

**New York University**  
**Commercial Broker's Boot Camp Program**  
**(RESB2-CS2301001 Commercial Leasing Brokerage E)**

**June 27, 2012**

Course Outline and Syllabus (3-26-2012)

Presented by John Busey Wood

Schack Institute of Real Estate School of Continuing and Professional Studies

**Introduction**

This is a one day intensive seminar on Commercial Real Estate Brokerage Business and Legal Concepts as well as negotiation of exclusive agency agreements and transactional agreements. This course deals with the fundamentals of broker's contracting for employment, procurement and practical and legal techniques for negotiation and commission calculation, earning and collection. This course will consist of practice negotiations, review of standard and unusual forms of agreements and situations as well as case studies of disputes, litigation and enforcement of broker's rights.

The purpose of this concentrated Boot Camp Seminar is to enhance the knowledge of brokers, sales persons, owners and lawyers in the fundamentals of commercial real estate brokerage and through evaluation of disputes and real live projects, employments, and requests for proposal, to enhance the probability of a successful brokerage relationship. This syllabus will consist of an outline of topical issues, exhibits of case studies and examples, form term sheet and handouts that will be attached. In addition to this syllabus and the attachments, there are several suggested reference books and treatises that can significantly augment the knowledge and effectiveness of attendees in the transactional business of commercial brokerage. The first is a short but meaningful work on commercial leasing and brokerage **Navigating the Dangerous Shoals of a Commercial Lease for Beginners** (which may be ordered online at [www.leasingnyc.com](http://www.leasingnyc.com) under the tab "Leasing for Beginners" via lulu.com). This work was written originally as a handbook for facilities directors and specifically for The National Geographic Society in 1991 and has been updated for current practices and changes in laws. The second reference material is an exhaustive desk reference treatise on commercial leases and brokerage **Negotiating and Drafting Office Leases**, which deals extensively on these topics and contains forms and commentary on all aspects of commercial brokerage and commercial leasing and the interaction between the two. Information on ordering each and discount codes for NYU students appears at the end of this syllabus.

**LAW AND REGULATION**

- I. How to Get Employed!: Owner (Landlord) always modifies the "prevailing rates," "due on signing" and "subject premises" terms with written agreement.

II. How to Really Get Employed - **Exclusives**: Keep short for quick action and execution by client.

III. Need to Show Space? Or just register the client?

IV. Nature of the Employment

- A. Employment contract without condition - To procure a purchaser ready, willing and able to buy on terms specified by the seller. Broker performs his contract when he procures such a buyer; contract need not be signed and title need not be closed; even if purchaser defaults, broker entitled to commission.

Illustration: *Hecht vs. Meller* (Property destroyed by fire; vendee cancels contract. Held: Broker entitled to commission.)

- B. Employment agreement with conditions - Seller's liability may be conditioned upon any agreed requirement, such as the closing of title.

Illustration: *Levy vs. Lacey* (Agreement provided that commission not to be paid until sale's actual consummation; title did not close. Held: Broker not entitled to commission; *however*, a new trial was required, and:

1. if the failure to close is due to seller's fault, the broker will be found to have earned the commission because the seller rendered full performance impossible (thus being deemed to waive the condition of closing). The reasonableness of seller's conduct under the circumstances is to be examined.)
2. Nevertheless, the seller may avoid liability if he includes a provision stating that no commission will be due if title does not close for any reason whatsoever "including Seller's (Lessor's) acts".

Illustrations: *Douglas L. Elliman & Co., Inc. v. Sterling Garage, Inc.* (Agreement, drafted by the broker, provided that no commission would be earned until lease actually closed. If for any reason, including lessor's fault, no lease is consummated, no commission is earned; Lessor made a better deal through another broker; Held: in absence of fraud on part of lessor, first broker not entitled to commission.)

*Graff v. Billet* (Agreement called for commission to be earned “as, if and when title passes, except for willful default on the part of seller”; Seller never signed a contract with broker’s party and accepted a better offer from another party. Held: there was never a willful default by seller because there was no contract to default under. Although the brokerage agreement must clearly specify the intent that the broker not be paid even if seller defaults, in this case the parties clearly intended that no commission would be earned prior to the execution of a contract. The broker, who drafted the brokerage agreement, could have provided differently.)

3. However, where exculpatory language is included as part of scheme to deprive broker commission, seller will be liable.

Illustration: *Langfan v. Walzer* (After procuring purchaser ready, willing and able to buy property, seller requested broker to sign an agreement providing that no commission would be paid until contract of sale was executed; seller thereafter changed terms of offer and deal was aborted. Held: There must be a trial to determine whether seller had preconceived plan to deprive broker of commission.)

C. Employment by purchaser –

1. If purchaser employs a broker and agrees to pay a commission for performance, purchaser is liable for payment. However, there must be an *express* undertaking by the purchaser to pay the commission, unless the circumstances show either a valid oral contract, where enforceable, or on the basis of *quantum meruit* (e.g., compensation for the value of the work performed).

Illustration: *Brabazon Agency, Inc. v. Donohue* (Broker hired by purchaser, and provision in brokerage form requiring seller to pay commission was stricken, but no express provision

was inserted requiring purchaser to pay commission. Evidence showed that purchaser was informed orally that he would be obligated for commission, and that purchaser made extensive use of broker's services. On first appeal, the Appellate Division concluded there was no express agreement, therefore broker not entitled to commission. The Court of Appeals reversed and reinstated the lower court's judgment in favor of the broker, holding that the findings of the trial court more nearly comported with the weight of the evidence.)

2. If purchaser hires a broker with the understanding that the seller will pay the commission, the purchaser may be liable for the commission if he reneges on the deal.

Illustration: *Duross Company v. Evans* (Broker employed by purchaser located property on which purchaser made offer; seller accepted offer and agreed to pay broker's commissions; purchaser refused to proceed with transaction. Held: Purchaser liable for commission.)

## V. Performance by Broker

### A. Procuring cause (where deal ultimately consummated)

1. Broker must prove that he generated a chain of circumstances or established a favorable climate which resulted in the deal.

Illustration: *Eugene J. Busher Co., Inc. v. Galbreath-Ruffin Realty Co., Inc.* (Broker brought the parties together and instigated a proper attitude toward a possible lease. Held: Broker entitled to commission notwithstanding the lack of participation in negotiations of the terms of the lease.)

2. In certain circumstances merely bringing property to the attention of ultimate purchaser is sufficient to entitle broker to commission.

Illustration: *Salzano v. Pellillo* (Facts justify conclusion that broker entitled to commission without doing more than introducing purchaser to owner.)

3. In other circumstances, brokers found not entitled to commission by merely bringing property to attention of ultimate buyer.

Illustrations: *Greene vs. Hellman* (Broker not able to show he was procuring cause of ultimate sale, which was consummated directly between owner and purchaser approximately one year after broker informed purchaser that property was for sale.)

*Briggs vs. Rector* (Purchaser shown property by broker; no further contact until purchaser called broker who instructed purchaser to deal directly with seller; broker did not participate in the negotiations and did not know the terms of the sale. Held: Broker not entitled to commission.)

B. Agreement on essential terms (where deal not consummated)

1. Customary terms of transaction.

Illustration: *Tanenbaum vs. Boehm* (Broker employed by lessor and procured tenant who orally agreed to conditions imposed by lessor; thereafter, lessor's attorney insisted upon reasonable condition in lease and aborted. Held: Broker entitled to commission.)

2. Where customary or essential terms have not been agreed to, commission not earned.

Illustrations: *Freling v. Restivo* (No agreement as to financing terms.)

*C. A. Frank & Company, Inc. v. Corland Corporation* (No agreement as to financing terms.)

*Kaelin v. Warner* (Broker required to procure purchaser for fixed price with terms to be arranged; until terms arranged no commission earned.)

C. If financial ability of purchaser is undertaken - Broker must prove that purchaser was financially able to close the deal.

Illustration: *Globerman v. Lederer* (Personal finances of purchaser not revealed; no bank commitments produced. Held: No proof of financial ability.)

VI. Entitlement to Commission Under Exclusive Agency and Exclusive Right to Sell

- A. If an exclusive agency, seller cannot employ a broker but can sell property himself, in which event seller not liable for commission. If an exclusive right to sell (or lease) is granted, broker earns a commission even if the principal sells property himself.

Illustrations: *Levy v. Isaacs* (Broker employed exclusive agent; broker did not procure purchaser or participate in any negotiations. Held: Broker not entitled to commission.)

*Bashant v. Spinnella* (Ultimate purchaser introduced during exclusive listing period; deal consummated after expiration of listing period at lower than offering price. Held: Broker not entitled to commission.) But watch out!

