of future performance under the sublease. *In Re: Elephant Bar Restaurant, Inc.*, 195 B.R. 353 (W.D. Tx, 1996). Sublessee's remedy is limited to offsetting rent due. Bankruptcy Code Sec. 365(h)(1)(B), 11 U.S.C.A. Sec. 365(h)(1)(B). Although probably not a major problem in an assignment situation, in a partial sublease context where the sublessee must then perform under the prime lease to protect the rights to only a portion, this remedy is of limited practical benefit.

B. Assignment.

1. Circumstances When Assignment Is A Tenant's Best Option. Assignment of the tenant's complete term and interest under a lease may be its best choice under the following circumstances:

- a. the space is highly marketable, particularly if it is in a desirable building, has a desirable configuration and a high level of tenant finish;
- b. the tenant no longer has a business need to be in the particular building, the building is too expensive, the space is too big or the space no longer works efficiently; or
- c. the space is not easily divisible.

2. Landlord Consent / Landlord's Mortgagee's Consent.

a. No consent required. Only if it is clearly stated in the lease will landlord's consent not be required. Although tenants commonly negotiate several specific exceptions to landlord consent to an assignment or subletting (related party transactions / limited reallocation of ownership interests / sale of all of tenant's assets), practically, they are unlikely to apply to an economically distressed tenant attempting to off-load excess lease space.

b. Landlord consent not to be unreasonably withheld. Texas has no clear test for a landlord's reasonableness. The court will likely look to the language of the lease for help in setting a reasonableness standard. Without more, a requirement for an increase in rent in order to approve an assignment or sublease would be unreasonable. The tenant's best strategy is to approach the landlord in advance and discuss what issues are important to it in considering a proposed assignee or subtenant. Unfortunately, an economically distressed tenant is unlikely to have the ability to challenge by lawsuit unreasonable landlord requirements, particularly those which are borderline (i.e. some arguable relationship to issues in the lease).

c. Purchase of the tenant entity to avoid landlord consent. There may be circumstances where it might be possible, from a corporate or partnership law perspective, to structure a sale of the tenant entity in an attempt to evade the requirement for a landlord consent. Based on the unsettled state of Texas law, this is not advisable, particularly where the tenant is a partnership.

d. Mortgagee consent. In almost every case, there will be a mortgage on the landlord's project. Most likely the loan documentation, and possibly a subordination, non-disturbance and attornment agreement signed by the tenant for the benefit of the mortgagee, may have the effect of requiring mortgagee consent. Further, the subtenant or assignee may insist upon a non-disturbance agreement from the mortgagee. Obtaining consent from an institutional, out of state mortgagee may be problematic.

e. Timing. Particularly with institutional landlords and mortgagees, the timing of consent can be problematic. Since every month of delay is a huge issue with the cash-poor tenant, there should be advance planning in order to minimize the delay of required consent. Also, as is common in direct lease transactions, requiring a non-disturbance agreement for the benefit of an assignee/subtenant might be a "good faith" or "best efforts" obligation after the commencement date.

3. Tenant Liability. Unless specifically released by the landlord, the tenant's liability on the lease will continue after the assignment. Sometimes landlords will agree to limit or release a tenant's liability, but only after qualifying the credit of the assignee. If a release of the tenant's liability is critical for the transaction, this must be established and agreed to by the landlord at inception of marketing of the premises. Other issues to be addressed include release/substitution of security deposit, release/substitution of additional collateral, and any other credit issues specific to the transaction.

The tenant may need to rely upon the fact that the assignee has liability for all obligations under the lease. The assignee will almost always agree to indemnify the tenant, but in the event of a default by the

tenant of its obligations on the lease, that indemnification is probably of no real benefit. Without a release of liability, the tenant will be jointly and severally liable with the assignee.

4. Marketing The Premises.

a. Through landlord (or its brokers). There may be circumstances where it is in all parties' best interest that the leasing agent for landlord's project handle the assignment to find a new tenant for the tenant's premises. This would be a minority circumstance, as the landlord's leasing agent is most likely to favor its ongoing client, the landlord, in showing space in the project. Where this issue can be addressed and the tenant's space will receive a fair opportunity to be leased, then using the landlord's agent (being the agent most knowledgeable with the project) may be appropriate.

In this circumstance, the landlord, effectively, is handling the re-leasing, but without absorbing the economic risk. This circumstance could also be favorable where it is likely that in order to market the space most effectively, additional lease term will need to be provided by a lease directly with the landlord commencing after termination of the lease being assigned. This is particularly true where the lease being assigned has no extension option.

b. Through separately retained brokers. In most instances, the tenant retains an independent broker to handle the assignment of the premises. The broker will coordinate with the landlord and the landlord's leasing agent in order to be able to provide an extended term, if that is necessary to attract a tenant. A good working relationship with the landlord and its leasing agent is often important. The retained broker owes its loyalty only to the tenant.

c. Marketing expenses. The tenant should consider a realistic marketing budget to potentially include extensive advertising, space planning and tenant improvement allowance. An aggressive marketing program is necessary since the underlying lease is a depreciating asset (i.e., the term is _____) and the burden to hold the lease continues until an assignee is obtained.

5. Financial Issues.

a. Upfront payment. In the best of all possible worlds, the assignee would pay a lump sum amount to the assigning tenant in order to receive the benefits of the assigned lease. However, it is more likely that the assigning tenant may make a lump sum payment to the assignee in order to entice it to assume the lease obligations.

b. Security deposit. Preferably, the tenant will have the assignee reimburse it for the security deposit. Possibly, the security deposit would remain in place with an agreement that when it is released at the end of the lease term, it would be paid to the tenant (which would require a tri-party agreement with the landlord).

c. Additional collateral. Preferably, additional collateral will be released or substituted with new additional collateral deposited by the assignee. If not, the additional collateral could remain in place.

d. Rent payment. Since the assignee is stepping into the shoes of the tenant, rent is paid directly by the assignee to the landlord. Any tenant who is not released from liability will want evidence of assignee's payment of rent.

6. Modification of the Lease. The assignee and its attorney will be encouraged to accept the lease without any changes. However, the assignee or its attorney may insist upon modifications. Although a minority of situations, there are circumstances when the landlord is happy to be rid of the financially challenged tenant and looks forward to the move-in of the assignee. In those circumstances, the lease can be

modified, either in a tri-party assignment/ modification agreement signed by landlord, tenant and assignee (see example attached), or by a two party modification agreement signed by the landlord and either the tenant (immediately prior to the assignment) or the assignee (immediately after the assignment). All documentation can be coordinated through a “closing” orchestrated by the attorneys.

7. Assignment Issues.

a. Tenant Release. Every tenant will want to be released from liability on the lease upon an assignment. Some landlords will never release a tenant. Others will release the tenant if the assignee meets the landlord’s requirements for new tenants.

b. Landlord cooperation. With the high-tech bust, many landlords are happy to cooperate with cash-poor tenants (whether or not in the technology field), as the landlords are concerned with the long term viability of the tenant. In some circumstances, the landlord is willing to make minor concessions in lease documentation, but generally the landlord limits its cooperation to attempting to facilitate the assignment transaction. Issues regarding the reasonableness of the landlord’s consent are rarely a problem when the tenant, or the tenant’s attorney, has convinced the landlord, or the landlord’s attorney, that the tenant’s economic problems are legitimate and that a cooperative approach is in the landlord’s best interest.

c. AS-IS condition. The tenant has a strong preference to assign the lease with the lease premises in their current, AS-IS, WHERE-IS condition. Tenants will provide a cash payment to the assignee rather than remodeling the premises.

d. Renewals. The tenant will want to address its continued liability in the event the assignee elects an extension option under the assigned lease. Since the tenant has continued liability on the lease, if the lease is extended that liability will be extended. A knowledgeable tenant will want to provide either that the assignee agrees not to exercise a renewal right (or an expansion right) thereby increasing tenant’s liability, or will cause the landlord to release the tenant at that time.

e. Assignee default. Since tenant has continued liability, it will look for practical remedies in the event of a lease default. A provision in an assignment document that the tenant has the right to retake possession of the leased premises upon a default by the assignee provides a very practical and effective remedy, but constitutes a reversionary right, and converts the assignment to a sublease. This may be an acceptable legal conclusion for the parties, however, the tenant will want to have the assignee/sublessee specifically assume obligations under the lease so that the assignee/sublessee will have direct legal liability to the landlord. The assignee/ sublessee will want the landlord to acknowledge its right to exercise all options. As a result, the “sublease” transaction could have the hallmarks, including legal results, of a true assignment, but the assigning tenant would have a recapture right to provide protection against an assignee default. Although the author has never seen it used, another alternative to allow an assignor to regain possession would be to have a tenant execute a deed of trust to secure performance encumbering the assigned leasehold estate, although this strategy would probably require landlord and landlord’s mortgagee’s consents.

8. Assignment Forms. Attached are 4 lease assignment forms as follows:

- Simple assignment form
- Tri-party assignment form including landlord estoppel, lease modification, lease assignment, and release of tenant, payment to assignee and conveyance of furniture to assignee
- Crescent assignment form
- Crescent consent to assignment form

C. Subleasing.

1. When Is Subleasing Appropriate? Subleasing is appropriate whenever assignment is not practical. Any time the tenant reserves a reversionary interest, the transaction is an assignment. Obviously, where the tenant desires to retain a portion of the space, the remaining premises will be sublet.

2. Consent By Landlord And Its Mortgagee. The issues regarding consent for a subleasing transaction are the same as in an assignment transaction.

3. Tenant Liability. Like an assignment transaction, in a subleasing transaction the tenant's liability remains. The only difference is that the subtenant has no liability directly to the landlord. If it is desired that the sublessee is to be liable for obligations under the lease, then that should be specifically stated. The sublessee should be aware that where it assumes obligations under the prime lease, and the landlord consents to the sublease, then the landlord is considered a third party beneficiary of the sublessee's assumption such that the landlord may sue the sublessee for lease violations.

4. Marketing The Premises. The issues in subleasing a portion of a leased premises are the same as assigning the entire lease. However, tenant may need to "spruce up" the area to sublet for it to show well to prospects. It may also be preferable to actually vacate that space so the prospect can better imagine its operations in the space.

