High-End Retail Leasing

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Benjamin Weinstock and Ronald D. Sernau

It's not only shoppers who are willing to pay premium prices for glitz, glamour, and Gucci — landlords do it, too.

THERE ARE many synonyms for the often-used term "high-end." They include "deluxe," "expensive," "sophisticated," and "discerning." High-end retail leasing implies all of these and brings with it a set of unique issues that we have experienced in representing landlords and tenants.

WHAT IS "HIGH-END" LEASING? • There is no bright-line test to identify a high-end lease, but to borrow Justice Stewart's famous definition of pornography, "you know it when you see it." It is often a self-identification that the parties place on a transaction. When they do, it's a clear signal that one or both of them regard the deal as being worthy of extra scrutiny, meticulous drafting, and careful attention to detail. For these reasons and others, it also means that the lawyers' performance will be watched closely by the clients, both during and following the negotiation process.

A landlord is often keenly interested in signing a lease with a particular luxury retailer be-

cause the desired tenant completes (or even starts) the tenant mix and brings an upscale identity that the landlord wants for its property. For some landlords, landing the right high-end retailer can be a game-changer. Similarly, the tenant may be uniquely interested in a property because, for whatever reason, it has become the anointed luxury center for a geographic market area.

The issues addressed in more pedestrian retail leases are the backbone of the high-end retail lease. However, there are some distinguishing factors that are frequently present in the context of a luxury retail lease. Consider, for example, that a luxury retailer generally opens far fewer stores than a mass marketer, and spends much more money than a mass marketer on its leasehold improvements and store fixtures. The corresponding potential impact to brand reputation and the large sums of money that are at stake in negotiating a lease for a high-end retailer or its landlord magnify issues that are more easily disposed of in ordinary retail leases. Furthermore, while luxury retailers are certainly sophisticated merchandisers, they may lack the internal real estate resources of a mass marketer, so they may require more guidance and advice from their outside consultants. Finally, a luxury retailer's boutique is typically smaller than other retailers so the landlord, who values everything in terms of square footage, may view the luxury retailer as a "small tenant." However, this is completely at odds with the luxury retailer's perspective that it is entitled to get whatever it wants.

This article is intended to identify and discuss issues and practices in negotiating a high-end retail lease. It is worth noting that the issues addressed in high-end retail leasing may not be unique to that genre. In some instances the difference is simply a matter of degree, where a high-end retailer places a greater significance on certain issues that are encountered in all forms of leasing. We believe that having an understanding of and sensitivity to those issues will help counsel navigate the high-end lease process more efficiently and successfully.

SITE SELECTION • The three most important factors in determining the desirability of a property are location, location, location. Nowhere is this axiom more applicable than in luxury retail leasing. A retailer's quest to open a new store or relocate an existing one begins with a detailed analysis of market demographics. Where its customers are located, the density of the targeted income population, and the location of its competitors, among other factors, are carefully compiled and analyzed before any effort is made to produce a revenue and expense proforma for a particular location. While these factors should be important to all retailers, the high-end retailer places an extraordinary premium on this information. It must be in the right location, near the right neighbors and in the right center or building before the tenant will even consider entering into a lease.

The attorneys must understand that these are paramount determinants for the tenant that will drive other issues in the lease negotiation. For example, the tenant's desire to be in a specific tenant mix with specific other retailers will result in unyielding pressure to have a co-tenancy clause that might impede a landlord's ability to secure financing. Similarly, the tenant may demand an exclusive use clause, even where it is otherwise illogical and inhibiting to a landlord's ability to lease the rest of its high-end location to similar retailers.

CO-TENANCY • One immediately associates luxury retail with world-renowned United States shopping venues, such as Fifth Avenue in New York, Rodeo Drive in Beverly Hills, Michigan Avenue in Chicago, and Worth Avenue in Palm Beach. Each one is a glamorous streetscape of alluring showcase windows displaying uniquely breathtaking wares. However, the vast majority of luxury retail is located in high-end shopping centers and malls, such

as the Mall at Short Hills (New Jersey), Ala Moana (Hawaii), Crystals at City Center (Nevada), Southcoast Plaza (California), and in proposed developments like Buckhead (Georgia).

Smaller luxury retailers want to be in an upscale mall only if the luxury goods anchors remain part of the tenant mix and are located in the same proximity to their location. It is obvious that a mall anchored by Neiman Marcus and Saks is different than one anchored by Sears and Kohls. The high-end retailer is frequently dependent on the mall's anchor tenants to draw a sufficient stream of wealthy shoppers to yield adequate profits for its store. Therefore, the upscale retailer will seek the right to terminate its lease if one of the designated anchors moves or goes dark. This is referred to as a co-tenancy clause.

While it makes sense for the high-end retailer to have this arrangement with the landlord, the mall's lenders have a different view. In analyzing the mall's credit (i.e., its rent roll) they always consider the financial stability of the anchor tenants. Faced with co-tenancy clauses, however, a lender will also evaluate the domino effect of the loss of an anchor tenant on the satellite retailers in the mall. Thus, co-tenancy clauses can be a significant drag on the landlord's ability to obtain financing.