## VII. Enforcing Right to Collect Commission – Costs of Collection and Indemnity – Acceleration Right for Pay-Outs or Commission Installments

- A. A broker's lien may be filed by brokers. It is a mechanics' lien provided for under the Lien Law, which includes in the definition of an "improvement" the "performance of real estate brokerage services in obtaining a lessee."
1. Pertains only to leases of more than three years for all or any part of real property used for other than residential purposes.
  2. There must be a written brokerage agreement either of employment or compensation (with signatures preferably notarized).
  3. Lien may be filed within eight months, but only after the performance of the brokerage services and execution of lease by both lessor and lessee and only if a copy of the alleged written agreement of employment or compensation is annexed to the notice of lien, provided that where the payment pursuant to the written agreement of employment or compensation is to be made in installments, then a notice of lien may be filed within eight months after the final payment is due, but in no event later than a date five years after the first payment was made. (Note these provisions in drafting your brokerage agreements.)
- B. Brokers' recording act.
1. Real Property Law Section 294-b applies to any purchase or lease of real property.
  2. Permits recordation of an "affidavit of entitlement to commission for completed brokerage services" by a duly licensed broker, where there is a

written or oral contract of brokerage employment. The statute specifies the required contents of the affidavit.

3. Requires that there be a contract of purchase or lease or an actual purchase or lease.
4. Recordation does not invalidate any transfer of property or lease.
5. Recordation does not create a lien and shall be discharged one year after filing.
6. Fairly worthless.

C. Indemnity Clauses – Collection Costs – Enforcement Clauses – Acceleration Clauses

1. Include Indemnity for broker's costs to enforce the agreement, collect the commission and defend against Owner/Landlord duplicate claims and defaults.
2. Include acceleration rights for installment or extended commission payouts/loans to Owners, costs of collection and enforcement.

PRACTICAL ISSUES  
(Discussed in reference to attached forms)

- I. Who is the client, and what's the difference?
  - A. Owner (Seller) (Landlord) - usually pays the commission. Name the Owner incorrectly, or the Owner does not have title to the building/property or is an agent without authority.
  - B. Buyer (Tenant) - usually does not pay the commission. So what? There are obligations and possible liability anyway. When is it appropriate for the Buyer (Tenant) to pay or share in the commission?
  - C. What if each party employs a broker? Exclusively?
    - 1. Holding the deal hostage while the brokers "duel" over the commission.
      - (a) No dueling if each party pays its own Broker.
      - (b) But, if there is only one pot of gold . . . .
    - 2. Is dueling really outlawed? (Ask the firm of Hamilton and Burr!) Liability of the Brokers if dueling kills not them but the deal?
  - D. Problems with dual representation – duty to disclose. Can a Broker serve two Masters?
- II. Drafting the Agreement.
  - A. Honing in on the difference between the exclusive agency and the exclusive right to sell (lease). What are the true requirements to make the agreement stick?
  - B. Term of the agreement.
    - 1. How long can you tie up the client and the property?
    - 2. The "tail" provision: how long do prospects introduced during the term belong to the exclusive broker?
    - 3. Trying to keep non-exclusive agency alive after exclusive expires.
  - C. "Grabs:" Fair, unfair, or is it what you can get? What are the limits? (Refer to sample forms)
    - 1. Negotiating the commission rate.



2. Special commission rates, i.e. waterfront sales (leases), sale of personal property.
  3. Trying to broker financing.
- D. What are the Rights and Obligations?
1. The client.
  2. The broker.
  3. Under common law, by statute, by agreement.
- E. Payment of the Commission: when and how?
1. Commission.
  2. Expenses.
- F. Default; Termination; Remedies.
- III. Extra, Extra! All the additional issues when brokering leases.
- A. Rent, additional rent, percentage rent, additional charges.
  - B. Options to extend, cancel.
  - C. Termination, surrender.
  - D. Net leases.
  - E. Allowances; Work Letters.
  - F. Options for additional space; to purchase the property.
  - G. Assignment, subleasing, take-back.
  - H. And more?

## ETHICS

(What, oh what is the right thing to do?)

- I. Perspective and Attitude: Do I *have* to do the right thing, or do I *want* to do the right thing?
  - A. Is it about the money, is it about the deal, is it about both parties, or is it about the client? What are my values and priorities?
    - 1. Structuring "I win, you lose."
    - 2. Structuring "Win/Win."
    - 3. Conflicts of interest.
    - 4. Client loyalty.
    - 5. Fiduciary duties.
    - 6. Confidentiality and disclosure.
  - B. Working through ethical problems; hiding or seeking.
- II. Ethical Standards.
  - A. Common law.
  - B. Statute.
  - C. Department of State Regulations.
  - D. Standards and guidance of Real Estate Boards, Organizations.
- III. Possible Issues.
  - A. Broker fee sharing with third parties – prohibited.
  - B. Basis for termination of exclusive agency agreement.
  - C. Moral turpitude.
  - D. Overreaching.
  - E. Forfeiture of commission.

F. Damages.

G. Sanctions.

IV. In Summary, putting it all together: How to do the deal.

#### BUSINESS/FINANCIAL TOPICS FOR BROKER'S PARTICIPATION

1. Deal Letter preparation
  - a. Line Items
  - b. Reviewed by Consultants and Attorneys?
  - c. Architectural Review?
  - d. Insurance Review?
2. Work Letter or Rent Credits
3. Limitations on Use of Premises
4. Limitations on Assignment/Subletting
5. Attention to Premises/Building legal compliance and layout condition
6. Services-HVAC-costs efficiencies condition of Building Systems
7. Tenant's Telecommunication needs/electrical needs
8. Completion, Occupancy and rental abatements for construction and/or occupancy
9. Letter of Credit, Security, Guarantees, Corporate structure
  - a. Holding companies
  - b. Parents on or off shore, "doing business and jurisdiction conference"
10. Other Services
  - a. Cleaning – Deficient specs?
  - b. Supplemental cooling, condenser or chiller, air intake access
  - c. Antenna or CATV, etc.
11. Expansion, Contraction, Option space and Renewal Periods
12. Radius or Exclusive uses
13. Compliance with laws and HAZMAT
14. Delivery Condition and Permits
15. Forms of Letter of Intent or Deal Letter/differences/no practice of law/Letter of Intent vs. Broker's Letter
16. Hidden costs i.e.:
  - a. Heating
  - b. Cleaning
  - c. Elevator
  - d. Submeters for utilities/check meters
17. The cross hatched sketch
  - a. Legal compliance liability
  - b. Repair
  - c. Insurance

18. Escalations and Additional Rent
  - a. TPS numerator defined and denominator of Building. Changes in measurements and different use for ERIF, Porter's Wage and Real Estate Taxes
  - b. Base and Comparison years as "finally determined"
  - c. Other formulas Porters Wage, CPI
  - d. Including the attorney and accountants
19. Work letters
  - a. Involving the architect/engineer
  - b. Involving the project administrator
  - c. Involving the tax expert for work credits for "Non-Retail" I.R.S. Sect. 1.10 uses

FORMS - HANDOUTS  
(Attached or Presented at Seminar)

- I. The Case Study on Creation of Duplicate Brokerage Claims
- II. The Standard Proforma/Term Sheet
- III. The Comprehensive RFP
- IV. Case Study - Specific Leasing Transaction Mark-up
- V. Case Study -- Exclusive Leasing Agency Mark-up

ADDITIONAL RESOURCE MATERIALS:

RESEARCH TREATISE: NEGOTIATING AND DRAFTING OFFICE LEASES, LAW JOURNAL SEMINARS PRESS (Library of Congress ISBN 1-58852-061-7, 1995 - 2010), Two volume Treatise (approx. 3000 pages) , updated 2 times per year, can be obtained by calling **American Lawyer Media: (800) 603-6571** and ask for your student Discount (**Code Print/Online Bundle 2126836**) for NYU Students. The current cost is about \$1280 without discount and should run about \$200 with the NYU Student Discount and taxes and shipping. If you are uncertain when ordering online, stop and call the ALM person. Please email me, [jbwood@akerman.com](mailto:jbwood@akerman.com) if you run into any difficulty obtaining the Treatise.

NAVIGATING THE DANGEROUS SHOALS OF A COMMERCIAL LEASE FOR BEGINNERS: Order from [www.leasingnyc.com](http://www.leasingnyc.com), under the tab "Additional Resources" and click "**Leasing for Beginners**". This handbook was utilized by the NYU Graduate School as a course text for real estate valuation courses in 1992-1996 and was published then by NYU. The handbook was written in 1991 (updated in 2009) for the facilities department of The National Geographic Society and is an econometric treatment of leases as financial instruments and will complement the regular course materials and lectures. This publication ships within about 3 business days and costs under \$100 delivered.