5. Financial Issues.

a. Rent payment. The tenant remains liable to pay all rent. Typically, the tenant will pay all prime lease rent to the landlord and the sublessee will pay the sublease rent to the tenant. It is possible, but rare, to structure a transaction for the sublessee to pay its rent directly to the landlord with the tenant paying the difference. Most landlords will not want to be involved in the collection of sublease rent.

b. Insuring tenant pays the rent. The sublessee may have concerns about the tenant's payment of rent on the prime lease. Where the tenant is financially distressed, these legitimate concerns may lead to sublessee desiring to pay sublease rent directly to landlord. Where the sublease premises is simply excess space of a solvent tenant, these concerns are less significant. More practically, the assignee can request a personal guaranty or additional collateral for the tenant's obligation. Some subtenants just hope for the best, figuring that the sublease rent will be sufficient to keep the tenant economically viable.

c. Calculation of rent. Often, the calculation mechanism for sublease rent is different (and often simpler) than for the prime lease rent. For example, the sublease rent may be quoted on a gross basis, while the prime lease rent is payable on a net basis. Care should be given to insure there is clarity regarding the relative party's obligations.

d. Expense pass-throughs. In a sublease, the parties will need to address how (or even whether) a subtenant can review and audit operating expenses. Also, some subleases may give the sublessee a more current base year.

e. Sublessee's improvements. If the sublessee requires modifications to the premises, the parties must address the requirement for approvals from the landlord, the landlord's mortgagee (if applicable) and the tenant. Occasionally, the tenant will provide a tenant improvement allowance or perhaps free rent to fund sublessee's improvements. The parties must address whether the sublessee's improvements (including internal demising walls) must be removed at the end of the lease term.

f. Security deposit. The parties must determine whether the security deposit will be replaced on a prorata basis by the sublessee, a separate deposit made by sublessee with tenant, or the sublessee will simply indemnify the tenant for a prorata portion.

g. Credit enhancement. The tenant may require a lease guaranty or additional collateral to secure the sublessee's obligations under the sublease, just as a landlord might in a direct lease.

h. Additional charges. The sublease shall address the sublessee's right to incur additional charges (e.g., _____ HVAC) and the obligation to pay those charges directly to landlord, the failure of which is a default under the sublease.

6. Sublease Issues.

a. Tenant. If a sublease, the tenant will have many of the same concerns which a landlord has in a direct lease transaction, with a few unusual twists:

- (i) Sublessee's rent can be due to tenant sooner than the outside deadline for rent payment due under the prime lease, in order to provide tenant the ability to use the sublessee's rent payments in making the prime lease payment. Sublessee should covenant to perform all lease obligations as to the subleased premises, but within a shortened time period than required for tenant, in order to give tenant an opportunity to cure any non-performance by the sublessee.
- (ii) Tenant will not want to assume any of landlord's responsibilities under the prime lease. Tenant will not want to agree to provide any services to the sublessee, or at least to limit any services required to be provided. Tenant will want to limit its obligations under the sublease to (1) payment of rent for the entire lease premises, and (2) performing obligations as to the non-subleased premises. Thus, tenant will want to pass-through to the sublessee casualty, condemnation and interruption of service issues as to the subleased premises.
- (iii) Sublessee modifications to the subleased premises must be addressed, particularly the approval process. Tenant will wish to limit those modifications, for practical and legal reasons.
- (iv) The sublessee will be required to have insurance consistent with that required to be held by the tenant and will be expected to show both tenant and landlord as additional insureds.
- (v) Since the relationship between tenant and sublessee is a landlord/tenant relationship, tenant will require sublessee to waive all express and implied warranties.
- (vi) Where tenant desires the transaction to be a sublease rather than an assignment, despite the fact that the entire leased premises is being sublet, the tenant will require a clear reversionary right be retained by the tenant.
- (vii) The parties must deal with timing for a landlord consent, as well as the possibility that the consent will not be freely given, or will be given with conditions.

b. Sublessee. The sublessee will have similar issues to a tenant in a direct lease transaction, with the added concern of whether tenant will perform under its obligations on the prime lease. Issues include the following:

- (i) Sublessee will want landlord to provide an estoppel letter confirming no defaults under the prime lease.
- (ii) Sublessee will want landlord's consent (and possibly landlord's mortgagee's consent) to the sublease transaction. The timing and form of these consents could be critical. Even if the mortgagee's consent is not required under the landlord's loan documents, sublessee may want a non-disturbance agreement in the event of a foreclosure of the landlord's project.

- (iii) A careful sublessee will review the prime lease and in the event of concerns about the sublessee's ability to comply strictly with lease provisions, sublessee will require a modification or waiver of those provisions by the landlord.
- (iv) Sublessee will want to insure it has thought through the practical procedures to elect effectively any audit rights relating to expense pass-throughs.
- (v) Insurance requirements should be carefully addressed.
- (vi) Sublessee will want to insure there is an adequate legal description of the sublease premises.
- (vii) Sublessee will want to insure it has received all necessary consents from tenant and landlord for any necessary built-out at inception and will want the right to make additional modifications without obtaining tenant's consent, so long as it has obtained landlord's consent. Sublessee will want the right to deal directly with landlord regarding future modifications. Sublessee will want to deal with any tenant improvement allowances, either in a lump sum payment or through rent abatement.
- (viii) Where there are renewal or expansion rights, sublessee may want the right to participate if tenant intends to elect those rights.
- (ix) The allocation of parking between tenant and sublessee should be carefully addressed.
- (x) A knowledgeable sublessee may want a landlord to agree to various protections as follows:
 - (i) notice of tenant default,
 - (ii) right to cure tenant default,
 - (iii) right to assume the lease after a tenant default,
 - (iv) landlord agreement not to disturb sublessee if landlord terminates the prime lease,
 - (v) sublessee's right to exercise renewal/expansion rights relating to the subleased premises.

Many landlords are very reluctant to provide these assurances.

c. Landlord. The landlord's concerns with a sublease will primarily relate to the complication of an additional party utilizing a portion of the lease premises. The landlord's issues include the following:

- (i) Determining what restrictions there are to its unfettered ability to deny consent and/or establish requirements for that consent.
- (ii) Desire for no conflict with the terms of the prime lease or with the rights of other tenants in the project on issues such as:
 - uses
 - parking
 - intensity of use
 - business hours
 - energy consumption
 Landlord may wish to condition its consent to issues of this type being appropriately addressed.
- (iii) Landlord will want to insure there will be no unintended amendments of the prime lease.
- (iv) Landlord will not want to have any privity of contract with a sublessee, rather, it will likely insist that its only landlord/tenant relationship will be with the tenant. This eliminates any duties to the sublessee, but also simplifies legal relationships by eliminating one party. If the approved sublease requires the sublessee to assume the obligations of the lease, then the consenting landlord is deemed a third party beneficiary so it can sue the assignee directly. Landlord will want to specify clearly that it is not assuming any liability as to the sublessee or the sublease.
- (v) Landlord may insist that the sublessee waive all claims against landlord, as well as provide appropriate insurance, with landlord as additional insured.
- (vi) In some circumstances, the landlord may allow or request direct payment of sublease rent from the sublessee. Landlord may want to specify that such acceptance is not a ratification of the

sublease as a direct lease so that in the event of a default by the tenant the landlord retains all remedies.

- (vii) Landlord will want to address the question of whether the subtenant may deal directly with the landlord and *vice versa*. Some landlords may not want to have any direct communications for legal reasons, while others may wish to have direct communication for practical reasons.
- (viii) Landlord may insist that its attorney's fees and costs regarding the sublease transaction be paid prior to any consents being granted.

d. Mortgagee. Many mortgage documents require approval of all leases over a specified square footage, or the modification thereof, or the change of any tenant. A sublease may trigger the requirement for mortgagee's approval. Landlord may require the mortgagee's approval before the landlord provides its consent. The mortgagee's concerns should be no different than for a direct lease transaction. The concerns of the other parties will be with the timing and potential non-responsiveness of a mortgagee to a transaction that all of the other parties have approved.

7. Subleasing Forms. Most sublease forms are "pass-through" forms whereby the prime lease is incorporated by reference and the sublessee agrees to comply with all of the prime lease provisions as they apply to the subleased premises. Some subleases provide that the tenant bears all the obligation of the landlord under the prime lease. When a pass-through form is proposed by the tenant subleasing the premises, the attorney for the proposed sublessee must review carefully the prime lease, as there will likely be many provisions under the prime lease which are not appropriate to be incorporated by reference in the sublease without modification or clarification. As an alternative to a pass-through sublease, there is no reason (other than a desire not to have a conflict with the prime lease) not to utilize a standard lease form for the relationship between the tenant and sublessee, if carefully drafted to conform with the prime lease and the sublease transaction.

Attached are 3 sample sublease forms as follows:

- State Bar form (quasi pass-through form)
- Crescent sublease form (pass-through)
- Crescent sublease consent form

Sublease forms are also provided in (i) Real Property, Probate and Trust Law Journal (Saltz and Miner, Subleases: a New Approach, 34 Real Prop. Prob & Trust Law Jn. 1, Spring 1999) and (ii) Pass-through form (from P. Weller, The Assignment/Sublease Document: The Practical Side, Georgetown University Law Center, Commercial Lease Negotiations, 1995).

VII CHECKLIST

Attached is a checklist prepared by Candace Baggett of The Calibre Group, a Houston, Texas office leasing firm, focusing on practical issues relating to subleasing and assignment.

VIII. CONCLUSION

In today's uncertain times, more and more tenants find themselves with extra space, but little understanding of the process to eliminate that space. Assigning the tenant's entire interest under the lease or subletting a portion of the leased premises can provide a substantial economic benefit to the tenant. The legal issues to the tenant as well as the assignee or sublessee require a clear understanding of the legal and practical distinctions between assignments and subleasing.

ATTACHMENT 3

ASSIGNMENT OF LEASE

That _____ ("Assignor"), for and in consideration of the sum of Ten and No/100 Dollars (\$10.00) and other good and valuable consideration, the receipt and adequacy of which is hereby expressly acknowledged, does hereby, and by these presents, does TRANSFER AND ASSIGN, unto _____ ("Assignee"), all of Assignor's rights, titles and interest in and to that certain Lease dated _____ ("Lease"), executed by _____ ("Landlord") and Assignor leasing the premises located in _____ as Suite _____ with the following mailing address: _____.