Below is an example of a co-tenancy clause from a lease that demises space in a luxury shopping center. (All model clauses are offered as examples for illustration purposes only to provoke and inspire thinking by the reader. They are certainly not intended to estop anyone, including the authors, from taking a contrary position in any negotiation or transaction):

> Subject to the terms of this paragraph, if (I) the tenant that is currently operating under the name "XYZ" in the location in the Center that is shown on Exhibit A (such location being referred to herein as the "XYZ Premises"), or a Comparable Replacement, closes more than fifty percent (50%) of the XYZ Premises for the conduct of business with the general public, and (II) a Comparable Replacement does not open all or substantially all of the XYZ Premises for the conduct of business with the general public for a period of three (3) months after the date that such tenant (or the successor thereto that is a Comparable Replacement, as the case may be) ceases the conduct of business with the general public in the XYZ Premises, then, during the period commencing on the date that is three (3) months after the date that XYZ or any successor to or Affiliate of XYZ, or a Comparable Replacement ceases the conduct of business with the general public in the XYZ Premises and ending on the date that a Comparable Replacement opens all or substantially all of the XYZ Premises for the conduct of business with the general public (such period being referred to herein as the "Special Period"), Tenant shall have the right to pay to Landlord as alternate rental hereunder, in lieu of Minimum Annual Rent and Percentage Rent, six percent (6%) of Gross Sales, in the manner that would otherwise apply hereunder in respect of the payment of Percentage Rent. In no event shall such alternate rent that Tenant is required to pay to Landlord under this Section ___ for the Special Period exceed the amount of Minimum Annual Rent and Percentage Rent that Tenant would otherwise be required to pay under this Lease for the Special Period. If the Special Period continues for a period of three (3) months, then Tenant shall have the right to terminate this Lease by giving notice thereof to Landlord not later than the thirtieth (30th) day after the end of such period of three (3) months (as to which period of thirty (30) days time shall be of the essence), in which case the Term shall expire and terminate on a date that Tenant specifies in such notice but in no event later than one hundred eighty (180) days after the date that

Tenant gives such notice to Landlord (it being understood that Tenant shall be permitted to pay such alternate rent in accordance with this Section ___ until the termination date set forth on Tenant's termination notice to Landlord); provided, however, that Tenant shall not have the right to give such notice to Landlord if the Special Period ends prior to the date that Tenant gives such notice to Landlord. If Tenant so terminates this Lease, then this Lease shall terminate on the date set forth in Tenant's termination notice, and neither party shall have any further liability to the other accruing from and after the date of such termination, except for those provisions expressly stated to survive. As used herein, the term "Comparable Replacement" shall mean [insert generic description of appropriate retailer].

Landlords have devised various techniques over the years to reduce the likelihood of a domino effect after an anchor store goes dark. First, a landlord will seek to have an extended period of time to replace an anchor tenant, perhaps with a retailer that differs materially from the tenant that went dark, or with various smaller retailers that together deliver the same draw as the tenant that went dark. Second, a landlord may argue that if the tenant does not exercise the tenant's termination right, then the tenant is no longer permitted to pay the alternate rent (on the theory that the tenant would have terminated the lease if the dark store was really damaging tenant's business). Third, in larger centers, the landlord may request an opportunity to move the tenant to a less deserted part of the shopping center in an effort to preserve the traffic that the tenant sought from the dark store (although it is less likely that a luxury retailer would accept this arrangement).

EXCLUSIVE USE • Anyone who has negotiated a retail lease certainly has seen the tenant's request that it be the only retailer in the landlord's property permitted to sell a particular product or line of merchandise. The operative theory is that Retailer A wants to the only upscale bridal shop or jeweler in the property without the need to compete with its traditional rival, Retailer B. Perhaps this is justifiable in certain types of retailing, but its usefulness in the universe of high-end retailing, particularly in a mall environment, seems to be anachronistic.

The traditional underpinning of the exclusive use clause is a retailer's theory that one supermarket does not want to compete with another supermarket for the same clientele who will buy milk and produce in the nearest or most convenient location. However, that rationale seems inapposite when considering what the typical shopper for luxury goods desires. Assume that the shopper is looking for a high-end handbag. He or she, if a specific brand and item have not already been selected by online browsing, will want to shop in several boutiques to see what is available. Having Gucci, Prada,and Louis Vuitton in close proximity to each other will drive the sale to one of those retailers, and the shopper will ignore the offerings by Fendi or Dior, whose shops are not nearby. (All references to brand names and trademarks are intended to be generally illustrative only and do not suggest that the mentioned brands are actually engaged in any of the practices mentioned.)

The demand for an exclusive use clause seems even more out of place when negotiating a lease with a high-end retailer for a shop in a street front location. Assume that the landlord has three adjacent retail stores on Rodeo Drive. One store is vacant and a world-renowned fragrance retailer wants to lease it. The retailer demands that the landlord agree that it will not at any time in the future rent its adjacent stores (or any other stores that the landlord or any of its affiliates owns in the same market) to any competing fragrance retailer, or to any retailer that sells fragrances as part of its business. The request seems perfectly reasonable to the retailer, who

cannot understand why the landlord would object. In reality, the request is unreasonable on several grounds.

First, the close proximity of a high-end retailer selling similar products creates a multiplying effect that will draw traffic for all retailers. For example, anyone shopping for a diamond ring thinks of 47th Street in Manhattan, where there are hundreds of diamond merchants operating shoulder to shoulder. Similarly, if one wants to purchase a chandelier in New York, the Bowery quickly comes to mind because there are scores of lighting fixture retailers tightly packed together in a few blocks.

Second, in a street front location, unlike a shopping center or mall, the landlord typically controls only a small portion of the geographic area to which the retailer is seeking to locate. Even if the retailer succeeds in compelling its landlord not to rent to a competitor in the same building, a competitor can move in next door simply by purchasing a building or renting from another landlord. That is how Harry Winston Jewelers opened a store on the same block as Tiffany in New York City.

Notwithstanding that one may disagree with the retailer's demand for an exclusive use clause, it must be dealt with in the leasing process. The retailer's leasing representative is unlikely to abandon his or her demand for an exclusive use clause based on counsel's rational argument or analysis, particularly when the representative says: "I don't care if my competitor opens next door, so long as my landlord isn't the one leasing to him — it would cost me my job."