ONLINE EDUCATIONAL WEBPAGE: [www.leasingnyc.com](http://www.leasingnyc.com) and [www.officeleasingusa.com](http://www.officeleasingusa.com)

## JOHN BUSEY WOOD

John Busey Wood is a member of the commercial real estate group at the New York City office of the law firm Akerman Senterfitt LLP, and advises domestic and "cross-border" public and private companies on real estate acquisitions, facilities management, construction and development, brokerage law, commercial leasing, commercial property management and litigation. For over 30 years Mr. Wood has represented owners in the design and negotiation of commercial leases covering in excess of 50 million square feet of retail, office and mixed use space projects. Mr. Wood has been featured in articles on the impact of commercial leases on companies and being referred to by The Wall Street Journal and other publications as "the father of the modern killer lease." His extensive national experience in developable land, improved property acquisitions, large scale retail and office developments, and leasing and management programs have made him an ideal corporate facilities support resource for companies. He is a noted authority on fair market value determination and valuation of properties as well as rental escalations, expenses, allocations, auditing and litigation/dispute resolution. Among noteworthy projects, Mr. Wood directed the legal team in a national portfolio acquisition with a value in excess of \$2 billion and he participated in the development, leasing and financing of over 4 million square feet of regional shopping malls and retail centers nationwide. In 1998 he negotiated the largest ground/space lease transaction in the history of New York City, containing more than 1.6 million square feet and including "fast-track" rehabilitation, construction lending, permanent financing and options for fee acquisition. In addition, Mr. Wood has advised, directed teams and designed correlated construction contracts for "fast-track" design-build projects, conversions and renovations in New York City, exceeding 8 million square feet, with values greater than \$4 billion. Mr. Wood is a licensed Class "A" commercial real estate broker, a Certified Public Accountant and holds B.B.A. (Accounting and Economics), M.B.A. (Accounting and Finance) and J.D. degrees.

Mr. Wood is a member of the Association of the Bar, NYC, New York State Bar Association, American Bar Association ("ABA"), and Board of Legal Advisors to the Practicing Law Institute ("PLI"). Mr. Wood frequently lectures on property acquisition and management, commercial leasing and construction contract techniques, transaction structuring and brokerage law at major real estate brokerage firms in New York City, REBNY, the New York University Graduate School and Schack Real Estate Institute and on national television programs. He also lectures at PLI, where he is the New York and national Chairman of the Commercial Leasing Seminars, and at the executive and annual meetings of the ABA and AICPA. Mr. Wood has frequently served as a "party selected" and Federal arbitrator and with the A.A.A. in fair market rent valuation and rental/expense/adjustment disputes and audits and he is an American Arbitration Association - National Neutral - Commercial Panelist-Arbitrator and is Co-Chair of the rule making National Dispute Resolution Committee. He has also served as Assistant Attorney General (Kansas), and as special counsel to Bronxville Board of Zoning Appeals, Planning Board and Board of Trustees and is a member of the appeals court of North America for the Dutch Reformed Church, Westchester-Putnam Boy Scouts of America Council, Masonic Order, Scottish Rite Order and the National Eagle Scout Association.

Mr. Wood is the senior co-author, with Alan M. DiSciullo, Esq., of the treatise Negotiating and Drafting Office Leases, published by Law Journal Seminars-Press (Library of Congress ISBN 1-58852-061-7, 1995-2011, a 3 volume treatise supplemented twice a year); co-authored "Building Owner's Assumptions Spark Zoning War", Legal Times of New York, August/September, 1985 and co-authored "Financing Real Estate Development through Participation Leases", Real Estate Review, Volume 20, No. 4, Winter, 1991. He is the author of the book, Navigating The Dangerous Shoals of a Commercial Lease – For Beginners, published by New York University Graduate School, 1992-2011 and the ABA 1994-99, and Cross-Border for Beginners – First U.S. Business Location – Structuring for Success, published by various Chambers of Commerce ( German-American and Swedish-American ) and a textbook at NYU. Mr. Wood is listed in Who's Who in Real Estate, Who's Who in American Law, 2nd and 4th Editions, and Who's Who Registry of Global Business Leaders, 1993-4 Edition. Mr. Wood is AV peer rated preeminent by Martindale-Hubbell and is an American Bar Foundation "Fellow".

**John Busey Wood**  
**[www.leasingnyc.com](http://www.leasingnyc.com)**  
**[www.linkedin.com/in/johnbuseywood](http://www.linkedin.com/in/johnbuseywood)**  
**[jbwood@akerman.com](mailto:jbwood@akerman.com)**

## **Handout I. The Case Study on Creation of Duplicate Brokerage Claims**



## **Case Study on Creation of Duplicate Brokerage Claims**

- I. The Problem: Preparing to close a lease and addressing the “no other broker representation and indemnity section” with claims of employment and representation made by 3 or 4 brokers. Landlord’s exclusive agent and other procuring brokers or salespersons.
- II. The magnitude of the problem: Commissions in NYC are on the modified “Lehman Formula” and run approximately 28% to 35% of the first year rentals: i.e. : \$100 per sq. ft. annual rental average at say 30%, or \$30 per sq. ft. and at 50,000 sq. ft. the full commission would be 1 and ½ a commission usually or \$2.25M per commission times 3 claims or \$6.75M. Usually can tank a deal.
- III. After spending sometimes a year or more looking for candidate space and making term sheet offers on 2 or more, it is very expensive to finalize and be ready to close on one and find out that you can not close. Also, employment , even when in writing, can be a problem due to “caveat emptor” in some states like NY.
- IV. The solution:
  - a. Teach your client that brokers can earn commissions by being employed orally both by the owner and the Tenant.
  - b. Address protections of employing an exclusive broker by a tenant and clearing all inquiries through that agent.
  - c. Teach that only one officer should communicate with brokers and advise that there will be no employment unless elected and until in writing even if space is viewed with that broker. Also do not let multiple officers go out to view space without being with the employed exclusive broker.
  - d. For subleasing of space or exit strategy, address the issues up front with the facilities team to make sure multiple brokers are not employed when your client is an “owner”.

e. Have standard approved exclusive and transactional brokerage employment forms and protocol for dealing with space and brokers in place with the client.

V. Resources / attachment on Sunset 3 Realty, Inc. v. Russo Case and Lease – Brokerage Timeline of Litigation for Duplicate Brokerage Claims caused by Owner.

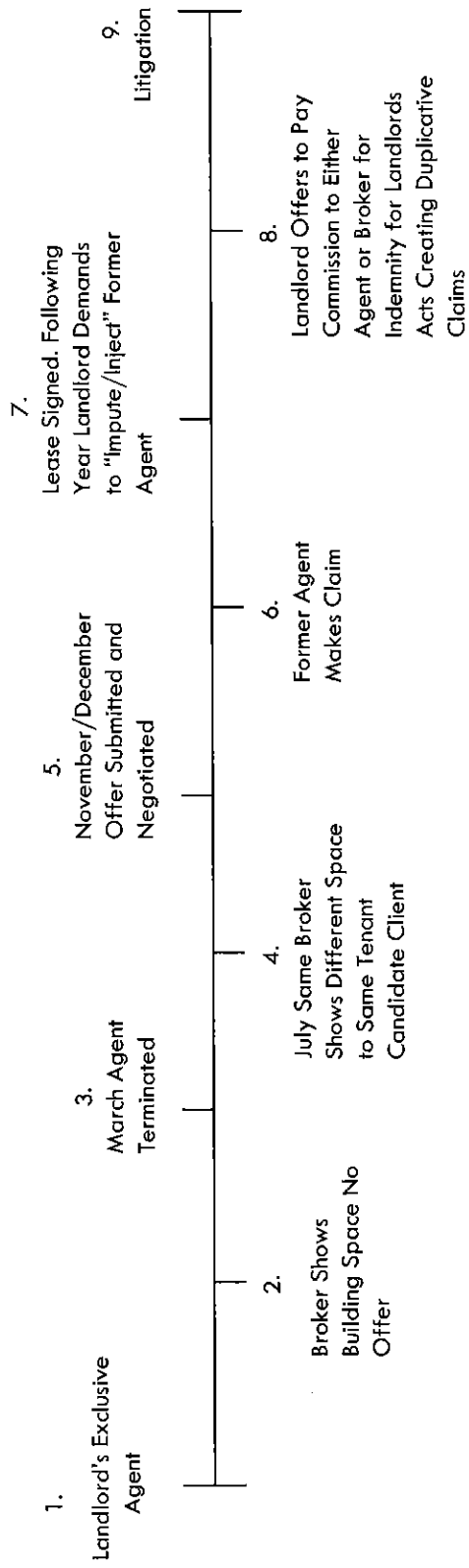
## Handout

Lease Brokerage – Employment –

Procuring Cause –

Earning Event – Co-Broker

Ethics or Duties



1. Agency Terminated No Continuing Landlord Recognition Obligations
2. Employment of Transaction Broker-Negotiations with Broker's Tenant
3. Landlord Tries to "Insert" Former Agent Without Privity or Agency
4. Former Agent Claims Interest in New Deal: Not Agent – Not Employed at "Deal Time" – No Privity with Broker for Transaction
5. Agent Not Employed as Exclusive at "Earning" – Not "Procuring Broker" – No Contractual or REBNY Ethical Relationships at Employment of Tenant Broker