The Lease has an initial term of _____, commencing _____ and ending _____. Assignor is aware of no default by any party to the Lease. A true and complete copy of the Lease (and any modifications) is attached as Exhibit A. Assignor represents to Assignee that the terms and conditions of the Lease have not been modified. Assignee assumes the Lease and agrees to perform all of Assignee's obligations as tenant under the Lease. Assignee assumes the obligation to cure any defaults which may presently exist under the Lease. All prepaid rentals, security deposits, operating expense reimbursements and/or other credits under the Lease are assigned by Assignor to Assignee. Landlord may deal exclusively with Assignee in the future regarding all aspects of the Lease.

Assignor remains liable on the Lease. In the event of default by Assignee of any of the terms, conditions, or covenants contained in the Lease, Landlord may exercise any remedies against Assignor and/or Assignee. Assignee indemnifies and holds Assignor harmless from any claims, causes of action or damages relating to the Lease from the date hereof. Assignor agrees to promptly provide Assignee copies of any correspondence received from Landlord which does not reflect it has been also sent to Assignee.

Assignee acknowledges that any further assignment or subletting of the Lease requires Landlord's consent. Landlord consents to this Assignment, but waives no rights under the Lease. This Assignment is binding upon and inure to the benefit of the parties, their heirs, executors, administrators, legal representatives, successors and assigns. This Assignment constitutes the sole agreement of the parties relating to the assignment of the Lease and fully sets forth the rights, duties, and obligations of each to the others as of its date. Any prior agreement, promises, negotiations, or representations are of no force and effect.

EXECUTED effective the ___ day of _____, 200__.

ASSIGNOR:

By: _____
Name: _____
Title: _____

ASSIGNEE:

By: _____
Name: _____
Title: _____

ACKNOWLEDGED BY LANDLORD FOR THE LIMITED PURPOSED OF APPROVING THE ASSIGNMENT PURSUANT TO THE PROVISIONS OF THE LEASE:

LANDLORD:

By: _____
Name: _____
Title: _____

Landlord's Address: _____

ATTACHMENT 4

ASSIGNMENT AND MODIFICATION OF LEASE

This Assignment and Modification of Lease ("Assignment") is entered into as _____, between _____ ("Landlord"), _____ ("Assignor") and _____ ("Assignee") relating to (i) the assignment by Assignor to Assignee of its rights under Lease dated _____, between Landlord and Assignor ("Lease") for Suite _____ ("Premises") in the _____ Office Building, Houston, Harris County, Texas ("Building"), (ii) the agreement of Landlord to modify the Lease for the benefit of Assignee, and release any rights against Assignor (contingent on Assignor's performance hereunder) and (iii) Landlord's consent to this transaction. All defined terms utilized in this Assignment and not otherwise defined shall have the meanings set forth in the Lease.

Background Facts

1. The Lease was executed by Landlord and Assignor regarding the Premises for a _____ (____) year term commencing _____, and terminating 5:00 o'clock p.m. _____.
2. The Lease has not been modified or amended in any way.
3. Assignor desires to vacate the Premises and assign all of its rights under the Lease to Assignee.
4. Assignor's performance under the Lease is secured by a cash security deposit in the amount of \$ _____ ("Security Deposit") plus \$ _____ in the form of 2 Letters of Credit (cumulatively, the "LC's") and a contract credit of \$ _____ from unused Tenant Improvement Allowance ("Allowance"); all pledged for the benefit of Landlord (cumulatively referred to as the "Security").
5. Assignor agrees to make a cash payment of \$ _____ to Assignee.
6. Assignor agrees to convey to Assignee certain personal property, at no charge.
7. As consideration for Landlord's agreement to this Assignment, Assignor agrees to pay Base Rental and Tenant's Proportionate Share of Excess due under the Lease (cumulatively, the "Rent") to Landlord for the remainder of _____, as and when it comes due (_____ Rent having been paid), and to release to Landlord for Rent due for _____ and a portion of _____, _____, any claim Assignee, its successors or assigns may have in and to the Security Deposit in the amount of \$ _____ and the Allowance and to pay Rent to Landlord, monthly, beginning in _____ at the estimated (including estimated increases in operating expenses over the base year) rate of \$ _____ per month (such release of Security Deposit and Allowance and payment of Rent not to exceed in the aggregate the sum of \$ _____) for a portion of _____, in accordance with the terms hereof.

8. Landlord agrees to (i) approve the assignment of the Lease to Assignee, (ii) release Assignor from all obligations under the Lease through the Possession Date (defined in Section 2 below) other than to pay the Rent referenced above, and (iii) to modify various provisions of the Lease for the benefit of Assignee.

9. The parties desire to set forth their agreements in a single document to eliminate misunderstanding and confusion regarding the transaction.

Agreements

For consideration of \$10.00 and other good and valuable consideration received by each of the parties and the mutual agreements contained herein, the parties agree as follows:

1. Assignment. Effective on the Possession Date (defined below), Assignor assigns to Assignee all its right, title and interest under the Lease (including but not limited to all rights to estimated Excess of Operating Expenses over the Base Year). Landlord consents to that assignment, such that Landlord and Assignee shall henceforth have a direct landlord/tenant relationship, provided that Assignee is not liable for Rent for the first \$_____ of Rent and other payments due under the Lease for calendar year 200__, or any amounts due Landlord under the Lease for calendar year 200__ (including Rent). Assignor remains liable for Rent and other obligations under the Lease, including escalations, for all calendar year 200__ and the first \$_____ of Rent and other financial obligations under the Lease for calendar year 200__, subject to a credit of \$_____ for the Security Deposit and \$_____ for the Allowance as described above. Landlord waives any right to terminate the Lease based on this Assignment.

2. Possession of the Premises. Assignor shall vacate the Premises as soon as possible after it executes a new lease or sublease, and in no event later than _____, 200__ (the date Assignor vacates being the "Vacation Date"). Assignor represents to Landlord and Tenant that it has selected alternative space and has tentative proposals for that space (which alternative space is anticipated to be available for Assignor's occupancy not later than _____, 200__). The Premises shall be delivered to Assignee on the Vacation Date, broom-clean, in its current, AS-IS condition, and free from damage due to Assignor vacating the Premises, subject to normal wear and tear. Assignee may take possession of the Premises immediately upon Assignor's vacating it (the date Assignee takes possession being the "Possession Date", provided the Possession Date is deemed to be _____, 200__ if possession is not taken by Assignee prior to that date). If the Vacation Date occurs beyond _____, 200__ (subject to Force Majeure as defined below), Assignor shall pay to Assignee \$_____ for each day of delay, until the first to occur of the following: (i) the Vacation Date, or (ii) the Termination Date (defined below), which damage amount shall be payable the earlier of ten (10) days after (y) the Possession Date, or (z) the Termination Date. If the Vacation Date occurs after _____, 200__, Assignee may terminate this Assignment by written notice to Assignor (the date Assignee terminates this Assignment being the "Termination Date"), but shall continue to be entitled to the \$_____ per day delay penalty as liquidated damages. If this Assignment is so terminated, the original Lease between Assignor and Landlord shall be reinstated and not amended as hereinafter provided. The \$_____ per day penalty is stipulated as liquidated damages based on the fact that Assignee will not have access to the Premises and the damages incurred by Assignee are difficult and uncertain of calculation. Assignor indemnifies Assignee for any damages to the Premises caused by Assignor, its employees, directors or agents as a result of vacating the Premises or the occupancy of the Premises by Assignor prior to the Vacation Date or Termination Date, as applicable, but subject to normal wear and tear. No later than the 2nd business day after the Vacation Date, Assignee shall inspect the Premises and if there are damages due to Assignor vacating the Premises, then Assignee shall notify Assignor, in writing, detailing the damages and the required repairs. Assignor shall make the repairs as soon as possible so not to impede Assignee'

work to the Premises, but in no event to exceed 10 business days. If repairs are not timely made, Assignee may cause those repairs to be made at Assignor's expense and Assignor will reimburse Assignee for the reasonable cost of repairs. The _____, 200__ deadline for the Vacation Date shall be extended, day for day for each day an event of Force Majeure causes Assignor to be unable to timely vacate the Premises, despite Assignor's best efforts to the contrary. Force Majeure is (i) acts of God, (ii) unanticipated governmental action, delay or restraint, and (iii) other cause not reasonably anticipatable by Assignor which is not within Assignor's reasonable control through the exercise of foresight and diligence.

3. Assignor Payment to Assignee. Upon the execution of this Assignment by all parties and receipt of a telefax signed copy, Assignor will immediately wire transfer to the trust account of _____, Attn: _____, ("Escrow Agent"), \$ _____ as a portion of the consideration for Assignee executing this Assignment. Upon receipt by Escrow Agent of a letter from Landlord acknowledging that Assignee is in possession of the Premises and all requirements of the Lease and this Assignment to be discharged as of that date by Assignee have been satisfied ("Landlord's Letter"), Escrow Agent shall deliver the funds to Assignee. At Assignee's request after the Possession Date, Landlord shall inspect the Premises and promptly issue such letter when Landlord has confirmed the appropriate facts. If the Termination Letter is issued by Assignee, upon receipt, Escrow Agent will wire transfer the funds to Assignor without further authorization, less the applicable liquidated damages, which shall be delivered to Assignee.

4. Assignor conveyance to Assignee. Concurrently with the execution of this Assignment, Assignor has delivered to Escrow Agent the following: (i) a Bill of Sale conveying to Assignee the personal property of Assignor described therein ("Property"), executed by an authorized officer of Assignor (which shall be held in escrow by Escrow Agent pending receipt of the Landlord's Letter or the termination letter, and (ii) (a) a UCC search of the UCC records of the Secretary of State of Texas under Assignor's name (and the name of any assumed names utilized by Assignor) dated no earlier than _____, 200__ (the "UCC Report"), and (b) if the UCC Report reflects the existence of any liens against the Property, a release for all liens encumbering the Property shown in the UCC Report. Landlord consents to the conveyance of the Property. Escrow Agent shall deliver the Bill of Sale to Assignee concurrently with the delivery of the \$ _____ check described in paragraph 3 above (or return it to Assignor, in the event of termination). The conveyance of the Property by the Bill of Sale is additional consideration for Assignee's executing this Assignment. Assignor warrants to Assignee that it is the sole owner of the Property and the property is conveyed free and clear of all liens and encumbrances.