An example of an exclusive use clause offered up by tenant's counsel might look like this:

> The term "Competitor" shall mean a Person listed on Exhibit "A" attached hereto and made a part hereof, except that Tenant, at any time and from time to time, shall have the right to substitute a Person for a Person that has theretofore constituted a Competitor by giving not less than thirty (30) days of advance notice to Landlord, provided that the Person that Tenant so substitutes for a Person that has theretofore constituted a Competitor derives more than fifty percent (50%) of its revenues in a business that competes directly with Tenant and from which Tenant derives at least fifty percent (50%) of Tenant's revenues. Subject to the terms of this Section ____, Landlord shall not permit any Competitor to use for the conduct of its business any portion of the Building. Nothing contained in this Section ___ shall require Landlord to prohibit a Person that is a Competitor from using any portion of the Building (a) unless such Person constitutes a Competitor on the earlier of (x) the date that such Person entered into occupancy of the applicable space, and (y) the date that such Person entered into an agreement to occupy the applicable space, or (b) if such Person occupies a portion of the Premises pursuant to (I) a sublease by Tenant or any Person claiming by, through or under Tenant, or an assignment of the interest of Tenant hereunder or the assignment of any such other Person of such Person's interest in the Premises, or (II) a sublease by a Person (other than Landlord or an Affiliate of Landlord) that has a leasehold interest in the Real Property as of the date hereof. This Section ___ shall apply only during the period that Tenant is _____ or a Person that succeeds to _____ as tenant hereunder pursuant to the [corporate transactions section] and during the period that Tenant or such other Person occupies the Premises for the conduct of business with the general public

There are a variety of issues that arise in the context of negotiating an exclusive use clause. In the example above, the prohibition focuses on a list of competing retailers rather than a description of competing uses. The parties' definition of competitor is the fundamental issue, and of course the

landlord wants to narrow the scope while the tenant wants to broaden it. Either technique works, although generally the enumeration of competing users better protects the interests of the landlord, while the categorization of competing uses better serves the tenant. A landlord may also seek to soften the impact of the clause by limiting its protection to the tenant originally named in the lease and not its subtenants or assignees. In some cases, the exclusive rights are covered in a lease without ever using the words "exclusive" or "restrictive covenant." Instead, the lease provides that the tenant may pay a reduced or percentage rent if the landlord leases space to a specific group of competitors or competitive uses.

In all cases, the landlord should be careful to avoid being unintentionally snared by an exclusive use clause if another tenant in the center assigns or subleases to a third party that happens to be a competitor of the protected tenant. Some exclusive use clauses (see the example that follows) incorporate clever protections for the landlord in such cases, or if a tenant begins using a portion of its store for a competing use in violation of its lease.

Finally, when the landlord grants exclusive uses in its center or extends exclusivity to adjacent properties owned by the landlord or its affiliates, then the landlord must recognize that the value of the center or the adjacent properties may be diminished. In addition, the ability to sell or finance the adjacent properties independently will be impaired.

> If Tenant's Exclusive Use provided in Section ___ shall be violated, Tenant may, and only while such violation is continuing, upon thirty (30) days prior notice to Landlord, reduce the Fixed Annual Rent by an amount equal to thirty-five percent (35%) of the Fixed Annual Rent payable at such time (the "Alternate Rent"). Notwithstanding the foregoing, Tenant shall not have the right to elect to pay Alternate Rent for a violation of the Tenant's Exclusive Use if another tenant or occupant in the Center violates a provision of its lease agreement regarding its premises (a "Rogue Tenant"), which lease agreement either does not permit or specifically prohibits a use specified in the Tenant's Exclusive Use provided that Landlord following receipt of notice from Tenant advising of a violation of the Tenant's Exclusive Use, promptly commences an action or proceeding (or arbitration, if required by such lease) against such Rogue Tenant, and thereafter uses commercially reasonable and good faith efforts to enforce its rights under such lease seeking to obtain a temporary restraining order, preliminary injunction, permanent injunction other court order or judgment, or order resulting from an arbitration proceeding, enjoining or stopping the lease violation.
>
> If Tenant gives Landlord a notice (the "Alternate Rent Notice") demanding an Alternate Rent, the Alternate Rent shall become effective thirty (30) days following Landlord's receipt of the Alternate Rent Notice unless within said thirty (30) day period Landlord shall give Tenant a notice denying Tenant's entitlement to an Alternate Rent and submitting evidence of one (1) or more of Landlord's specific grounds for denying such demand. In such case, Tenant shall not offset, abate, withhold or in any other way reduce the payment of Rent or effectuate the payment of Alternate Rent until there has been a final arbitration determination in accordance with Section ____ awarding Tenant the right to pay Alternate Rent.

In one Manhattan transaction a national bank creating a "flagship" branch sought to negotiate a clause preventing any other tenant in the building from having a branded ATM in its premises. (Although banks are not renowned boutiques, we classify this deal as high-end because of the prominent

location and record-setting rents involved.) The landlord correctly anticipated that the other tenants needed the ability to install branded ATM's as part of their credit processing arrangements. The compromise negotiated in the lease that solved the problem was to prohibit the competitive ATM branding from being displayed in the store windows.

BATTLE OF THE LEASE FORMS • It is common in retail leasing to have a tenant insist on using its own lease form. This is much more common with mass marketers than it is with boutique retailers, and is expected when renting to Subway or McDonalds. In our experience, luxury retailers are not mass marketers and therefore usually lack the market clout to insist on using their own lease forms. To the contrary, since luxury retailers set their sights on a limited number of centers, frequently travel in packs and like to be near one another, we have found that a luxury retailer may enjoy less bargaining clout on this issue than less pedigreed retailers.

The issue of whose lease form will be used is very important. Just as the forms prepared by landlords favor their position, those prepared by tenants are, not surprisingly, favorable to the tenant. They are frequently more difficult for landlord's counsel to deal with. In addition to addressing the issues that are raised in the tenant's form, landlord's counsel must identify the issues that have been entirely omitted by the tenant. Very often, a tenant's form does not contain a conditional limitation, landlord's self-help remedies in the event of a default, a relocation clause, late fees or meaningful mortgage subrogation language. An excellent checklist has been developed by a subcommittee of the New York State Bar project headed by Spencer Compton, Esq. and Joshua Stein, Esq. titled the Landlord's Checklist of Silent Lease Issues (Second Edition) (available at http://www.joshuastein.com/infoFrame.php?pdf=119), and while it is not specifically addressed to retail leasing, it is very useful nonetheless.