1 of 1 DOCUMENT

[\*1] **Sunset 3 Realty, Inc., Plaintiff, v. Robert J. Russo, SR., Defendants.**

17917-2002

**SUPREME COURT OF NEW YORK, SUFFOLK COUNTY****2005 NY Slip Op 50600U; 7 Misc. 3d 1015A; 801 N.Y.S.2d 243; 2005 N.Y. Misc. LEXIS 797****February 14, 2005, Decided**

**NOTICE:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

**DISPOSITION:** Motion by the Defendant Robert J. Russo, for re-argument and to vacate a judgment denied.

**HEADNOTES**

[\*\*1015A] [\*\*\*243] Brokers--Real Estate Brokers--Commission.

**COUNSEL:** Peter D. Tamsen, P.C., Attorneys for Plaintiff, Bay Shore, New York.

Robert J. Russo, Pro se, Bay Shore, New York.

**JUDGES:** ROBERT WEBSTER OLIVER, J.S.C.

**OPINION BY:** ROBERT WEBSTER OLIVER

**OPINION**

Robert Webster Oliver, J.

**ORDERED** that this motion by the Defendant Robert J. Russo, for re-argument and to vacate a judgment is denied.

On May 4, 2004, this Court granted the motion of the Plaintiff for summary judgment. The Court stated the facts as follows:

On or about June 23, 1999, an agent employed by the Plaintiff obtained a listing agreement to sell a parcel of property known as 1673 Elsie Lane in Bay Shore for the agreed upon sum of \$ 169,000. The property was owned by the Defendant Robert J. Russo, Sr. and he signed that listing agreement. A copy of the

agreement is attached to the motion papers. Two offers were received for the real property. One offer was received from Jessie Josephs and another was received from George and Carmen Noriega. Although the Plaintiff alleges that both offers were full price offers, Russo, who is pro se, disputes this allegation. In any event, Russo elected to accept the offer made by Jessie Josephs and attempted to sell the property to her. Josephs then withdrew her offer to purchase the property. The listing agreement expired on September 23, 1999.

The Defendant then chose to sell the property on his own after the listing agreement had expired and placed an advertisement in the Long Island Newsday classified section for Real Estate on October 1, 1999. After the advertisement ran in the newspaper, the Defendant entered into a Contract of Sale for the subject property with George and Carmen Noriega, the same individuals that had previously submitted an offer for the house. There is no allegation that either the Defendant or Josephs acted wrongfully when a contract was not signed selling the house while the property was listed by the Plaintiff real estate broker. There is a clause in the listing agreement stating that Russo is obligated to pay a commission if the listing agreement expires and he sells the property to someone to whom the Broker had shown the house within six months immediately following the expiration of the agreement (see, *Ackerman v. Dobbs*, 181 A.D.2d 704, 580 N.Y.S.2d 793).

2005 NY Slip Op 50600U, \*; 7 Misc. 3d 1015A, \*\*;  
801 N.Y.S.2d 243, \*\*\*; 2005 N.Y. Misc. LEXIS 797

As noted in the previous decision, generally, a real estate broker is entitled to a commission when he produces a purchaser ready, willing and able to purchase the property on the terms set forth in the Listing Agreement. It is undisputed that the property herein was sold shortly after the listing agreement had expired to people that the Plaintiff broker had produced to view the property while the listing agreement was in full force and effect. The Defendant Russo cannot by placing an advertisement in a newspaper avoid a commission rightfully earned by the Plaintiff (see, *Sheppard [\*2] Int'l, Ltd. v Vogel* 147 A.D.2d 351, 536 N.Y.S.2d 788). While Russo permitted the agreement to expire by its own terms, an owner cannot terminate "activities in bad faith and as a mere device to escape the payment of the commission" (*Werner v. Katal Country Club*, 234 A.D.2d 659, 662, 650 N.Y.S.2d 866; see, *O'Connell v. Rao*, 70 A.D.2d 982, 983, 417 N.Y.S.2d 794, *lv. denied* 48 N.Y.2d 609, 424 N.Y.S.2d 1026, 400 N.E.2d 372).

Paragraph 9 of the brokerage agreement herein states:

*The above compensation shall be paid to the broker in the event that the owner enters into a contract of sale to sell the property or actually sells the property within six months immediately following the expiration of this agreement to a purchaser who was shown the property by the broker or any of the broker's agents during the term of this Agreement.*

Where, as here, there is a clause in the listing agreement stating that Russo is obligated to pay a commission if the listing agreement expires and the owner thereafter sells the property to someone that the Broker

had shown the house to before the agreement expired, the Plaintiff broker is entitled to summary judgment if the clause is enforceable (see, *Ackerman v. Dobbs*, 181 A.D.2d 704, 580 N.Y.S.2d 793; *Blake Realty, Inc. v. Giligan*, 155 A.D.2d 816, 547 N.Y.S.2d 930).

The Defendant alleges that the clause is not enforceable because 19 NYCRR § 175.15 provides:

*No real estate broker shall be a party to an exclusive listing contract which shall contain an automatic continuation of the period of such listing beyond the fixed termination date set forth therein.*

Although the period of time after the agreement terminates that the broker is protected in the situation where the owner sells the property to a person that the broker had produced while the agreement was in effect is pre-printed in Paragraph 9 of the agreement, this does not violate 19 NYCRR § 175.15. The agreement is not automatically continued by Paragraph 9 because Paragraph 9 is only a provision that protects the Plaintiff if a sale is made to a person who was shown the property while the listing agreement was in effect. The Court therefore adheres to its prior determination and the Plaintiff is entitled to summary judgment under the facts herein (see, *Buck v. Cimino*, 243 A.D.2d 681, 663 N.Y.S.2d 635, *lv. to app'l den'd* 91 N.Y.2d 807, 692 N.E.2d 129, 669 N.Y.S.2d 260).

The Court is unaware of any reason that it should recuse itself from consideration of this matter and therefore the request that the matter be assigned to another Judge addressed in the first two pages of the combined motion and affidavit is denied.

ROBERT WEBSTER OLIVER, J.S.C.

## **Handout II. The Standard Proforma/Term Sheet**

## Case Study for Proforma Term Sheets/Offer Letters

November 25, 2003

Executive Director  
West Street  
New York, NY

Re: New York Ltd.  
xxx Madison Avenue

Dear xxx

We have been authorized to submit the following proposal to lease space.

<b>PROPERTY:</b>	xxx Madison Avenue
<b>TENANT:</b>	New York Ltd. All rights shall be contained and reflected in the lease agreement as "running with the lease" and not <u>in personum</u> to the named tenant.
<b>PREMISES:</b>	Entire x <sup>th</sup> Floor – 49,000 rentable square feet
<b>LEASE COMMENCEMENT:</b>	On or around January 1 <sup>st</sup> , 2004, after Landlord Work and "Delivery Conditions" are achieved.
<b>TERM:</b>	Fifteen (15) years from Rent Commencement
<b>BASE RENTAL:</b>	Years 1-5: \$43.50 per rentable square foot Years 6-10: \$48.50 per rentable square foot Years 11-15: \$53.50 per rentable square foot
<b>RENT COMMENCEMENT:</b>	Eight (8) months from Lease Commencement (on or around September 1 <sup>st</sup> , 2004, taking into account that Premises is in Delivery Condition and no Landlord delay has occurred).
<b>LANDLORD'S WORK:</b>	Landlord to contribute \$55.00 per rsf cash to be used by tenant towards hard & soft costs expended by Tenant in preparing its Premises for occupancy, including architectural & engineering fees. Landlord to have no approval rights over Tenant's Architect or General Contractor. Subject to structuring adjustment for Section 110 IRSC issues.
<b>LEASE TAKEOVER:</b>	Landlord shall assume Tenant's remaining lease obligations at Wall Street from the date of Tenant's occupancy of Premises. The takeover agreement shall assume either an assignment with release of Tenant from the obligations under its old lease or a guarantee by the named Landlord entity with self help and offset rights and same reflected in recognition and no disturbance agreement(s) to be issued from all superior lessors and mortgagees.