5. Rent Payment by Assignor for Assignee's Benefit. Assignor retains the liability to pay Rent and other financial obligations due under the Lease for all of 200__ and the first \$ _____ of such Rent and financial obligations due for 200__, subject to the credits provided for herein (such amount being the "Assignor Rent"). Once Assignor has performed under this Assignment and paid to Landlord all Rent for 200__ and Rent for 200__ equal to \$ _____ less \$ _____ credit for the Security Deposit and less credit of \$ _____ for the Allowance, Assignor's obligation to pay Rent is satisfied. Assignor shall pay directly to Landlord and Landlord shall accept and credit to the Lease, monthly payment for Rent as provided in the Lease until Assignor has paid the entire Assignor Rent, subject to the credits provided for herein. If Assignor fails to pay the Rent monthly on or before the 5th calendar day of each month hereafter, Assignor authorizes and directs Landlord to draw against the LC's, as and when due, until the entire Assignor Rent has been paid. This Rent is additional consideration for Assignee executing this Assignment. Landlord agrees to draw on the LC's if Assignor fails to make timely payment of the Assignor Rent. Landlord waives any right to collect Rent from Assignee for the periods covered by the Assignor Rent (approximately through _____, 200__) such that this period is Rent free to Assignee. No default by Assignor will give any right to Landlord to collect Rent from

Assignee for such period. Assignor agrees to pay directly to Landlord concurrently with execution of the Assignment, all Rent and other financial obligations due under the Lease for _____, 200__.

Upon Assignor's payment of the entire Assignor Rent, Landlord shall deliver to Assignor the LC's.

6. Assignee Assumption of the Lease. Effective with the Possession Date, Assignee assumes all obligations of Assignor as tenant under the Lease (with the exception of the obligations to pay the Assignor Rent) in paragraph 5 above.

7. Release of Assignor and Landlord. Effective with the day prior to the Possession Date, Landlord releases Assignor from all of its obligations as tenant under the Lease (other than the obligation to pay the Assignor Rent) and Assignor releases Landlord from all of its obligations as landlord under the Lease. Upon the Possession Date and payment by Assignor of the Assignor Rent, Assignee releases any claims of any kind it may have against Assignor.

8. Assignor's Temporary Rights to Use the Premises. Assignee grants to Assignor a non-exclusive right to utilize the [_____] in the Premises (provided such use shall not reasonably interfere with Assignee's use) for a period not to exceed forty five (45) days after the Possession Date, at no charge. Landlord consents to this right.

9. Landlord Estoppel. Landlord acknowledges there are no defaults under the Lease. Landlord waives any claims under the Lease which may be asserted against Assignee relating to defaults which occurred prior to the Possession Date. Effective upon Landlord's receipt from Assignor of the entirety of the Assignor Rent and other financial obligations under the Lease, Landlord releases Assignor from all obligations under the Lease.

10. Modifications of the Lease. Landlord and Assignee agree (with Assignor's consent) that the Lease is modified as follows (all references are to Sections in the Lease):

[Lease modification]

11. Miscellaneous Contract Provisions. Except as specifically modified by this Assignment, the Lease shall continue in full force and effect. All capitalized terms used in this Assignment and not specifically defined herein shall have the same meaning as defined in the Lease. Time is of the essence in the performance of this Assignment. THIS ASSIGNMENT IS SUBJECT TO TEXAS LAW AND ENFORCEABLE IN HARRIS COUNTY, TEXAS. This Assignment is the entire agreement of the parties relating to the assignment of the Lease by Assignor to Assignee. The parties agree to execute such other documents as reasonably necessary to carry out the purpose of this Assignment. This Assignment may be executed in multiple counterparts which shall be construed together as a single document. Facsimile signatures to this Assignment shall be binding on the parties when executed copies are distributed via telefax transmission, provided the parties agree to provide executed originals for each party as soon as practical.

12. Lender's Consent. Landlord represents that it has the authority to execute this Assignment and Modification Agreement without the consent of Landlord's Mortgagee, or will obtain that consent prior to execution. Landlord shall provide the parties reasonable evidence of its authority.

13. Special Termination Right. Assignor may terminate this Assignment by written notice delivered to _____, and received in his office no later than 5:00 o'clock p.m. Central Time on _____, _____, 200__, by personal delivery or machine confirmed telefax transmission, in

the event that, despite Assignor's commercially reasonable efforts, Assignor is not able to sign a lease for its alternative space by such date.

LANDLORD:

By: _____
Name: _____
Title: _____

ASSIGNOR:

By: _____
Name: _____
Title: _____

ASSIGNEE:

By: _____
Name: _____
Title: _____

ATTACHMENT 5

AT YOUR REQUEST, LANDLORD IS FURNISHING THIS FORM OF ASSIGNMENT AND ASSUMPTION OF LEASE TO YOU AS A COURTESY IN CONNECTION WITH YOUR ANTICIPATED TRANSACTION AT ONE OF OUR PROPERTIES. YOU ACKNOWLEDGE THAT NEITHER LANDLORD NOR ITS REPRESENTATIVES, AGENTS OR EMPLOYEES REPRESENT YOUR INTERESTS NOR, BY FURNISHING THIS FORM, ARE WE PROVIDING LEGAL ADVICE TO YOU. LANDLORD DISCLAIMS ANY LIABILITY THAT MAY ARISE FROM YOUR USE OF THIS FORM FOR ANY PURPOSE. PLEASE READ THIS DOCUMENT CAREFULLY. YOU ARE STRONGLY URGED TO RETAIN COMPETENT LEGAL COUNSEL TO PROTECT YOUR INTERESTS AND TO ENSURE THE APPLICABILITY OF THIS FORM TO THE TERMS AND CONDITIONS OF YOUR PLANNED TRANSACTION.

[REMOVE THIS HEADING FROM FINAL DOCUMENT]

ASSIGNMENT AND ASSUMPTION OF LEASE

This ASSIGNMENT AND ASSUMPTION OF LEASE (this "Assignment") is entered into as of _____, 200__ (the "Effective Date"), between _____, a _____ ("Assignor"), and _____, a _____ ("Assignee"), with reference to the following:

A. _____ ("_____"), as Landlord, and Assignor, as Tenant, entered into that certain Office Lease dated _____, 19__ (the "Original Lease") whereby certain premises located on the _____ floor of _____ [Property Name] _____, _____ [Property Address] _____ (the "Building"), and more particularly described in the Original Lease (the "Premises"), were leased to Assignor. A copy of the Original Lease, and any amendments (the Original Lease, as amended, is referred to in this Assignment as the "Lease"), is attached and incorporated by reference for all purposes into this Assignment as **Exhibit "A"**.

[B. Crescent Real Estate _____ ("Landlord") acquired the Building from _____ and succeeded to the interest of Landlord under the Lease.]

10. Assignor desires to assign all of its right, title and interest under the Lease to Assignee, and Assignee desires to assume and perform Assignor's obligations under the Lease, upon the terms and conditions set forth below.

For good and valuable consideration, the receipt and sufficiency of which are acknowledged, Assignor and Assignee agree as follows:

11. Assignor assigns and transfers to Assignee all of Assignor's right, title and interest in and to the Lease and delegates to Assignee all of Assignor's duties and obligations under the Lease; TO HAVE AND TO HOLD the same for the unexpired term of the Lease, subject to the payment of rent and other sums in accordance with the Lease, and the performance of the covenants, conditions and stipulations contained in the Lease.

12. Assignee acknowledges that it has examined and is familiar with all of the terms and provisions of the Lease. Assignee assumes each and every obligation in the Lease to be performed by Assignor after the Effective Date, including without limitation the obligation to pay the rent and other sums due and owing to

Landlord and to perform all covenants, conditions and stipulations contained in the Lease. If the Effective Date does not fall on the first day of a calendar month, Assignee shall reimburse Assignor for its pro rata share of the rent and other payments paid to Landlord under the Lease by Assignor for such partial month.

13. Assignee agrees to hold harmless, indemnify and defend Landlord and Assignor, and their respective successors and assigns, from and against any and all losses, costs, damages, expenses, claims and/or causes of action arising out of or in connection with Assignee's performance or non-performance of the obligations of the Tenant under the Lease after the Effective Date. It is the intention of the parties to this Assignment that Assignee shall succeed to each and every right, duty and obligation of Assignor under the Lease accruing after the Effective Date.

14. Assignor agrees to hold harmless, indemnify and defend Landlord and Assignee, and their respective successors and assigns, from and against any and all losses, costs, damages, expenses, claims and/or causes of action arising out of or in connection with Assignor's performance or non-performance of the obligations of the Tenant under the Lease on or before the Effective Date. It is the intention of the parties to this Assignment that Assignor shall remain fully liable for all obligations of Assignor under the Lease accruing on or before the Effective Date.

15. Assignor covenants that, on the Effective Date, no uncured default will exist in the payment of rent or other sums due and owing to Landlord under the Lease or in the performance by Assignor of any of the terms, covenants or conditions of the Lease.

16. If either party to this Assignment commences legal action of any kind to enforce the terms and conditions of this Assignment, the prevailing party in such litigation will be entitled to collect from the other party all costs, expenses and attorneys' fees through appeal incurred in connection with such action.

17. Assignee will not, without the prior written consent of Landlord in each instance, further assign the Lease or sublet the Premises or any interest in, or part of, either the Lease or the Premises.

18. Notwithstanding anything to the contrary contained in this Assignment, this Assignment shall not enlarge or increase Landlord's obligations or liability under the Lease or otherwise.

19. Assignee acknowledges and agrees that Assignee shall not be entitled to any renewal or expansion options afforded to Assignor as the Tenant under the terms and conditions of the Lease.

20. Assignor and Assignee each agree to indemnify, defend and hold Landlord, its affiliates, successors and assigns, harmless from and against any and all damage, loss, cost or expense, including without limitation all attorneys' fees and disbursements, incurred by reason of any claim of or liability to any broker or other person for commissions or other compensation or charges with respect to the negotiation, execution and delivery of this Assignment. The obligations of Assignor and Assignee under this paragraph shall survive the expiration or sooner termination of the Lease.