By the time the deal reaches counsel, the issue of whose form will be used has most likely already been decided. That is why counsel should proactively address this issue at the earliest stages of the transaction. We prefer to identify the controlling form at the Letter of Intent stage of the deal, whenever possible. The presumption is that the landlord's form will be used if the Letter of Intent is silent, although this is clearly not always correct. If counsel has not had experience dealing with the particular tenant, perhaps the brokers involved will know if the tenant has a preference.

Assuming the tenant's form is used, the economic portions of the lease — those dealing with real estate tax payments, common charges and marketing and promotional expenses, and those dealing with operational issues such as business hours, access for staff, customers and deliveries and insurance requirements — will generally require extensive revision since they do not conform to the property-specific operational, billing, and collection methods used by the landlord for a particular mall or standalone property. Generally, it is less complicated, and frequently acceptable to tenants, to discard those sections of the tenant's lease form and substitute the landlord's provisions in their place.

While this discussion extends well beyond the scope of this article, we believe that more can and should be done to improve the efficiency of the leasing process. It still matters to us whose form we use because we have not yet devised a system that allows us to manipulate freely and easily all of the concepts that we seek to include in our lease documents. We assume that clients will have less resentment toward the legal process if standardization and efficiency leads to economic savings.

USE OF THE PREMISES • The permitted use identified in the lease must be broad enough to allow the tenant to conduct its business in the manner desired by the tenant. Assuming that the tenant's business as presently conducted will not conflict

with exclusive use rights given to other tenants, the tenant will invariably seek to have a use clause that is flexible enough to allow its manner of operation to change.

A broadly written use clause allowing "any lawful use" (the language most often requested by tenants) can result in disastrous consequences for landlords who have granted exclusive use rights to other tenants. A better approach might be as follows:

> Tenant may change its Permitted Use of the Premises provided that the changed use may not be one that (a) could result in a violation of any so-called "exclusive use" right granted to any other tenant in the Center, (b) could cause a default by Landlord under any other lease or agreement to which it is party, or (c) would be directly competitive with the use of any other tenant in the Center, even if such tenant does not have an exclusive use provision in its lease.

BRANDING AND ALTERATIONS • Next to location, the second most important consideration of a high-end retailer is its ability to display its signage or branding. Lesser tenants may be willing to accept more restrictions on signage than high-end retailers. This has several consequences for the leasing process.

In a mall location, the size and location of the tenant's brand on the building, pylon and monument signs, and in and above its store, are threshold issues. Tenant's counsel will address these issues as thoroughly and vigorously as any other core issue. If the landlord is unsure about the limits of available signage and cannot commit to the tenant's minimums, the lease may contain a contingency for the tenant to obtain sign permits, failing which the tenant may cancel the lease. Some landlords also seek to control (or at least have approval rights over) the signage and displays that tenants create within their premises, behind the storefront. In our experience, tenants resist this sort of intrusion upon their merchandising, and they usually prevail.

The lease will also require the landlord to commit that the landlord will not obstruct the visibility of the tenant's signage except for temporary periods, such as when scaffolding is place on the building for repairs and maintenance. In such cases, the landlord will be obligated to provide temporary alternate signage. In central business districts, some tenants insist that landlords install "double-height" or "triple-height" sidewalk bridges that seem less confining, and interfere to a lesser degree with the tenant's signs. A careful tenant will also seek to prohibit the installation of sidewalk bridges that will remain in place over peak shopping seasons, will require the landlord to remove its sidewalk bridges as promptly as is practicable, and will prohibit the landlord from displaying advertising for third parties on the sidewalk bridges. Some landlords have dragged their feet in removing sidewalk bridges once they start to collect some unanticipated revenue from third parties that are willing to pay for advertising space on the bridge.

Below is an example of a sign clause from a storefront lease in a central business district:

> Subject to the terms of this Section ___, Tenant shall have the right to erect and maintain signs that identify Tenant as the occupant of the Premises (and for no other purpose) at the locations described in, and in accordance with the specifications described in, Exhibit "A" attached hereto and made a part hereof (any such signs erected by Tenant being collectively referred to herein as "Tenant's Signs"). Tenant's installation of Tenant's Signs shall be performed at Tenant's cost in accordance with the provisions set forth in Section ___ hereof. Tenant shall not have the right to erect Tenant's Signs that would create the impression in the mind of a reasonable person that the Building is named for Tenant. Tenant, at Tenant's expense, shall

operate, maintain and repair any Tenant's Signs that Tenant erects pursuant to this Section ____ in accordance with customary standards for first-class ____ buildings in the vicinity of the Building and in compliance with all applicable Requirements. Tenant, at Tenant's expense, shall remove Tenant's Signs promptly upon the Expiration Date, and shall repair any damage caused by the installation of Tenant's Signs or such removal.

Tenant acknowledges that it may be necessary for Landlord to erect a sidewalk bridge, bracing and scaffolding (the "Sidewalk Bridge") in front of the Building in connection with repairs or improvements to or expansion of the Building. Tenant agrees that the existence of the Sidewalk Bridge will not entitle Tenant to make a claim against Landlord for damages or entitle Tenant to an abatement of Rent. Landlord agrees that (i) Landlord will use commercially reasonable efforts to obtain a sign permit for Tenant to erect a sign on the Sidewalk Bridge to advertise Tenant's presence in the Building, and (ii) will use the Sidewalk Bridge for the shortest period of time necessary and will construct it in such a way as to minimize interference with access to the Premises and the conduct of Tenant's business. Landlord will give Tenant at least thirty (30) days notice of the installation of a Sidewalk Bridge, except in the case of an "Emergency." An "Emergency" means any condition that if not corrected or protected promptly could cause imminent personal injury or death or imminent material property damage.