<b>USE:</b>	The premises shall and Landlord must represent that it may be used as executive, administrative and general offices and for investment, brokerage and banking purposes.
<b>ELECTRICITY:</b>	<p>Direct Con Ed metered or Submetered at Landlord's cost:</p> <ul style="list-style-type: none"> <li>A. Landlord to install and charge for a submeter based on actually consumption in Premises only. Landlord to represent no building systems or other spaces are to be included on the submeter.</li> <li>B. Actual consumption shall be applied to Landlord's net annual average kilowatt cost for electricity consumed by Tenant, net of any abatements and incentives.</li> </ul>
<b>PREMISES DELIVERY CONDITIONS:</b>	<p>Premises to be ready for Tenant's work when:</p> <ul style="list-style-type: none"> <li>A. Landlord's work to be complete and include: <ul style="list-style-type: none"> <li>1. Tie-ins for life safety systems available and ready and no tap or tie in costs or charges.</li> <li>2. Any non-compliance with law issues within the space to be cured and the building in compliance and ready for pulling Tenant's work permits and delay adjustments for impacts on Tenant's Work if any. Landlord representation that the Premises is HAZMAT free and that an ACP-5 has been provided.</li> </ul> </li> <li>B. Tenant to have no legal compliance obligations for common areas and building systems or core toilets.</li> </ul>
<b>OPERATING EXPENSE/ REAL ESTATE TAX ESCALATION:</b>	<p><u>Operating Expenses</u></p> <p>Tenant shall pay its pro rata share of increases in actual operating expenses over a Calendar 2005 base year. Landlord shall supply Tenant a copy of the most recent year's operating expense details, and all operating expenses shall be based upon or in accordance with GAAP and AICPA audit standards consistently applied, as well as an estimate for Calendar 2004, on a fully grossed-up basis. Please denote the absence or presence of any extraordinary expenses (i.e. terrorism insurance). Operating Expenses shall reflect a 100% gross-up of the office space premises with expense components typical of comparable Manhattan office buildings. In no event shall management fees exceed 2% of gross building rents. (All years, including the base year, shall be grossed up to reflect that the building is fully occupied and that all tenants are paying rent). Expense statements and bills shall have full line item detail for services provided and trades. Invoices to support as well as general ledger and supplemental and sub ledgers will be provided on request. There shall be no inclusion of expenses, costs or disbursements for retail space or any parking areas or garage. Special revenues for services provided to tenants or guests such as concierge or valet parking must be removed from expenses.</p> <p>Operating Expenses shall not include the costs of capital events , disbursements or improvements or repairs or any cost associated with compliance with laws or HAZMAT remediation. Operating Expense statements shall contain line-item detail by service classification and trade category with invoice backup. Tenant shall have the right to audit, with an auditor of Tenant's choice, Owner's</p>



books and records from time to time during the term to confirm Operating Expense charges.

**Real Estate Taxes**

Tenant shall pay its pro rata share of increases in Real Estate Taxes over a Fiscal 2004/2005 base year. Tenant's Proportional Share calculations will include in the numerator all spaces of Tenant from time to time in the building and the denominator shall be adjusted each year to be the average of the sum of all demisable premises in the building, including management spaces, Landlord occupied spaces and all measured at the then current reflection in existing leases or occupancy agreements and if vacant, at the last measurement. Take back spaces shall be at the measurement in the take back agreement or sublease to Landlord or its designee.

In light of the fact that the property under construction and vacant, Tenant requires a 'basket of comparables' approach. If the rate of increase for the assessment for xxx Madison Avenue over five years exceeds the annual rate of increase of seven mutually-acceptable fully operational and tenanted buildings by more than 2% per annum, Tenant's base year amount shall be adjusted appropriately.

Base taxes shall include any BID taxes in effect. Please outline any special tax programs that now apply to the property or that may be sought.

**PLAN APPROVAL:**

Landlord shall provide expedited turn-around times for the initial and follow-up (if any) review of both initial and future alterations work. Landlord's approval shall not be unreasonably withheld, delayed or conditioned. Landlord shall receive no fees or payments associated with Tenant's initial or future Tenant work, except that Tenant shall reimburse Landlord for its reasonable out-of-pocket expenses of reviewing Tenant's plans for future Tenant work.

**LANDLORD'S BASE BUILDING  
WORK:**

Landlord shall deliver premises in accordance with the following general conditions:

- a) Fully compliant with New York building codes and all other applicable laws and shall undertake for any required work. Landlord to provide Premises fireproofed and with appropriate firestopping. All life safety tie-ins to be present and Landlord shall not charge any tie-in fees.
- b) Bathrooms shall be ADA-compliant and constructed according to New York City codes and will be of a capacity sufficient to satisfy general office requirements (alternatively, Tenant shall receive a cash allowance to perform such work).
- c) Landlord to provide electricity riser capacity for 6 watts/RSF demand load, excluding base building loads or supplemental HVAC. Landlord to provide electrical closets with panels, transformers, switchgear, and ventilation sufficient to provide 6 watts/RSF of demand capacity (plus capacity required for supplemental HVAC) throughout Tenant's space.
- d) Space will be delivered demolished and "broom-clean", and Landlord will represent that there is no ACM or other hazardous materials in the premises. At tenant's direction,

space to be demolished as per tenant's plans. Other design information that will impact Landlord's work will be provided on a mutually agreed upon schedule.

- e) Floor leveling specification to be negotiated and included in the lease. Slope or variation not to be greater than 1 inch for 25 linier feet in any direction. No dimples or gouges.
- f) HVAC and elevator specifications, and/or Landlord representations as to the comfortable habitability of Tenant's Premises, shall be consistent with a Class "A" building, to be determined and included in the lease.

Overtime and supplemental HVAC systems– Please provide description of the systems, temperature specifications and normal hours of operation.

Tenant shall have the right to install supplemental A/C at its sole cost and expense, and Landlord to provide condenser or chilled water and watts per rsf (to be determined by Tenant's engineer) for supplemental use at Landlord's actual cost (based on a formula TBD). Tenant to pay no tap-in fee for such supplemental cooling. Please provide a proposal for overtime charges based upon Landlord's actual out-of-pocket cost.

- g) Columns, core walls, and exterior walls to be provided sheetrocked and ready to receive paint.
- h) All Demising walls are to be appropriately fireproofed and constructed according to code.
- i) Convectors, if any, shall be provided in good working order, with consistent covers throughout.
- j) Landlord to provide standpipes and main sprinkler loop.
- k) Adequate riser capacity for voice and data cabling to points of presence in the building and between Tenant's floor(s).

Please provide a detailed timeline of ongoing work to the property including lobby, elevators, mechanical systems etc.

Tenant's hoisting for Tenant's initial alterations to have priority access and be at no cost to the Tenant. No redelivery or end of term obligations of Tenant except broom clean.

**BUILDING SECURITY:**

Please describe the security for the building, including procedures for tenants, guests and deliveries.

**DATA/TELECOM PROVIDER:**

Please list the providers currently servicing the building. Tenant will have the right to engage its own telecom provider, and that such provider will have POE and riser access allowing a direct pathway to Tenant's premises.

**ROFO:**

Tenant intends to grow for the foreseeable future and will require rights of first offer during the lease term (to be discussed further).

Tenant shall have the right to install staircase (s) connecting any additional floor (s) added to Premises and no removal or redelivery obligations at end of term.

**EXTENSION OPTIONS:**

Tenant shall have the option to extend its lease for a minimum of a full floor for two terms of five (5) years each, exercisable at least 12 months in advance by an extension amendment based on the all of

the terms contained in the original lease. Rent shall be at 95% Fair Market Rental Value. Fair Market Rental Value shall be defined in the lease to reflect the base rents, work contribution, free rent, and other terms and concessions available in the market at the time of renewal.

Tenant to have the right to renewal all space if it has sublet less than 30% of the Premises per floor (aggregated if on one or two floors).

**ROOF SPACE:** Landlord shall provide roof space at no cost (and appropriate riser space to/from the premises also at no cost) of up to 500 SF per floor of space leased for telecommunications equipment. Please identify location(s) available.

**FLOOR PLANS:** Please submit electronic versions of CAD plans for the proposed Premises along with your response. Alternatively, you may email plans to [mstewart@studley.com](mailto:mstewart@studley.com).

**NON-DISTURBANCE:** Landlord shall obtain a non-disturbance and recognition agreement from the lender(s) and/or ground lessor(s) on behalf of Tenant in a form reasonably satisfactory to Tenant. This SNDA will allow Tenant the right to self-help including work credits and the takeover obligations for Landlord's performance.