ACCORDINGLY, the parties have executed this Assignment as of the Effective Date.

ASSIGNOR:

a _____

By: _____
Name/Title: _____

ASSIGNEE:

a _____

By: _____
Name/Title: _____

ATTACHMENT 6

CONSENT TO ASSIGNMENT

This CONSENT TO ASSIGNMENT (this “*Consent*”) is entered into by and among Landlord, Tenant and Assignee with reference to the following:

1. General Terms. All capitalized terms used in this Consent shall have the same meanings as set forth in the Lease, unless otherwise provided below:

- a. “*Effective Date*”: _____, 200__
- b. “*Landlord*”: CRESCENT REAL ESTATE _____,
a Delaware limited partnership[include successor-in-interest language, if applicable]
- c. “*Tenant*”: _____,
a _____
[include successor-in-interest language, if applicable]
- d. “*Assignee*”: _____,
a _____
- e. “*Lease*”: _____ [include title and date], as it
may have been amended from time to time
- f. “*Premises*”: Approximately _____ square feet of Rentable Area on the
_____ floor(s) of the Building.
- g. “*Building*”: _____
[include name and address]
- h. “*Assignment*”: _____
[include title and date]
- i. “*Excess Consideration*”: \$ _____, payable to Landlord within 30 days
of the Effective Date.

2. Recitals.

- a. Tenant is the tenant under the Lease, under which Landlord leased to Tenant the Premises located in the Building.
- b. Tenant desires to assign all of its right, title and interest in the Lease to Assignee.
- c. The terms of the Lease require Landlord’s consent to any such assignment.

3. Landlord’s Consent. As of the Effective Date, Landlord consents to the assignment of all of Tenant’s right, title and interest in and under the Lease to Assignee pursuant to the Assignment, a copy of which is attached as **Exhibit “A”**, subject to the terms and conditions of this Consent.

4. **Assumption.** Assignee expressly assumes and agrees to perform all of the covenants, duties and obligations of Tenant under the Lease. Assignee acknowledges that it has examined and is familiar with all of the terms and provisions of the Lease.

5. **No Release or Further Transfer.**

(a) *Continued Liability of Tenant and any Guarantors.* Landlord's consent shall not be deemed in any way or manner to be a waiver or release of Tenant or any guarantor(s) of Tenant's obligations under the Lease from the responsibility and liability for the payment of rent under the Lease and for compliance with any and all obligations to be performed by Tenant as the tenant under the Lease.

(b) *Prohibition Against Further Transfer.* Assignee shall not, without Landlord's prior written consent in each instance, (i) convey, assign or encumber the Lease or any interest in the Lease, directly or indirectly, voluntarily or by operation of law, including the merger or conversion of Assignee with or into another entity, (ii) sublet all or any portion of the Premises, or (iii) permit the use or occupancy of any part of the Premises by anyone other than Assignee (any of the foregoing actions shall be a "***Prohibited Transfer***"). If Assignee is other than an individual, any change in Control (defined in the following sentence) of Assignee shall constitute a Prohibited Transfer. "***Control***" means the direct or indirect power to direct or cause direction of the management and policies of an entity, whether through ownership of voting securities, by contract or otherwise. Conversely, Tenant and Assignee shall not sublease space from, or assume the lease obligations of, another tenant in the Building (or, if the Building is part of a multi-building project, another tenant in such project) without Landlord's prior written consent. Following any Prohibited Transfer, Tenant or Assignee, as applicable (and any guarantors) shall remain fully liable under the Lease and this Consent, as either may be amended with or without notice to or consent of Tenant or Assignee (or any guarantors), and Landlord may proceed directly under the Lease or this Consent against Tenant or Assignee (or any guarantors) without first proceeding against any other party. If Landlord, or an affiliate of Landlord, is a real estate investment trust under Section 856, *et seq.* of the Internal Revenue Code of 1986, as amended ("***Code***"), any Prohibited Transfer will be void *ab initio*.

6. **Landlord's Obligations.** Notwithstanding anything to the contrary contained in the Assignment, neither the Assignment nor this Consent shall (i) enlarge or increase Landlord's obligations or liability, or (ii) reduce or decrease Landlord's rights, under the Lease or otherwise. Landlord is not a party to the Assignment and, therefore, is not bound by any of the terms of the Assignment.

7. **Excess Consideration.** In the event that the rental and other consideration payable to Tenant by Assignee under the Assignment exceed the rental payable under the Lease, then Tenant shall be bound and obligated to pay Landlord the Excess Consideration set forth in **Paragraph 1.i**. Tenant's failure to pay to Landlord such amounts when due shall be an event of default under the Primary Lease.

8. **Options.** Assignee acknowledges and agrees that Assignee shall not be entitled to exercise any renewal, expansion, right of first refusal or other similar options or rights afforded to Tenant under the Lease.

9. **Brokerage.** Tenant and Assignee each agree to indemnify, defend and hold Landlord and its designated property management, construction and marketing firms harmless from and against any and all damage, loss, cost or expense, including, without limitation, all attorneys' fees and disbursements, incurred by reason of any claim of or liability to any broker or other person for commissions or other compensation or charges with respect to the negotiation, execution and delivery of the Assignment. The

obligations of Tenant and Assignee under this **Paragraph** shall survive the expiration or sooner termination of the Lease.

10. Other Agreements. Other than the Lease, the Assignment and this Consent, there are no other agreements or understandings, whether written or oral, between Tenant and Assignee with respect to the assignment of the Lease to Assignee or with respect to Assignee's use and occupancy of the Premises. No compensation or consideration is payable or will become due and payable to Tenant or any affiliate of Tenant in connection with the Assignment of Tenant's leasehold interest other than the consideration expressly set forth in the Assignment. This Consent shall not be amended orally, but only by an agreement in writing signed by all parties to this Consent.

11. INDEMNITY. IN ADDITION TO ANY OTHER RIGHT OR REMEDY AVAILABLE TO LANDLORD AT LAW, IN EQUITY, OR UNDER THE LEASE OR THIS CONSENT FOR ASSIGNEE'S VIOLATION OF **PARAGRAPH 5** OF THIS CONSENT, TENANT AND ASSIGNEE SHALL INDEMNIFY LANDLORD AGAINST ANY DAMAGES, LOSSES, INJURIES, COSTS, EXPENSES OR LIABILITIES RESULTING FROM THE FAILURE OF ANY PART OF THE GROSS INCOME FROM THE BUILDING TO QUALIFY AS "RENTS FROM REAL PROPERTY", AS SUCH TERM IS DEFINED IN SECTION 856(d) OF THE CODE, BECAUSE OF A PROHIBITED TRANSFER.

12. Binding Effect. This Consent and its provisions shall be binding on and inure to the benefit of the parties to this Consent and their successors and permitted assigns.

13. Recording. Neither this Consent nor the Assignment may be recorded, without Landlord's prior written consent.

14. Conflicts. In the event of any conflicts among the provisions of the Lease, the Assignment and this Consent, the provisions of this Consent and the Lease shall control; and in the event of any conflicts between the provisions of the Lease and this Consent, the provisions of this Consent shall control.

ACCORDINGLY, the parties have executed this Consent as of the Effective Date.

LANDLORD:

CRESCENT REAL ESTATE _____,
a Delaware limited partnership
By: _____,
a Delaware corporation, its General Partner

By: _____
Name: _____
Title: _____

TENANT:

a _____
By: _____
Name: _____
Title: _____

ASSIGNEE:

a _____

By: _____
Name: _____
Title: _____

THE UNDERSIGNED "GUARANTOR" JOINS IN THE EXECUTION OF THIS CONSENT TO EVIDENCE ITS ACKNOWLEDGEMENT OF THE FOREGOING TERMS AND CONDITIONS, AND TO RATIFY AND CONFIRM ITS CONTINUING OBLIGATIONS AS GUARANTOR OF TENANT'S OBLIGATIONS UNDER THE LEASE:

a _____

By: _____
Name: _____
Title: _____

Exhibit A: Assignment and Assumption of Lease

ATTACHMENT 7

(State Bar Form)

SUBLEASE

Date:

Sublessor:

Sublessor's Address:

Sublessee:

Sublessee's Address:

Subleased Premises:

Sublease Commencement Date:

Sublease Termination Date:

Sublease Term:

Sublease Rent:

Permitted Sublease Use:

Base Lease:

Date:

Landlord:

Tenant:

Premises:

Sublessee agrees to--

1. Sublease the subleased premises for the sublease term beginning on the sublease commencement date and ending on sublease termination date.
2. Pay the sublease rent to Sublessor in advance of the first day of each month.
3. Obey all laws, rules and regulations, and terms of the base lease as they apply to the subleased premises.

4. Promptly move out of the subleased premises on the sublease termination date or on the termination of this sublease.

5. Indemnify, defend, and hold Sublessor harmless from any loss, attorney's fees, expenses, or claims arising out of use of the subleased premises or resulting from Sublessee's failure to comply with the base lease.

6. Maintain public liability insurance for the subleased premises and the conduct of Sublessee's business, with Sublessor named as an additional insured, in the amounts stated in the base lease.

7. Maintain insurance on Sublessee's personal property.

8. Deliver certificates of insurance to Sublessor before the sublease commencement date and thereafter when requested.

Sublessee agrees not to--

1. Use the subleased premises for any purpose other than the permitted sublease use.

2. (a) Create a nuisance, (b) interfere with any other tenant's normal business operations or Landlord's management of the building, (c) permit any waste, or (d) use the subleased premises in any way that is extra hazardous, would increase insurance premiums, or would void insurance on the building.

3. Change Landlord's lock system.

4. Alter the subleased premises.

5. Allow a lien to be placed on the subleased premises.

6. Assign this sublease or sublease any portion of the subleased premises without Sublessor's written consent.

Sublessor agrees to--

1. Sublease the subleased premises to Sublessee for the sublease term.

2. Comply with the Tenant's obligations under the base lease.

3. Enforce Landlord's obligations under the base lease.

4. Make available to the subleased premises all services and rights provided under the base lease.

General Provisions

1. Defaults by Sublessee are (a) failing to timely pay sublease rent, (b) abandoning or vacating a substantial portion of the subleased premises, or (c) failing to comply within ten days after written notice with any provision of the lease or sublease other than the defaults set forth in (a) or (b) above.