The appearance of the store for many retailers, including high-end retailers, has become an essential part of their brand. For this reason, high-end retailers demand the ability to make alterations with a minimum of control and interference by landlords. They often proudly stress that because they are luxury retailers, all of their work will be first class and better than anything else in the landlord's property. They will also assert that the high rents they pay and the prominence they add to the landlord's location in attracting other tenants and shoppers is sufficient reason for the landlord to be as accommodating as possible. The landlords, for the most part, buy these arguments and do not meddle in the design or quality of the interior installation. However, in our experience, some landlords seek to require luxury retailers to invest an agreed-upon sum of money in the initial installation and to continue to make upgrades over the term of the lease at predetermined spending minimums. A tenant should consider agreeing to this sort of arrangement if the landlord agrees to require other tenants in the center to perform similar initial installations and refurbishments.

While tenants will usually immediately agree to remove signs and other similar branding upon the expiration of the term of the lease, some landlords also seek to require the tenant to demolish the interior installation. While some tenants miss the opportunity to complain about this requirement (see the battle of the forms section above), a tenant will usually reject this requirement and will usually prevail.

POP-UPS • In our youth, "pop-ups" were a form of toaster pastry. Today, they are a rapidly emerging real estate trend. In its simplest incarnation, a pop-up store is a store opened by a merchant with a minimal investment in leasehold alterations. During the 2011 holiday shopping season a retired retail toy executive opened a large pop-up store and boasted that he did it in 10 days and spent in the "four digits" to open it. Most surprisingly, the store opened in the most luxurious mall on Long Island. *Funky Monkey toys pop up in the Americana Mall*, Newsday, December 16, 2011.

Once relegated to seasonal merchants selling Halloween costumes and Christmas decorations,

major chains are now legitimizing this phenomenon. Merchants can test new markets and products with amazing agility and virtually no lead time. For landlords, the ability to populate a vacancy without the need for an extensive build-out or other capital investment is seen as a terrific short-term solution to high vacancy rates. Luxury retailers are joining this trend. In one example, retailers used pop-ups as a way to open stores in resort locations for the high season, thereby avoiding the costs of operating the store through three low seasons just to reap the benefits of the high season.

Pop-ups are an especially effective solution during the prime year-end retail season. If a store becomes vacant during the summer or fall, it may remain vacant until the following January or February. In addition to the lead time needed to locate a replacement tenant and negotiate a lease, most retailers will not accept possession of a location between October and year-end. At that time, they are focused on sales, not opening new stores. Only pop-up tenants will take a store during that time frame.

The key to negotiating a pop-up lease is speed. Neither party has the time or tolerance for a lengthy negotiation. In such cases, tenants will accept a landlord-favorable form with virtually no negotiation, as long as there is no lingering liability beyond the lease term and the tenant's liability is limited to the negotiated payments (often received in advance for the entire rental period) and other risks covered by insurance.

We have noticed a similar trend in high-end shopping centers, where landlords understandably seek to wring out the last drop of revenue that they can. A landlord may permit a pop-up retailer to erect a kiosk or use a cart in the common areas of the center during the high season. While some of the traditional tenants may not necessarily object to this activity in concept, we have seen most retailers react to kiosks and carts in a NIMBY ("not in my back yard") fashion, taking the position that the kiosk or cart would be fine in front of some other store in the shopping center. In representing some luxury retailers, we have sought to limit the landlord's right to allow carts and kiosks in the common areas that are adjacent to the tenant's store.

INTERNATIONAL TENANTS AND GUARANTIES • Global retailers continue to seek new markets in the United States and landlords are anxious to do business with well-capitalized companies. The problem is that the perception may not match the reality. While the parent company is well-heeled financially, its American subsidiary, which will be the actual tenant, may not be. The parent will invest only as much capital as is needed to get started, and the American entity may have insufficient reserves. The landlord sees a tenant with an excellent business plan and a committed parent, but it may also be one without a balance sheet, operating history, or marketable credit.

The parent offers up its guaranty of the lease. This seems great until one starts to think about enforcing it. Assume a Canadian parent, one on our own continent, will guaranty the lease of its American subsidiary. What must the landlord do to enforce it? Is there subject matter and in personam jurisdiction over the parent in the state where the property is located? Assuming that there is, does the parent have attachable assets in that state or anywhere in the United States? Will the landlord be relegated to obtaining a domestic judgment and enforcing it in Canada?

It seems that the simplest solution is to require a security deposit in the form of a letter of credit from a domestic bank. Unfortunately, corporate egos and sensibilities often block this solution and real estate counsel is left to advise the client on matters of international jurisprudence on the enforcement of American judgments in foreign countries.

We have addressed this issue by requiring an opinion of counsel from the jurisdiction of the guarantor to the effect that a court in the home jurisdiction will enforce a judgment of a court in the United States. In some cases, a treaty exists between the United States and the foreign jurisdiction that provides for the enforceability of judgments. In other cases, we obtain a reasoned opinion from the local counsel to the effect that a court in the home jurisdiction will enforce a foreign judgment, without re-examining the merits, provided that the party seeking to enforce the judgment can show that such party obtained such judgment in a proceeding that conformed to standard principles of due process.

CONCLUSION • While the principles of retail leasing in the context of luxury retail space are similar to the principles that we apply in leasing other retail and office space, the sensibilities of the parties, the visibility of the deal, and the high-stakes financial consequences in the luxury retail arena are different and more extreme. We have found that emotions run a little hotter in the context of these transactions, so a cool head and objective advice are particularly helpful and welcome.