**SUBLEASE AND ASSIGNMENT:** Tenant shall have the right at any time to assign or sublease all or any portion of Tenant's premises without recapture and with the ability to sublease to tenants in the building. Landlord's consent shall not be unreasonably withheld, conditioned or delayed and not required for affiliated or related transactions, Banking or other Federal or State regulator related changes in ownership or assignments etc. Tenant's subtenants shall also have rights to further sublease. Tenant shall retain 50% of all profits realized from such subleasing or assignment, after traditional expenses. Landlord shall deliver recognition agreements to Tenant's subtenants, if requested.

Changes in the Tenant's name, ownership share, or its use by sublease or assignment to affiliated or related entities shall not require Landlord's consent.

**CLEANING:** Landlord to clean Tenant's space in accordance with a cleaning specification (please provide), which is comparable to other, Class "A" office buildings in New York. The specification shall contain wet mop of non-carpet areas and carpet stain removal weekly, as a standard services under the contract.

**SIGNAGE:** Tenant shall be allowed its standard signage, subject to Landlord's reasonable approval, on any full floor it occupies. Any Federal or State regulator required signage or listings shall be accommodated without consent.

Tenant shall be entitled to pro-rata listings in the Building's computerized tenant directory and comparable listing in the elevator marquee, in the event that such signage is created for other tenant (s).

**CONFIDENTIALITY:** Landlord, Tenant and their respective consultants, advisors and agents shall maintain the confidentiality of the terms herein and any discussions thereof.

**BROKERAGE:** A full commission shall be payable to XYZ pursuant to separate agreement.

This proposal is not to be construed as a lease or a reservation of space. This proposal is intended to be a non-binding proposal regarding the contemplated lease. The parties will attempt to negotiate a definitive lease generally consistent with the terms of this letter but intend no legal rights or obligations between them will come into existence until the definitive lease is signed and delivered by both of them and that, in such event, their respective legal rights and obligations will then only be those set forth in the definitive lease. No party will have any liabilities or obligations to the other, nor any rights against the other, in the event a definitive lease is not executed and delivered for any reason whatsoever and either party may terminate all discussions and/or negotiations concerning the lease at any time and for any reason.

Yours truly,

## **Handout III. The Case Study of the Comprehensive RFP**

## **Case Study of Request For Proposals and Allied Services**

**XXXXXX, LLC**  
**XXXXXXXX**  
**New York, New York 10xxx**

August, 200x

President  
Broker, Inc.  
1223 Street  
New York, NY

Dear Mr:

Thank you for your proposal to have Broker, Inc. ("Broker") provide real estate services for XXXX, LLC ("XXX,LLC"). From time to time as elected by us in writing to you and as accepted by you, we will be pleased to retain Broker to provide some or all of the services more fully described in this letter agreement (the "Agreement") and on the terms and conditions contained in this Agreement, as follows:

Broker is requested to provide services ("Basic Services") to XXX,LLC for the relocation of its headquarters space use of approximately xx,000 rentable sq. ft. ("Existing Space") from 123 Street, New York, New York (the "Building") to new space ("Replacement Space") in Manhattan, New York City. Scoping and pricing of Basic Services will consist of (a) planning for and marketing and disposal of the Existing Space ("Offering Services") if requested by XXX,LLC and (b) locating, evaluating, comparing and providing feasibility analysis of candidate spaces and procuring the Replacement Space ("Relocation Services") and procurement and disposal from time to time over a period of ten (10) years from and after the completion of the relocation from the Existing Space to other spaces as required and requested in writing by XXX,LLC on the same terms and conditions as set forth herein. You are further requested to provide additional services ("Additional Services"), including project administration of the construction of the tenant installation and build out of new locations, including provision of an on-site independent contractor to co-ordinate construction and needs from within the XXX,LLC organization ("Project Administration"), construction materials bulk purchasing for new locations construction ("Bulk Purchasing") and any monitoring and compliance review and auditing of any landlord or owner records for XXX,LLC at designated locations to evaluate and report on compliance with lease documentation of all charges and rentals billed to XXX,LLC by the owners/landlords thereunder ("Lease Auditing"). Project Administration shall be provided to construct and prepare any acquired space obtained by Broker for XXX,LLC or its affiliates, and the scope of services shall be as set forth in Schedule "C" attached hereto, and, after the Relocation Services (Phase I as defined below) which shall be provided at no cost, the cost shall be at \$2.00 per usable square foot of space prepared for occupancy less the application of a credit of 20% of Relocation Services commissions plus a credit of 30% of Offering Services commissions, with such cost payable in equal installments monthly during the term of the applicable project. Except for the actual cost of materials purchased, Bulk Purchasing shall be

considered a part of, and its cost shall be included in the cost of, Project Administration. Any defined services described herein may also be referred to herein generically as "Services".

## **1. Basic Services**

**Offering Services will, at the written election of XXX,LLC, consist of:**

(a) Obtaining a suitable subtenant or assignee (or landlord release or settlement) to take over and assume all of the obligations under the Existing Space lease all without a commission payable to Broker ("Existing Lease") or other locations (with a commission payable to Broker) as directed by XXX,LLC. A suitable subtenant or assignee will need to meet all of the consent requirements contained in the Existing Lease for consent of the landlord, must agree to economic terms which assume and defray all rent and additional rental obligations of the Existing Lease and be a suitable and creditworthy entity in the sole and absolute judgment of XXX,LLC ("Target Transaction"). Broker will be required to search for and obtain such suitable candidate occupants for a Target Transaction, help obtain landlord's consent to a sublease or assignment and attempt to obtain a release from the Existing Lease obligations by way of recapture by the landlord or a landlord release with an assignment. Offering Services shall also consist of such efforts and procedures as set forth in the Scope of Work section of this Agreement.

(b) There shall be excluded from the Offering Services and from any compensation, any transactions constituting the "Exempt Transactions." Exempt Transactions shall include any transaction with the listed entities on Schedule "B" attached hereto or the recapture of the Existing Space by landlord resulting from the proposal of any Exempt Transaction or assignment or subleasing of the Existing Space.

**Relocation Services will consist of:**

Searching and obtaining suitable Replacement Space (or new location space as elected by XXX,LLC) which shall be satisfactory to XXX,LLC in its absolute and sole judgment. Relocation Services shall consist of such efforts and procedures as set forth in the Scope of Work section of this Agreement, which shall include site and space feasibility analyses, MEP, and compliance with laws inspection and reporting.

## **2. Term and Termination**

The "Term" of representation for the Basic Services shall be for 12 months from the date of Broker's acceptance of this Agreement. XXX,LLC may terminate the Basic Services Term in whole or in part, with or without cause, at anytime during that Term. In the event XXX,LLC terminates the Basic Services without cause prior to the expiration of the Term, XXX,LLC agrees to reimburse Broker for the actual XXX,LLC approved charges the Broker has incurred for the Offering Services as of the date of termination, except in the event any commission(s) is, will or has been earned pursuant to the terms of this Agreement. The Term may be extended by XXX,LLC upon written notice to Broker, and XXX,LLC shall have the right to elect obtaining any of the Services described herein by notice to Broker for a period of fifteen (15) years after either the expiration of the initial Term or the termination of this

Agreement, in which case the Broker shall provide such Services and the provisions of this Agreement shall again apply to such elected Services, irrespective of any earlier expiration of the Term or termination of this Agreement. Unless terminated by XXX,LLC, this agreement shall automatically renew for periods of one year each for 15 years after the conclusion of the relocation of the Existing Space.

Within fifteen (15) days of any termination of the agreement for Basic Services, Broker must provide a certified list of all active candidates with whom it is currently negotiating and has exchanged documentation. XXX,LLC is only obligated to pay Broker a commission for candidates on the certified list and with whom a transaction closes within sixty (60) days of the termination of Basic Services. Any transaction XXX,LLC closes with a party on the Exempt Transaction list or for the Existing Space shall not be commissionable.

### **3. Scope of Work for Basic Services**

#### **Offering Services**

(a) The Broker will market future space when requested to qualified potential sub-tenants or assignees and work with XXX,LLC to conduct a candidate selection process.

(b) The Broker shall advertise the applicable space, prepare and secure special plans, signs, brochures, circular matter and/or other forms of advertising, subject to XXX,LLC's written approval and upon the Target Transaction criteria. The Broker shall also prepare and distribute a standard brokerage flyer with XXX,LLC's written approval. Except for the Exempt Transactions and the Existing Space, during the Term of representation XXX,LLC will refer to the Broker all inquiries and offerings received by XXX,LLC with respect to the applicable space, and all negotiations shall be conducted with assistance of the Broker and with XXX,LLC's attorney. All final business and legal decisions shall be made solely by XXX,LLC and all binding agreements shall only be executed by XXX,LLC. Broker shall solicit and cooperate with outside brokers, "Co-Brokers" (as defined below), sub-brokers and sales persons outside Broker's company.