2. Sublessor's remedies for Sublessee's default are to (a) enter on and take possession of the subleased premises, after which Sublessor may relet the subleased premises on behalf of Sublessee and receive the sublease rent directly by reason of the reletting, and Sublessee agrees to reimburse Sublessor for any expenditures made in order to relet; (b) enter the subleased premises and perform Sublessee's obligations; or (c) terminate this sublease by written notice and sue for damages.

3. Default by Sublessor is failing to comply with any provision of this sublease within thirty days after written notice.

4. Sublessee's remedy for Sublessor's default is to sue for damages.

5. This sublease is subordinate to the base lease, a copy of which Sublessee acknowledges as received.

6. Sublessor may retain, destroy, or dispose of any property left in the subleased premises at the end of the sublease term.

7. Sublessor has all the rights of Landlord under the base lease as to Sublessee.

8. If either party retains an attorney to enforce this sublease, the prevailing party is entitled to recover reasonable attorney's fees.

[Add additional clauses here, if necessary.]

SUBLESSOR:

By: _____

Name: _____

Title: _____

SUBLESSEE:

By: _____

Name: _____

Title: _____

Consent of Landlord

Landlord consents to this sublease by Sublessor to Sublessee.

LANDLORD:

By: _____

Name: _____

Title: _____

(add acknowledgements, if necessary)

ATTACHMENT 8

AT YOUR REQUEST, LANDLORD IS FURNISHING THIS FORM OF SUBLEASE AGREEMENT TO YOU AS A COURTESY IN CONNECTION WITH YOUR ANTICIPATED SUBLEASE TRANSACTION AT ONE OF OUR PROPERTIES. YOU ACKNOWLEDGE THAT NEITHER LANDLORD NOR ITS REPRESENTATIVES, AGENTS OR EMPLOYEES REPRESENT YOUR INTERESTS NOR, BY FURNISHING THIS FORM, ARE WE PROVIDING LEGAL ADVICE TO YOU. LANDLORD DISCLAIMS ANY LIABILITY THAT MAY ARISE FROM YOUR USE OF THIS FORM FOR ANY PURPOSE. PLEASE READ THIS DOCUMENT CAREFULLY. YOU ARE STRONGLY URGED TO RETAIN COMPETENT LEGAL COUNSEL TO PROTECT YOUR INTERESTS AND TO ENSURE THE APPLICABILITY OF THIS FORM TO THE TERMS AND CONDITIONS OF YOUR PLANNED TRANSACTION.

[REMOVE THIS HEADING FROM FINAL DOCUMENT]

SUBLEASE AGREEMENT

This SUBLEASE AGREEMENT (this “Sublease”) is entered into as of _____, 200__ (the “Effective Date”), between _____, a _____ (“Tenant”) and _____, a _____ (“Subtenant”), with reference to the following:

A. (“_____”), as Landlord, and Tenant, entered into that certain Office Lease dated _____, 19__ (the “Original Lease”) whereby certain premises located on the _____ floor of _____ [Property Name] _____, _____ [Property Address] (the “Building”), and more particularly described in the Original Lease (the “Premises”), were leased to Tenant. A copy of the Original Lease, and any amendments (the Original Lease, as amended, is referred to in this Sublease as the “Primary Lease”), is attached and incorporated by reference for all purposes into this Sublease as **Exhibit “B”**.

[B. Crescent Real Estate _____ (“Landlord”) acquired the Building from _____ and succeeded to the interest of Landlord under the Primary Lease.]

C. Tenant desires to sublease a portion of the Premises to Subtenant, and Subtenant wishes to sublease a portion of the Premises from Tenant.

For good and valuable consideration, the receipt and sufficiency of which are acknowledged, Tenant and Subtenant agree as follows:

1. **Sublease.** Tenant subleases to Subtenant, and Subtenant subleases from Tenant, upon the terms and conditions set forth in this Sublease, a portion of the Premises consisting of approximately _____ rentable square feet as shown on the drawing attached to this Sublease as **Exhibit “A”** and incorporated by reference for all purposes (the “Subleased Premises”).

2. **Term.** The term of the Sublease shall be for a period of _____ (____) months commencing on _____, 200__, and ending on _____, 200__ (the “Expiration Date”); provided, however, that this Sublease shall terminate earlier upon termination, for any cause whatsoever, of the Primary Lease.

3. Rent.

(a) Subtenant agrees to pay Tenant for the use of the Subleased Premises the monthly sum of \$_____ (“Base Rent”). The Base Rent shall be paid in advance on or before the first day of each calendar month without notice or demand. Base Rent for any partial month shall be prorated.

(b) Subtenant further agrees to pay its pro rata share of the [**Operating Expenses**] (as defined in Paragraph _____ of the Primary Lease). For the purposes of this Paragraph, Subtenant’s pro rata share shall be determined by multiplying (i) the fraction having as its numerator the number of rentable square feet in the Subleased Premises and having as its denominator the number of rentable square feet in the Premises, times (ii) the amount of [**Operating Expenses**] owed by Tenant to Landlord under the Primary Lease. Subtenant agrees to make all such payments to Tenant at least five (5) days prior to the date on which Tenant is required to make such payments to Landlord pursuant to the Primary Lease.

4. Primary Lease.

(a) The terms and conditions of the Primary Lease are incorporated into this Sublease by reference for all purposes. Subtenant, by Subtenant’s execution of this Sublease, acknowledges that Tenant has furnished Subtenant with a copy of the Primary Lease, Subtenant has examined the Primary Lease and is familiar with its terms. Except as otherwise expressly provided in this Sublease, Subtenant agrees to comply in all respects with the terms and conditions of the Primary Lease insofar as the same are applicable to the Subleased Premises.

(b) As between Tenant and Subtenant, Tenant shall be entitled to all of the rights and remedies reserved by and granted to the landlord in the Primary Lease as if Tenant was the “Landlord” under the Primary Lease and Subtenant was the “Tenant” under the Primary Lease. Such rights and remedies are incorporated into this Sublease by reference for all purposes.

(c) This Sublease is subject and subordinate to all of the terms, covenants and conditions of the Primary Lease and to all of the rights of Landlord under the Primary Lease. If the Primary Lease terminates for any reason prior to the expiration or termination of this Sublease, Subtenant shall not have any claim whatsoever against Tenant arising or resulting from such termination of the Primary Lease.

5. Limitation of Liability and Indemnity. Notwithstanding any provision of the Primary Lease to the contrary, neither Landlord nor the Tenant shall be liable to Subtenant, or any of its agents, employees, servants or invitees, for any damage to persons or property due to the condition or design or any defect in the Building or its mechanical systems which may exist or subsequently occur. Subtenant with respect to itself and its agents, employees, servants and invitees, expressly assumes all risks and damage to persons and property, either proximate or remote, by the reason of the present or future condition of the Subleased Premises or the Building. All indemnification, hold harmless and release provisions contained in the Primary Lease running to the benefit of Landlord are incorporated into this Sublease by reference for the benefit of Tenant as if Tenant was the “Landlord” and Subtenant was the “Tenant” under the Primary Lease. Except as otherwise expressly provided in this Sublease, all indemnification, hold harmless and release provisions contained in the Primary Lease running to the benefit of the Tenant are incorporated into this Sublease by reference for the benefit of Subtenant as if Subtenant was the “Tenant” under the Primary Lease and Tenant was the “Landlord” under the Primary Lease. This paragraph is for the benefit of the Subtenant, Tenant and Landlord only, and no right of action shall accrue under this paragraph to any other party by way of subrogation or otherwise.

6. Furniture. Except as provided in the following sentence, all furniture and equipment placed in the Subleased Premises by Subtenant shall remain the property of Subtenant, subject to the rights of Tenant in

such property as provided by law. The Subtenant may, prior to the expiration of the Sublease term, remove all furniture and equipment, provided such removal is done so as not to damage the Subleased Premises.

7. Alterations. Subtenant may not make any alterations, improvements or additions to the Subleased Premises (collectively, "Improvements") without the express prior written consent of Landlord and Tenant. Any Improvements to which Landlord and Tenant consent must be constructed and installed in accordance with (i) all requirements contained in the Primary Lease and (ii) any requirements imposed by Tenant to protect Tenant's interest in the Primary Lease and/or in the Subleased Premises. Further, upon termination of this Sublease, any Improvements to the Subleased Premises shall remain in the Subleased Premises, and Subtenant shall not have the right to remove such Improvements.

8. Damage and Destruction.

(a) If the Subleased Premises, or any portion of the Subleased Premises, are damaged or destroyed by any cause whatsoever, such that the Primary Lease is terminated, this Sublease shall terminate immediately upon termination of the Primary Lease. Rent and any other payments for which Subtenant is liable shall be apportioned and paid to the date of such damage or destruction, and Subtenant shall immediately deliver possession of the Subleased Premises to Tenant.

(b) If all or any portion of the Subleased Premises is damaged or destroyed by any cause whatsoever, and such damage or destruction is not significant enough to cause a termination of the Primary Lease, Tenant agrees, subject to Paragraph ___ of the Primary Lease, to use good faith efforts to cause Landlord to repair such damage. Notwithstanding any such damage, Subtenant shall continue to be obligated to pay all rent under this Sublease during the period of restoration.

9. Condemnation. Upon any taking by condemnation or other eminent domain proceeding of all or a portion of the Premises which results in the termination of the Primary Lease, this Sublease shall terminate concurrently with the Primary Lease. As between Tenant and Subtenant, any awards or damages payable as a result of such taking by condemnation or other eminent domain proceeding shall be the sole property of Tenant, and Subtenant shall have no claim to any part of such awards or damages.

10. Certificates. Subtenant agrees to furnish to Tenant or to Landlord certificates certifying as to any information reasonably requested by either Tenant or Landlord.