APPENDIX

Sample Clauses

Note: All sample clauses in this article come with no guarantee or warranty; may contain errors or omissions; should be used only where correct in context; do not replace thought, analysis, and use of a range of appropriate precedents; the clauses have not been tailored for use in any particular state; do not define a minimum standard of practice; have not been approved by, and are not the official position of, any organization (actually, no organization has even given any thought to the merits, if any, of any of these model clauses); do not estop any person in any negotiation or transaction or otherwise; and are just sample clauses or other reference resources — nothing more. Consent is granted to any attorney to copy, re-use, and adapt our model clauses in this article, in whole or in part, for use in any standard document set or transaction-specific documents. Note that the following clauses have been discussed above and appear in the Appendix for ease of reference.

1. SAMPLE CO-TENANCY CLAUSES

Required Cotenant to Remain Open

Subject to the terms of this paragraph, if (i) the tenant that is currently operating under the name "XYZ" ("Cotenant") in the location in the Center that is shown on Exhibit A (such location being referred to herein as the "Cotenant Premises"), and Cotenant closes more than fifty percent (50%) of the Cotenant Premises for the conduct of business with the general public, and (ii) a Replacement Cotenant does not open all or substantially all of the Cotenant Premises for the conduct of business with the general public for a period of three (3) months after the date that such tenant (or the successor thereto that is a Replacement Cotenant, as the case may be) ceases the conduct of business with the general public in the Cotenant Premises, then, during the period commencing on the date that is three (3) months after the date that such tenant (or such successor) ceases the conduct of business with the general public in the Cotenant Premises and ending on the date that a Replacement Cotenant opens all or substantially all of the Cotenant Premises for the con-

duct of business with the general public (such period being referred to herein as the "Special Period"), Tenant shall have the right to pay to Landlord as alternate rental hereunder, in lieu of Minimum Annual Rent and Percentage Rent, six percent (6%) of Gross Sales, in the manner that would otherwise apply hereunder in respect of the payment of Percentage Rent. In no event shall such alternate rent that Tenant is required to pay to Landlord under this Section ___ for the Special Period exceed the amount of Minimum Annual Rent and Percentage Rent that Tenant would otherwise be required to pay under this Lease for the Special Period.

If the Special Period continues for a period of three (3) months, then Tenant shall have the right to terminate this Lease by giving notice thereof to Landlord not later than the thirtieth (30th) day after the end of such period of three (3) months (as to which period of thirty (30) days time shall be of the essence), in which case the Term shall expire and terminate on a date that Tenant specifies in such notice but in no event later than one hundred eighty (180) days after the date that Tenant gives such notice to Landlord (it being understood that Tenant shall be permitted to pay such alternate rent in accordance with this Section ___ until the termination date set forth on Tenant's termination notice to Landlord); provided, however, that Tenant shall not have the right to give such notice to Landlord if the Special Period ends prior to the date that Tenant gives such notice to Landlord. If Tenant so terminates this Lease, then this Lease shall terminate on the date set forth in Tenant's termination notice, and neither party shall have any further liability to the other accruing from and after the date of such termination, except for those provisions expressly stated to survive.

As used herein, the term "Replacement Cotenant" shall mean:
1. [Complete this Section as negotiated.]
2. Generic description of appropriate retailer [e.g., "a department store"].
3. Specific named alternate retailer [e.g. "Nordstrom"].
4. A combination of retailers [generic or named] occupying [__%] of the Cotenant Space.

Required Cotenant as a Condition of Rent Commencement

Landlord shall give Tenant written notice (the "Commencement Date Notice") no less than forty-five (45) days prior to the date on which Landlord believes the Commencement Date Conditions will be fulfilled. The conditions enumerated below (the "Commencement Date Conditions") must be fulfilled to Tenant's reasonable satisfaction before the Commencement Date will be deemed to have occurred: (i) Landlord shall have Substantially Completed Landlord's Work in the Premises; and (ii) Landlord shall produce evidence that is reasonably acceptable to Tenant that Nordstrom (or a "Substitute Tenant" (as hereinafter defined)) shall have executed an "Acceptable Co-Tenant Lease" (as hereinafter defined), for space in the Shopping Center.

Landlord acknowledges that if Landlord does not enter into an Acceptable Co-Tenant Lease with Nordstrom (or an affiliate of [_____] that will operate a [_____] store in the Shopping Center), it must enter into a lease for space in the Building with a substitute national retail tenant that is equivalent to [_____] in Tenant's reasonable discretion (a "Substitute Tenant"). Landlord acknowledges that the following entities

shall not be acceptable Substitute Tenants: (i) [name specific tenants or uses that will not be acceptable]. Tenant shall advise Landlord whether a proposed Substitute Tenant is an acceptable Substitute Tenant within ten (10) business days after Landlord delivers written notice to Tenant including: (i) of the name of the proposed Substitute Tenant and (ii) a brief description of the proposed Substitute Tenant's proposed use of its prospective space in the Shopping Center. An "Acceptable Co-Tenant Lease" shall mean a lease: (i) with [_____] or a Substitute Tenant, (i) covering at least 110,000 rentable square feet of space in the Shopping Center, and (iii) with a term of no less than fifteen (15) years.

Other Remedies:
1. Additional free rent or reduced rent up to, or possibly including, renewal periods;
2. Termination option;
3. Liquidated damages payable by Landlord.