#### **Relocation Services**

During the Term of Basic Services Broker shall use its commercially diligent efforts to obtain Replacement Space or other designated space at a location or locations and on terms absolutely satisfactory to XXX,LLC. Broker's services shall include, without limitation, the following ("Phase I"):

Broker shall:(a) Acquire the pertinent descriptive information, and all other relevant materials, details, and information necessary or advisable for XXX,LLC's informed consideration, on all contemplated or presently available locations which in Broker's reasonable opinion professionally applied are the most suitable for XXX,LLC's purposes.

(b) Carefully select and present to XXX,LLC such suitable locations, with such pertinent and relevant information, at a time or times convenient to XXX,LLC. Selection and



suitability will be determined by premises visits by Team members which shall have engineering and mechanical experience.

(c) Arrange for inspections of such suitable locations by XXX,LLC or its representatives and prepare site analysis and financial analysis, including site and space feasibility analyses, MEP, and compliance with laws inspection and reporting, acceptable to XXX,LLC.

(d) Seek to obtain and negotiate offers on appropriate terms from lessors or owners and review them with XXX,LLC. If and when XXX,LLC decides on a potential transaction, Broker will negotiate the terms of the contemplated transaction on XXX,LLC's behalf and in XXX,LLC's interest, utilizing Broker's knowledge of real estate values, space engineering and rentals, and the terms of the numerous sales and leases previously negotiated by Broker and others in the location. Broker will prepare written term sheets or term letters for XXX,LLC approval for offers and counter-offers.

(e) Cooperate with attorneys for XXX,LLC to prepare and finalize documents associated with the contemplated transaction.

(f) Meet and communicate periodically with XXX,LLC to review the status of the search for replacement space and submit written reports of such status and prepare complete budgets and financial analysis and reporting for each candidate location containing appropriate cash flow comparisons, present value analysis, critical path timing analysis, and tax impact analysis for consistent evaluation of all candidate locations. Such budgets and financial analysis shall include work and alterations at each location as well as supplemental systems needed and annual costs to operate same to supplement basic building systems.

(g) XXX,LLC acknowledges that Broker shall not be responsible to determine whether or not hazardous wastes or substances or other undesirable materials are present at the space or location which is the subject of any transaction entered into by XXX,LLC. Broker agrees to bring to XXX,LLC's attention any information of which Broker actually is aware or actually becomes aware which may bear on the issue of the potential presence of any hazardous wastes or substances or other undesirable materials.

### **Members of the Broker Team**

The Broker shall cause Peter xxxx, xxxx and xxxxt to be members of the team ("Team") assigned to provide the Basic Services and Additional Services for any designated location, subject to the written approval of XXX,LLC. The members of the Team shall not be changed except with the written approval of XXX,LLC. In the event that the Broker no longer employs a listed Team member, the Broker agrees to replace the Team member with a person having the same area of expertise and similar experience and subject to XXX,LLC's reasonable approval. Broker hereby further warrants and represents to XXX,LLC that each member of the Team will not now have, and to the best of their knowledge shall not have at the time of the execution of any documents in connection with any transaction consummated in connection with the Basic Services, any financial, proprietary, or any other legal interest or relationship, as agent, broker, or otherwise, in either the Replacement Space or other space or any of the entities constituting

any lessor or owner, or affiliate of any lessor or owner, of such Replacement Space or building containing same (singly and/or collectively, a "Related Interest") under any transaction which Broker presents to XXX,LLC. If Broker or any of its principals does have any such Related Interest, Broker shall promptly disclose such Related Interest to XXX,LLC, but in no event later than five (5) business days after the submission to XXX,LLC of candidate Replacement Space or Target Transaction candidates in which such Related Interest exists. If the Broker Team elects to submit to XXX,LLC a potential Replacement Space or Target Transaction candidate in which any member of the Broker Team has a Related Interest, Broker shall include the disclosure of such Related Interest with the submission to XXX,LLC. Upon any such disclosure, XXX,LLC may, at its sole and absolute discretion, proceed with or decline to proceed with the proposed transaction. If Broker breaches its warranties or representations contained in this Paragraph or misrepresents or withholds any required disclosure or facts regarding any Related Interests, XXX,LLC may terminate the Term of the Basic Services agreement for cause, without waiving or releasing any claims or remedies available to XXX,LLC, all of which are expressly reserved and shall survive the expiration or termination of the Basic Services Term.

#### **4. Compensation for Basic Services**

##### **Offering Services**

##### **(a) If No Co-Broker is Involved**

In the event that Broker represents it is the sole procuring cause of a Target Transaction sub-leasing or assignment or a recapture of the applicable space lease by landlord through such efforts of Broker (other than for an Exempt Transaction or for the Existing Lease or Space) and has dealt with no other broker, person, corporation or other in connection with respect to the transaction or the negotiations prior thereto and that no other person, corporation or other entity of any kind other than Broker is, or will be in any way, involved as a broker, finder or in a similar capacity with respect to the transaction, then the Broker shall be paid seventy percent (70%) of a "Full Commission" (defined below) as provided in accordance with the rate schedule attached as Schedule A ("Rate Schedule") and as calculated below for a sublease or assignment (without a landlord release). Broker shall indemnify, defend, and hold XXX,LLC harmless from and against any liability, claim, damage, cost or expense (including, but not limited to, attorneys' fees and disbursements) arising out of or with respect to any claims made by any broker, person or other entity for commission or other compensation with respect to the transaction or the negotiations leading thereto who claim to have dealt by and through Broker; provided, however, the Broker's liability arising under the indemnity set forth in this Section 4(a) shall be limited to the amount of commission paid to Broker, but including in all cases without applying such limitation, all fees or expenses, including, without limitation, court costs, expert witness fees and reasonable attorneys' fees and disbursements, incurred by XXX,LLC in order to enforce Broker's indemnity obligations hereunder.

##### **(b) If a Co-Broker is Involved**

In the event a licensed real estate broker other than the Broker ("Co-Broker") is the effective procuring cause of any sublease or assignment meeting the Target Transaction

criteria during the Basic Services Term (other than for an Exempt Transaction or the Existing Space or Lease) , then that Co-Broker shall be entitled to a Full Commission as provided in accordance with the Rate Schedule and as calculated below. In such circumstances, Broker shall be paid an override commission of 25% of the Full Commission payable to the other procuring Broker. All commissions shall be paid to Broker for disbursement to Co-Broker, unless XXX,LLC elects to pay such directly.

## **Relocation Services**

Broker shall not charge XXX,LLC any commission or other fee, and none shall be due or payable, for the initial review of information, site selection, and feasibility studies phase of the Relocation Services (Phase I). Broker shall receive its sole fee and compensation from the owner or lessor of each and every Replacement Space that is leased, ground leased, assigned, or purchased. Broker hereby covenants to grant to XXX,LLC a reasonable opportunity to review any proposed commission agreement between Broker and the owner or lessor of the space selected, in order to participate in the drafting and revision of any term which may affect XXX,LLC's interest, and to obtain XXX,LLC's prior written consent to the portion of the commission agreement which affects XXX,LLC's interest before it is executed by Broker. XXX,LLC shall not unreasonably withhold its consent to Broker's undertaking of such agreement and will in no way interfere with the matters contained therein which do not pertain to or affect XXX,LLC's interest thereunder. In no event shall XXX,LLC negotiate or communicate with the owner or lessor or their respective agents in connection with any such commission agreement. Broker shall not inform other brokers or agents or owner or lessor of any of the terms of this Agreement with XXX,LLC when negotiating any prospective lease or brokerage agreement with such owner or lessor. Broker shall at XXX,LLC's direction, contribute 20% of its commission compensation for any Relocation Services transaction effected by Broker as a credit against any compensation due Broker for any transaction under this Agreement for any Services provided to XXX,LLC for any location or apply 20% of its commission compensation for any Relocation Services transaction effected by Broker toward additional free rent and/or work allowance or alteration work (or any combination of any or all) with respect to such negotiated location.

## **5. Calculation of Compensation for Offering Services**

(i) Broker agrees that the sole compensation to be paid to it (or to any Co-Broker) for other than Exempt Transactions, in the event that the "Conditions" (as hereinafter defined) are fulfilled, will be seventy percent (70%) of a Full Commission (as hereinafter defined). A "Full Commission" shall be equal to the sum of the products resulting from the applications of the rates set forth in the Rate Schedule to the "fixed rent" (as hereinafter defined) for each applicable year (a) of the sublease for the corresponding years of the particular existing Lease term and (b) of an assignment or a recapture by landlord (if obtained by Broker as determined by the terms of this Agreement). In the event of a landlord recapture and termination of the obligations of the applicable existing Lease produced by Broker through its provision of a subtenant or assignee satisfactory to XXX,LLC, the commission, if any, payable for the balance of the term of the applicable existing Lease shall be reduced by any commission received by Broker for any lease transaction in the Building relating with the tenant introduced by Broker triggering the recapture of the applicable existing Lease. This commission payment for a recapture by a landlord will not be available for a Co-Broker. As set forth in this agreement, no

commission shall be paid or deemed earned for any Exempt Transaction or Existing Lease or Space.