11. Condition of Subleased Premises and Surrender of the Subleased Premises. Subtenant acknowledges that (a) Subtenant has fully inspected the Subleased Premises and accepts the same in their present condition, "as is, where is", with all faults, and (b) Tenant has made no warranties or representations to Subtenant whatsoever with respect to the condition of the Subleased Premises. Upon the expiration or termination of this Sublease, Subtenant agrees to return the Subleased Premises to Tenant and Landlord in the condition required by the Primary Lease.

12. Certificates, Licenses and/or Permits. Subtenant shall, at Subtenant's sole expense, obtain all necessary certificates, licenses or permits to do business in the Subleased Premises, which may be required by any governmental authorities.

13. Attorneys' Fees and Costs of Enforcement. If either party to this Sublease commences an action to enforce any of the provisions of this Sublease, the prevailing party in such action shall be entitled to collect all of the costs of such action (including, without limitation, attorneys' fees and court costs) from the other party. Subtenant shall also pay all reasonable attorneys' fees and other expenses incurred by Tenant incident to the negotiation and preparation of this Sublease.

14. Cumulative Rights and Remedies. No right or remedy contained in this Sublease, in the Primary Lease, or provided by law is intended to be exclusive of any other right or remedy, but shall be cumulative and in addition to every other right or remedy.

15. Assignment and Subletting. Subtenant may not assign Subtenant's rights under this Sublease or sublet all or any portion of the Subleased Premises.

16. General Provisions. This Sublease sets forth the complete agreement between Tenant and Subtenant regarding the subject matter of this Sublease. This Sublease may not be terminated, amended or modified in any respect except by agreement in writing executed by both Tenant and Subtenant. All duties and obligations of Subtenant under this Sublease that are unperformed shall survive the termination or expiration of this Sublease. Except as limited by this Paragraph, this Sublease, and all the terms and conditions of this Sublease, shall be binding upon and inure to the benefit of both Tenant and Subtenant and their respective successors, representatives and assigns.

ACCORDINGLY, the parties have executed this Sublease as of the date first set forth above.

TENANT:

a _____

By: _____
Name/Title: _____

SUBTENANT:

a _____

By: _____
Name/Title: _____

ATTACHMENT 9

CONSENT TO SUBLEASE

This CONSENT TO SUBLEASE (this “*Consent*”) is entered into by and among Landlord, Tenant and Subtenant with reference to the following:

1. General Terms. All capitalized terms used in this Consent shall have the same meanings as set forth in the Primary Lease, unless otherwise provided below:

- a. “*Effective Date*”: _____, 200__
- b. “*Landlord*”: CRESCENT REAL ESTATE _____,
a Delaware limited partnership[include successor-in-interest language, if applicable]
- c. “*Tenant*”: _____,
a _____
[include successor-in-interest language, if applicable]
- d. “*Subtenant*”: _____,
a _____
- e. “*Primary Lease*”: _____ [include title and date] _____, as it
may have been amended from time to time
- f. “*Primary Premises*”: Approximately _____ square feet of Rentable Area on the
_____ floor(s) of the Building.
- g. “*Building*”: _____
[include name and address]
- h. “*Sublease*”: _____
[include title and date]
- i. “*Subleased Premises*”: Approximately _____ square feet of Rentable Area on the
_____ floor(s) of the Building.
- j. “*Excess Rent*”: \$_____, payable to Landlord within 30 days of
Tenant’s receipt of such Excess Rent from Subtenant.

2. Recitals.

- a. Tenant is the tenant under the Primary Lease, under which Landlord leased to Tenant the Primary Premises located in the Building.
- b. Tenant desires to sublease the Subleased Premises to Subtenant.
- c. The Primary Lease requires Landlord’s consent to any sublease.

3. Landlord's Consent.

a. *Consent and Subtenant Acknowledgement.* As of the Effective Date, Landlord consents to the sublease of the Subleased Premises from Tenant to Subtenant pursuant to the Sublease, a copy of which is attached to this Consent as **Exhibit "A"**, subject to the terms and conditions of this Consent. Subtenant acknowledges that it has examined and is familiar with all of the terms and provisions of the Primary Lease.

b. *Prohibition Against Further Transfers.* Tenant and Subtenant shall not, without Landlord's prior written consent in each instance, (i) convey, assign or encumber the Primary Lease or the Sublease or any interest in either, directly or indirectly, voluntarily or by operation of law, including the merger or conversion of Tenant or Subtenant with or into another entity, (ii) sublet all or any portion of the Primary Premises or Subleased Premises, (iii) permit the use or occupancy of any part of the Primary Premises or Subleased Premises by anyone other than Tenant or Subtenant, as applicable (any of the foregoing actions shall be a "**Prohibited Transfer**"), or (iv) amend the Sublease. If Tenant or Subtenant is other than an individual, any change in Control (defined in the following sentence) of Tenant or Subtenant shall constitute a Prohibited Transfer. "**Control**" means the direct or indirect power to direct or cause direction of the management and policies of an entity, whether through ownership of voting securities, by contract or otherwise. Conversely, Tenant and Subtenant shall not sublease space from, or assume the lease obligations of, another tenant in the Project without Landlord's prior written consent. Following any Prohibited Transfer, Tenant or Subtenant, as applicable (and any guarantors) shall remain fully liable under the Primary Lease and this Consent, as either may be amended with or without notice to or consent of Tenant or Subtenant (or any guarantors), and Landlord may proceed directly under the Primary Lease or this Consent against Tenant or Subtenant (or any guarantors) without first proceeding against any other party. If Landlord, or an affiliate of Landlord, is a real estate investment trust under Section 856, *et seq.* of the Internal Revenue Code of 1986, as amended ("**Code**"), any Prohibited Transfer will be void *ab initio*.

4. Sublease Subordination. The Sublease shall be subject and subordinate at all times to all of the covenants, agreements, terms, provisions and conditions of the Primary Lease and of this Consent. Neither Tenant nor Subtenant shall do or permit anything to be done in connection with the Sublease or Subtenant's occupancy of the Subleased Premises that will violate the Primary Lease or this Consent. As between Landlord and Subtenant, the Sublease shall automatically terminate upon termination of the Primary Lease for any reason whatsoever, notwithstanding any other provision of the Sublease to the contrary.

5. Alterations. Subtenant agrees that no alterations, additions or physical changes will be made in or to any part of the Subleased Premises without Landlord's prior written consent in each instance, except as may be permitted under the Primary Lease.

6. No Release. Landlord's consent shall not be deemed in any way or manner to be a waiver or release of Tenant or any guarantor(s) of Tenant's obligations under the Primary Lease from the responsibility and liability for the payment of rent under the Primary Lease and for compliance with any and all obligations to be performed by Tenant as the tenant under the Primary Lease. Without limiting the scope of the preceding sentence, it is specifically understood that Tenant shall remain fully liable for the obligation to pay Landlord for any special services provided to Subtenant in the course of Subtenant's use and occupancy of the Subleased Premises, whether or not specifically provided for in the Primary Lease (including, without limitation, after-hours heating and air conditioning of the Subleased Premises), and Tenant hereby covenants and agrees that unless and until Landlord receives a written notice to the contrary from Tenant, Landlord may honor Subtenant's request for any such special services without the specific consent of Tenant. After an event of default by Tenant under the Primary Lease, Landlord may,

in addition to any other remedies under the Primary Lease or at law, collect directly from Subtenant all rents due and owing from Subtenant and apply any such rent against sums due to Landlord by Tenant as tenant under the Primary Lease. Further, Tenant authorizes and directs Subtenant to make such payments of rent directly to Landlord upon its receipt of written notice of default from Landlord. The collection of any such rents shall not be deemed a waiver of any rights and remedies of Landlord against Tenant as the tenant under the Primary Lease or constitute a novation or release of Tenant as tenant from the further performance of its obligations under the Primary Lease. Tenant acknowledges that the receipt by Landlord from Subtenant of any such rents shall be a full and complete release, discharge and acquittance of any claims by Tenant for rent against such Subtenant to the extent of any such amount of rent so paid to Landlord. In addition, Tenant agrees that it forfeits its rights to any excess consideration to which it may otherwise be entitled during any period when Tenant is in default under the Primary Lease, and any such excess consideration shall be payable to Landlord.

7. Landlord's Obligations. Notwithstanding anything to the contrary contained in the Sublease, neither the Sublease nor this Consent shall (i) enlarge or increase Landlord's obligations or liability, or (ii) reduce or decrease Landlord's rights, under the Primary Lease or otherwise. Landlord is not a party to the Sublease and, therefore, is not bound by the Sublease or any of its terms. Landlord shall have no responsibility or obligation to Subtenant for the performance by Tenant of its obligations under the Sublease. Similarly, Landlord shall have no responsibility or obligation to Subtenant for the performance of any obligations Landlord may owe to Tenant under the Primary Lease.

8. Excess Rents. In the event that the rental and other consideration payable to Tenant by Subtenant under the Sublease exceed the rental payable under the Primary Lease with respect to the Subleased Premises, then Tenant shall be bound and obligated to pay Landlord the Excess Rent set forth in **Paragraph 1.j**. Tenant's failure to pay to Landlord such amounts when due shall be an event of default under the Primary Lease.

9. Options. Subtenant acknowledges and agrees that Subtenant shall not have the right to exercise any renewal, expansion, right of first refusal or other similar options or rights afforded to Tenant under the Primary Lease.

10. Brokerage. Tenant and Subtenant each agree to indemnify, defend and hold Landlord and its designated property management, construction and marketing firms harmless from and against any and all damage, loss, cost or expense, including, without limitation, all attorneys' fees and disbursements, incurred by reason of any claim of or liability to any broker or other person for commissions or other compensation or charges with respect to the negotiation, execution and delivery of the Sublease. The obligations of Tenant and Subtenant under this **Paragraph 10** shall survive the expiration or sooner termination of the Sublease.

11. Other Agreements. Other than the Sublease, the Primary Lease and this Consent, there are no other agreements or understandings, whether written or oral, between Tenant and Subtenant with respect to Subtenant's use and occupancy of the Subleased Premises or any property of Tenant located in the Building. No compensation or consideration is payable or will become due and payable to Tenant or any affiliate of Tenant in connection with the Sublease other than the rentals expressly set forth in the Sublease. This Consent shall not be amended orally, but only by an agreement in writing signed by all parties to this Consent.