2. SAMPLE EXCLUSIVE USE CLAUSES

Restrictive Covenant Prohibiting Competition

The term "Competitor" shall mean a Person listed on Exhibit "A" attached hereto and made a part hereof, except that Tenant, at any time and from time to time, shall have the right to substitute a Person for a Person that has theretofore constituted a Competitor by giving not less than thirty (30) days' advance notice to Landlord, provided that the Person that Tenant so substitutes for a Person that has theretofore constituted a Competitor derives more than fifty percent (50%) of its revenues in a business that competes directly with Tenant and from which Tenant derives at least fifty percent (50%) of Tenant's revenues. Subject to the terms of this Section ____, Landlord shall not permit any Competitor to use for the conduct of its business any portion of the Building. Nothing contained in this Section ___ shall require Landlord to prohibit a Person that is a Competitor from using any portion of the Building (a) unless such Person constitutes a Competitor on the earlier of (x) the date that such Person entered into occupancy of the applicable space, and (y) the date that such Person entered into an agreement to occupy the applicable space; or (b) if such Person occupies a portion of the Premises pursuant to (I) a sublease by Tenant or any Person claiming by, through or under Tenant, or an assignment of the interest of Tenant hereunder or the assignment of any such other Person of such Person's interest in the Premises, or (II) a sublease by a Person (other than Landlord or an Affiliate of Landlord) that has a leasehold interest in the Real Property as of the date hereof. This Section ___ shall apply only during the period that Tenant is _____ or a Person that succeeds to _____ as tenant hereunder pursuant to the [corporate transactions section] and during the period that Tenant or such other Person occupies the Premises for the conduct of business with the general public.

Restrictive Covenant - Another Form

Provided that Tenant is not in monetary default of this Lease, Landlord agrees that it will not enter into a lease of other space in the Building with, or consent to or otherwise permit, the assignment of any lease to, or subleasing or other occupancy of any space within the [_____], to [_____], [_____], [_____],

[_____] or [_____] (or an affiliate of any of the foregoing, that would operate such space as a [_____], [_____], [_____], [_____] or [_____], or related store) (the "Restrictive Covenant," and each such prohibited tenant is a "Prohibited Tenant"). If Landlord violates the Restrictive Covenant, Tenant's Rent hereunder shall abate from the date that such breach occurs through the date that Landlord cures such breach. If the Landlord has not cured such breach within twelve (12) months after the breach, Tenant shall have a right to terminate this Lease upon written notice to Landlord. If the Tenant terminates this Lease pursuant to this provision, the Term of the Lease shall end and expire on the date set forth for the termination of the Lease in Tenant's notice, as if such date were the Expiration Date hereunder, and Tenant and Guarantor shall be released from all liability under the Lease and the Guaranty as of the termination date. If the Tenant does not terminate the Lease pursuant to this provision, the Rent abatement hereunder shall continue until Landlord cures its default under the Restrictive Covenant. [Rent abatement shall cease and Tenant shall resume paying the full Rent and Additional Rent reserved in this Lease.]

Alternate Rent as Remedy

If Tenant's Exclusive Use provided in Section ___ shall be violated, Tenant may, and only while such violation is continuing, upon thirty (30) days prior notice to Landlord, reduce the Fixed Annual Rent by an amount equal to thirty-five percent (35%) of the Fixed Annual Rent payable at such time (the "Alternate Rent").

If Tenant gives Landlord a notice (the "Alternate Rent Notice") demanding an Alternate Rent, the Alternate Rent shall become effective thirty (30) days following Landlord's receipt of the Alternate Rent Notice unless within said thirty (30) day period Landlord shall give Tenant a notice denying Tenant's entitlement to an Alternate Rent and submitting evidence of one (1) or more of Landlord's specific grounds for denying such demand. In such case, Tenant shall not offset, abate, withhold or in any other way reduce the payment of Rent or effectuate the payment of Alternate Rent until there has been a final arbitration determination in accordance with Section ___ awarding Tenant the right to pay Alternate Rent.

Protection from Rogue Tenants

Notwithstanding the foregoing, Tenant shall not have the right to elect to pay Alternate Rent for a violation of the Tenant's Exclusive Use if another tenant or occupant in the Center violates a provision of its lease agreement regarding its premises (a "Rogue Tenant"), which lease agreement either does not permit or specifically prohibits a use specified in the Tenant's Exclusive Use provided that Landlord following receipt of notice from Tenant advising of a violation of the Tenant's Exclusive Use, promptly commences an action or proceeding (or arbitration, if required by such lease) against such Rogue Tenant, and thereafter uses commercially reasonable and good faith efforts to enforce its rights under such lease seeking to obtain a temporary restraining order, preliminary injunction, permanent injunction other court order or judgment, or order resulting from an arbitration proceeding, enjoining or stopping the lease violation.

Restricting the Tenant from Violating Other Exclusives

There are covenants, restrictions and declarations of record to which this Lease (and Tenant's use of the Demised Premises) may be subject. Landlord has heretofore granted, and may hereafter grant, exclusive use rights ("Exclusive Rights") to other tenants of the Shopping Center, which do not violate the Exclusive Use granted to Tenant in Section ___. Tenant shall not violate any such Exclusive Rights and shall indemnify, defend and hold Landlord Parties harmless against any and all cost, damage, liability, and expense (including reasonable legal fees) arising from any breach or claimed breach of such covenants, restrictions, declarations and Exclusive Rights of which Tenant has been given notice. In addition to any other right or remedy, in the event of any breach of this Section, Landlord shall have the right to obtain injunctive relief in accordance with applicable law without posting a bond or proving irrevocable damage. Tenant shall have no right to control, limit, or restrict the use of any space outside the Demised Premises except for the Tenant's "Exclusive Use" in the manner provided in Section ___.

3. SAMPLE CHANGE IN USE CLAUSE

Tenant may change its Permitted Use of the Premises provided that the changed use may not be one that (a) could result in a violation of any so-called "exclusive use" right granted to any other tenant in the Center, (b) could cause a default by Landlord under any other lease or agreement to which it is party, or (c) would be directly competitive with the use of any other tenant in the Center, even if such tenant does not have an exclusive use provision in its lease.

4. SAMPLE SIGN CLAUSES

Storefront Lease in a Central Business District

Subject to the terms of this Section ___, Tenant shall have the right to erect and maintain signs that identify Tenant as the occupant of the Premises (and for no other purpose) at the locations described in, and in accordance with the specifications described in, Exhibit "A" attached hereto and made a part hereof (any such signs erected by Tenant being collectively referred to herein as "Tenant's Signs"). Tenant's installation of Tenant's Signs shall be performed at Tenant's cost in accordance with the provisions set forth in Section ___ hereof. Tenant shall not have the right to erect Tenant's Signs that would create the impression in the mind of a reasonable person that the Building is named for Tenant. Tenant, at Tenant's expense, shall operate, maintain and repair any Tenant's Signs that Tenant erects pursuant to this Section ____ in accordance with customary standards for first-class _____ buildings in the vicinity of the Building and in compliance with all applicable Requirements. Tenant, at Tenant's expense, shall remove Tenant's Signs promptly upon the Expiration Date, and shall repair any damage caused by the installation of Tenant's Signs or such removal.

Signage Clause in a Shopping Center Lease

Tenant may place any signage of Tenant's selection on the interior or exterior of the Premises and the Building (Tenant's signage that is inside of the Common Areas of the Building, but outside of the Premises (including, without limitation, directional signage, is referred to herein as the "Common Area Signage" and the signage that is on the exterior of the Building is referred to herein as the "Exterior Signage"), without first obtaining Landlord's written consent therefor, provided that the same complies with applicable Legal Requirements and is situated in the areas depicted on Exhibit __ attached hereto (with respect to Tenant's Exterior Signage) ("Tenant's Exterior Signage Locations") and depicted on Exhibit ___ attached hereto (with respect to Tenant's Common Area Signage) ("Tenant's Common Area Signage Locations"). Landlord further acknowledges that Tenant shall be permitted to install Tenant's choice of signage in all of the "Common Area Elevator" (as hereinafter defined) vestibules (the "Elevator Vestibule Signage"), in the locations depicted on Exhibit __ attached hereto (the "Elevator Vestibule Signage Locations"). Tenant, at Tenant's sole cost and expense, shall (i) install and maintain in good repair all Exterior Signage, Common Area Signage and Elevator Vestibule Signage, and (ii) repair any damage to the Building that results from Tenant's installation, maintenance or removal of the Exterior Signage, the Common Area Signage and Elevator Vestibule Signage. Tenant acknowledges that the electricity used to illuminate Exterior Signage, if any, shall be metered directly to Tenant pursuant to Article ___ hereof. Tenant shall not permit the Exterior Signage to encroach upon the property of any other person or upon any public road or street.

Landlord and Tenant agree to cooperate in diligently working to obtain approval from the applicable Governmental Authority to place marquee signage on the exterior wall of the Building facing _____ Street. If such approvals are obtained, Tenant shall construct such marquee as promptly as reasonably possible, and Tenant shall have the exclusive right to place Tenant's signage on the marquee.

Tenant shall have the right to seek a zoning variance, so that it may install larger Exterior Signage at the Building than is currently permitted by law. If such zoning variance is obtained, Tenant may increase the size of its Exterior Signage to the size permitted by such variance.

Landlord shall have no control over, or right to approve signage, displays, merchandising, branding or multimedia in the Premises even if visible from outside the Premises.

Obstructing Signage

Tenant acknowledges that it may be necessary for Landlord to erect a sidewalk bridge, bracing and scaffolding (the "Sidewalk Bridge") in front of the Building in connection with repairs or improvements to or expansion of the Building. Tenant agrees that the existence of the Sidewalk Bridge will not entitle Tenant to make a claim against Landlord for damages or entitle Tenant to an abatement of Rent. Landlord agrees that: (i) Landlord will use commercially reasonable efforts to obtain a sign permit for Tenant to erect a sign on the Sidewalk Bridge to advertise Tenant's presence in the Building; and (ii) will use the Sidewalk Bridge for the shortest period of time necessary and will construct it in such a way as to minimize interference

with access to the Premises and the conduct of Tenant's business. Landlord will give Tenant at least thirty (30) days notice of the installation of a Sidewalk Bridge, except in the case of an "Emergency." An "Emergency" means any condition that if not corrected or protected promptly could cause imminent personal injury or death or imminent material property damage

5. SAMPLE STOREFRONT CLAUSE

Tenant shall have the right to make any changes to the storefront of the Premises without Landlord's prior approval, provided that the same comply with applicable Legal Requirements. If Tenant replaces the storefront, Tenant shall construct, at Tenant's sole cost and expense, a construction barrier that complies with the Legal Requirements. Tenant shall maintain such Construction Barrier in good condition, appearance, and repair and shall decorate the Construction Barrier at Tenant's sole cost and expense as promptly as reasonably practicable after substantial completion of such Alterations, and shall repair any damage to the Building caused by the Construction Barrier or the removal thereof.

Landlord's Signage and Storefront Limitations

Tenant shall comply with any requirements and limitations Landlord shall impose (provided they do not unreasonably discriminate against Tenant and are consistent with Tenant's business being reasonably visible to the public) regarding coordination and design of Tenant's Facade and the overall Facade of the Project. Tenant shall install signage only on Landlord's designated signage panels. Tenant's Facade shall at all times comply with Landlord's signage and storefront program and criteria (the "Facade Requirements"). [The Facade Requirements are presently as set forth in Exhibit __.] Landlord shall give Tenant further specifications, if any, for the Facade Requirements upon Tenant's written request. Landlord may modify or add to the Facade Requirements from time to time. Tenant's Facade, and any changes to Tenant's Facade, are subject to Landlord's prior approval, not to be unreasonably withheld provided Tenant's Facade at all times fully complies with the Facade Requirements. Any construction or alteration of Tenant's Facade shall constitute Alterations, except that at Landlord's option Landlord shall have the right to perform such Alterations, at Tenant's reasonable expense with no Administrative Fee. If Tenant's Facade is wholly or partially damaged or destroyed, Tenant shall repair the damage or destruction within three (3) Business Days after receipt of Notice from Landlord.

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