12. INDEMNITIES. IN ADDITION TO ANY OTHER RIGHT OR REMEDY AVAILABLE TO LANDLORD AT LAW, IN EQUITY, OR UNDER THE PRIMARY LEASE OR THIS CONSENT FOR SUBTENANT'S VIOLATION OF **PARAGRAPH 3** OF THIS CONSENT, TENANT AND SUBTENANT INDEMNIFY LANDLORD AGAINST ANY DAMAGES, LOSSES, INJURIES, COSTS, EXPENSES OR LIABILITIES RESULTING FROM THE FAILURE OF ANY

PART OF THE GROSS INCOME FROM THE BUILDING TO QUALIFY AS “RENTS FROM REAL PROPERTY”, AS SUCH TERM IS DEFINED IN SECTION 856(d) OF THE CODE, BECAUSE OF A PROHIBITED TRANSFER.

13. Binding Effect. This Consent shall be binding on and inure to the benefit of the parties to this Consent and their successors and permitted assigns.

14. Recording. Neither this Consent nor the Sublease may be recorded, without Landlord’s prior written consent.

15. Conflicts. In the event of any conflicts among the provisions of the Primary Lease, the Sublease and this Consent, the provisions of this Consent and the Primary Lease shall control; and in the event of any conflicts between the provisions of the Primary Lease and this Consent, the provisions of this Consent shall control.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

ACCORDINGLY, the parties have executed this Consent as of the Effective Date.

LANDLORD:

CRESCENT REAL ESTATE _____,
a Delaware limited partnership

By: _____,
a Delaware corporation, its General Partner,

By: _____
Name: _____
Title: _____

TENANT:

a _____

By: _____
Name: _____
Title: _____

SUBTENANT:

a _____

By: _____
Name: _____
Title: _____

THE UNDERSIGNED "GUARANTOR" JOINS IN THE EXECUTION OF THIS CONSENT TO EVIDENCE ITS ACKNOWLEDGEMENT OF THE FOREGOING TERMS AND CONDITIONS, AND TO RATIFY AND CONFIRM ITS CONTINUING OBLIGATIONS AS GUARANTOR OF TENANT'S OBLIGATIONS UNDER THE PRIMARY LEASE:

a _____

By: _____
Name: _____
Title: _____

Exhibit A – Sublease Agreement

ATTACHMENT 10

SUBLEASING CHECKLIST

By: Candace Baggett
The Calibre Group
Houston, Texas

- I. Prime lease drafting considerations:
 - A. Use clause
 1. Landlord position – narrow
 2. Tenant position – broad (any legal use)
 - B. Sublease/assignment clause
 1. Tenant right to sublease/assign:
 - General right
 - to related entity, affiliate, and successor without landlord’s consent or right of recapture
 - office sharing arrangements with related entities
 - merger or asset sale
 2. Landlord’s consent not to be unreasonable withheld, delayed, or conditioned.
 3. Reasons landlord may withhold consent:
 - use
 - character of sublessee/assignee
 - financial instability of sublessee/assignee
 - exclude building tenants
 - exclude building or project tenants or occupants if landlord has comparable space for lease
 - exclude anyone involved in litigation with landlord
 4. Notification to landlord of pending sublease/assignment
 5. Information to landlord regarding sublessee/assignee
 6. Landlord charge for legal review
 7. Period for landlord response
 8. Landlord right to recapture/tenant right to withdraw request if landlord intends to recapture
 9. Tenant release - if sublessee/assignee has credit equal to or greater than that of tenant, tenant to be released from liability under the lease
 10. Definition of “sublease/assignment profit” – will want Tenant to recoup its reasonable costs such as downtime, leasing commissions, remodeling costs, unamortized tenant improvements (including cabling, engineering, architectural expenses) attorneys’ fees, advertising, etc.
 11. Sublease profit split between landlord and sublessor/assignor
 12. Sublessee/assignee right to sublease/assign
 13. Nondisturbance agreement for sublessees/assignees
 - C. Lease provisions
 1. Tenant options (renewal, expansion, etc.)
 2. Parking rights
 3. Signage rights

- II. Sublease/assignment considerations - sublessor's/assignor's viewpoint
 - A. Initial issues
 - 1. Review sublease/assignment provisions of prime lease to determine sublessor's/assignor's right to sublease/assign, timing of notice to landlord, landlord's consent requirements, landlord's right to recapture, charges landlord may impose for legal review, compliance with sublease/assignment procedures, removal of items that could arguably be classified as "fixtures", etc.
 - 2. Determine marketability of premises.
 - 3. Ascertain if space is divisible. Work with space planner to ensure compliance with life/safety codes.
 - 4. Determine if furniture and equipment may be sold or leased as part of sublease/assignment.
 - 5. Establish early dialog with landlord regarding sublessor's/assignor's intent to sublease/assign, landlord's plan to exercise any right to recapture, landlord's willingness to extend term and on what basis, etc. If prime lease provides that "profit" will be split, discuss with landlord anticipated "profit" and expenses that sublessor/assignor will incur and deduct prior to the splitting of any "profit."
 - 6. Obtain copy of landlord's preferred form of sublease agreement and consent to sublease. Discuss proposed revisions with landlord.
 - B. Assignment of prime lease provisions
 - 1. Verify if options can be assigned (renewal, expansion, etc.) Even if options are not assignable, try to ascertain willingness of landlord to extend lease and/or grant a renewal option if desired by sublessee/assignee. Try to get sublessor/assignor released from liability by landlord if options exercised.
 - 2. Verify if parking rights can be assigned. Agree to convey no more than what sublessor/assignor has contractually obtained from landlord.
 - 3. Verify if signage rights can be assigned.
 - C. Economics
 - 1. Provide that sublease is same type of transaction as prime lease: net/gross
 - 2. Provide that expense pass-throughs are based upon landlord's billings, not actual expenses of the building or project.
 - 3. Provide that sublessee/assignee pays rental prior to due date under prime lease.
 - D. Credit/liability
 - 1. Review sublessee's/assignee's financial statements to determine risk imposed by transaction.
 - 2. Sublessee/assignee is to provide adequate security deposit. Address credit enhancement issues by obtaining an unusually large security deposit, prepayment of rent, guaranty by corporate parent, letter of credit, personal guaranty.
 - 3. Try to get sublessor/assignor released from liability by landlord if sublessee/assignee has credit equal to or greater than that of sublessor/assignor. Try to get guarantors released from liability.
 - E. Leasehold improvements
 - 1. Leasehold improvements are to be provided "as-is, where-is."
 - 2. Limit sublessee's/assignee's rights to alter/remodel the premises without sublessor's/assignor's approval.
 - 3. Disclaim express and implied warranties with respect to leasehold improvement, including implied warranty of suitability of premises for sublessee's/assignee's intended purposes.
 - F. Default by parties
 - 1. Provide that sublessor/assignor has no liability for landlord's failure to provide services.

2. Provide that sublessee/assignee must perform obligations under prime lease in shorter time period than that required of sublessor/assignor.
3. Address default by sublessee/assignee. Sublessor/assignor will want sublessee/assignee to assume obligations under the prime lease, and sublessor/assignor will want to be able to enforce landlord's remedies.
4. Sublessor will want the clear right to regain possession in the event of sublessee's default.
5. Provide holdover rate and terms.
6. Ensure that landlord's written consent to sublease has been obtained prior to date of move-in by sublessee/assignee. Prime lease probably provides that sublessor/assignor is in default of lease otherwise.

III. Sublease/assignment considerations - sublessee's/assignee's viewpoint

A. Initial issues

1. Review sublease/assignment language from prime lease immediately
2. Review entire prime lease as soon as possible since sublessee/assignee is bound to terms of prime lease and covenants to comply with prime lease.
3. Establish early dialog with landlord to ascertain landlord's intentions *vis-à-vis* the proposed sublease/assignment transaction, as well as landlord's willingness to extend the term and the term for any extension.

B. Economics

1. Try to structure sublease on a gross versus net lease basis whenever possible, irrespective of type of prime lease.
2. Try to negotiate the highest expense stop/base year possible to limit sublessee's exposure to operating expense escalations.

C. Credit/liability

1. Review sublessor's/assignor's financial statements to determine risk imposed by transaction.
2. Provide minimal security deposit.
3. Try to avoid any credit enhancement, such as additional security deposit, prepayment of rent, guaranty by corporate parent, letter of credit, personal guaranty.

D. Leasehold improvements

1. Obtain sublessor's/assignor's/landlord's consent to alterations/remodeling in advance for initial work.
2. Provide that sublessor's/assignor's consent is not required for future renovations.
3. Negotiate upfront tenant improvement allowance or alternately, a rental abatement period to offset the cost of refurbishing premises.

E. Assignment of prime lease provisions

1. Review options (renewal, expansion, etc.) to determine if they are assignable. If not, try to obtain consent from landlord. If landlord is amenable to providing a renewal option to sublessee/assignee, consider attaching the form of lease to be used in the event of a renewal if new lease terms are desirable.
2. Review parking rights to determine if they are assignable. If not, try to obtain consent from landlord.
3. Review signage rights to determine if they are assignable. If not, try to obtain consent from landlord.
4. Obtain estoppel letter from landlord and preferably from sublessor/assignor.

F. Default by the parties

1. Sublessor to use reasonable efforts to cause landlord to perform landlord's obligations.

2. Address potential default of landlord. Sublessee wants to obtain agreement of sublessor to enforce prime lease if landlord defaults. Sublessee may want right to bring action against landlord in name of sublessor.
3. Address potential default by sublessor. Obtain a nondisturbance agreement from landlord (and landlord's mortgagee) so if lease is terminated, landlord (and landlord's mortgagee) will honor sublease.
4. Sublessee wants right to cure defaults of sublessor and to offset monies against sublease rentals.
5. If sublease covers only part of premises, sublessee may wish to seek right to cure defaults of other sublessees that could result in termination of lease and sublease.

G. Other agreements

1. Verify that landlord's preferred form of sublease/assignment agreement and consent to sublease/assignment are being utilized in proposed transaction. Discuss proposed revisions with landlord.
2. Obtain landlord's consent to sublease/assignment in writing so assignee/sublessee is not regarded as trespasser. Landlord may have right to terminate sublease if landlord's approval has not been obtained.