(ii) For the purposes of this Agreement, "fixed rent" shall mean (1) the aggregate base rental payable under the applicable existing lease for the balance of the applicable existing lease term in the event of a recapture by Landlord or an assignment by XXX,LLC or (2) in the event of a sublease, the base rental payable to XXX,LLC by a sub-tenant during each sublease year within the balance of the applicable existing Lease term. Base or fixed rent under the applicable existing lease or any sublease shall be exclusive of or have deducted from, as is applicable, the following items: (i) any operating expenses or escalations ; (ii) amounts payable for utilities or utility services, heat or air conditioning, or other services including but not limited to electricity, gas, water, sewer, or shared tenant services; (iii) any payments to be made pursuant to any cost of living formulae, or on account of increases in real estate taxes, wages or labor costs or costs of maintaining or operating the Building (whether actual or estimated), or any other payments to be made pursuant to any escalation formulae which increases the basic or additional rent; (iv) any payments to be made by a sub-tenant on account of work, labor or materials furnished by XXX,LLC, and any payments, allowances or funds given by XXX,LLC to a sub-tenant or assignee or payments made by XXX,LLC to the landlord for the recapture, assignment, release or sub-lease or the value of any work performed or caused to be performed by XXX,LLC in lieu of such payments or otherwise in respect to the applicable existing space or any portion of the Building; (v) any payments to be received by XXX,LLC or made by XXX,LLC in connection with an option to cancel, if any, under the sublease ; (vi) any payments by a sub-tenant or assignee of fixed rent which are waived by separate agreement; (vii) any payments to be made for overtime or extra cleaning, utilities, heat, air conditioning, or other services; (viii) all costs and expenses assumed or incurred by XXX,LLC, if any, in connection with an assignee's or sub-tenant's (or their affiliates) lease obligations for space rented by such assignee or sub-tenant (or their affiliates) from others outside the Building including, without limitations, all rent, additional rent, expenses incurred in re-letting such space and such assignee's or sub-tenant's moving costs; (ix) any costs and expenses assumed or incurred by XXX,LLC in connection with any takeback of space by XXX,LLC in connection with the assignment or sublease including, without limitation, all expenses incurred in re-letting such space; (x) any credits given by XXX,LLC to a sub-tenant against rent for any reason, including but not limited to, rent concessions; and (xi) any matter or thing whatsoever including, but not limited to, any increases in rentals agreed upon after the Conditions have been fulfilled, and any payments in connection with the exercise by an assignee or sub-tenant of a right of first refusal or other option contained in the sublease, assignment or a separate agreement to extend the term of the applicable existing lease, sublease or lease additional space in the Building. With respect to any Sublease which provides for adjustments in annual fixed rent, if the annual fixed rent payable during any portion of the term of the sublease is not determinable on the date the Conditions have been fulfilled, the annual fixed rent during such portion of the term of the sublease shall be deemed to be at the annual rate payable during the year immediately preceding such portion of the term of the sublease. If XXX,LLC shall have made any overpayment of commissions, such overpayment shall be repaid promptly to XXX,LLC. This obligation shall survive any expiration or termination of any agreement with Broker.

(iii) The term "Sublease Year" shall mean the twelve-month period commencing on the date set forth in the sub-lease or an assignment as the commencement of the term thereof (and for a recapture, the date of the termination of the Existing Lease) and each twelve-month

period thereafter, but not to exceed the balance of the term of the applicable existing lease. In the event of less than a twelve-month period at the end of the Lease term, such fixed rent shall be apportioned. Payments made by XXX,LLC as part of, or to induce, a recapture or assignment with release will be deducted from the base or fixed rent in the Sublease Year paid. Payments for equipment, fixtures, improvements, decorations and furniture shall be excluded from fixed or basic rent.

#### **6. When Compensation is Due**

No brokerage commission or compensation of any nature whatsoever will be due and payable to Broker unless a qualified sub-tenant, assignment or recapture of the applicable existing space and termination of the applicable existing lease is approved in writing by XXX,LLC and its landlord and until all of the following conditions (the "Conditions") are satisfied: (a) a sublease, assignment or landlord recapture and release agreement (procured in each instance by Broker) , as applicable shall have been fully executed and unconditionally delivered by all parties hereto, (b) all approvals, consents and agreements to the transaction documents deemed necessary, appropriate or advisable by XXX,LLC, its counsel or the holder of any superior lease or mortgage, or required by the landlord, assignee or the sublessee, or their counsel, shall have been duly and timely obtained or waived, (c) all deposits, initial payments and security by finally collected funds shall have been deposited with the landlord and with XXX,LLC such as advanced rent, security and/or guarantee(s) as may be required under the terms of the transaction documents, and (d) the subtenant, assignee, landlord, or owner, as the case may be, is not at the time in default of the agreement for its applicable transaction, and if such default exists, all payments of commissions shall be deferred until such default is cured. If for any reason whatsoever, including XXX,LLC's default, willful or otherwise, all of the foregoing conditions are not fulfilled, no brokerage commission or other compensation shall be payable to Broker or a Co-Broker. Broker hereby acknowledges that in such instance it shall have no right to file a lien against the Building, Existing Lease or Space or any interest of XXX,LLC therein under Sections 2 and 10 of the New York Lien Law or an affidavit of entitlement to a commission under Section 294-b of the New York Real Property Law, or under any other law or statute notwithstanding the provisions of Section 34 of the New York Lien Law, the provisions of which Broker hereby expressly waives. Broker agrees to indemnify XXX,LLC and its landlord and hold XXX,LLC and its landlord harmless from and against any damages, costs and expenses (including attorney's fees) arising out of Broker's breach of the foregoing provisions.

## **7. Timing of Commission Payments**

Any commission which may become payable shall be paid to Broker as follows: (i) 1/3 within ten (10) days after the execution by all parties of an assignment, sublease or recapture/termination agreement procured by Broker and any and all other necessary documents and the approval of same by all necessary parties thereto and any superior title interest holder such as the mortgagee or lessor of the Building or land thereunder, (ii) 1/3 within thirty (30) days after the sublease commencement, the effective date of the assignment, or the effective date of the applicable lease termination by the landlord (the "Intermediate Payment Date"), and (iii) the final 1/3 30 days after the Intermediate Payment Date; provided, however, that if the subtenant, assignee, landlord, or owner, as the case may be, is at the time in default of the agreement for its applicable transaction, all payments of commissions shall be deferred until such default is cured. All payments due and owing any applicable Co-Broker shall also be made in accordance with this schedule and directly by XXX,LLC to such Co-Broker if XXX,LLC so elects.

## **8. Additional Services: Scope and Compensation**

As provided in the introductory paragraphs of this Agreement, Additional Services shall include construction Project Administration (including Bulk Purchasing) and Lease Administration.

### **(a) Project Administration**

The terms and conditions under which the "Project Administration Services" shall be performed are provided in Schedule "C" hereof. Included in Schedule C-2 hereof is the scope of Project Administration Services to be provided hereunder which shall include, but not be limited to, the following services to be performed by Broker: Review applications for payment and percentage of completion; Assist in obtaining partial and final lien waivers and general releases; Assist in line-item budgeting and comparison to payments; Assist in controlled and other inspections; Assist in compliance with and application for work allowances and tenant funds; Assist in obtaining special use permits and coordinate with Owner/Landlord and trades to facilitate tie-ins between multiple floors; Review Owner's/Landlord's construction rules and approved contractors and assist in Tenant compliance therewith. The Project Administration Services as set forth in this paragraph and in Schedule C-2 are defined as "Phase II" for the purposes hereof. The fees for Project Administration shall be as set forth in the second paragraph of this Agreement, subject to the terms and conditions set forth in Schedule C-3 hereof. XXX,LLC.

### **(b) Lease Administration**

The scope of Lease Administration Services shall be as described in Schedule "D" to this Agreement and this Section 8(b). The fees for Lease Administration shall be as set forth in Schedule "D" to this Agreement, and shall be subject to the applicable provisions of this Agreement, except as provided in the next sentence. In the event of a Basic Services transaction hereunder that results in the acquisition or disposition of space by or on behalf of XXX,LLC, XXX,LLC shall be entitled to elect Lease Administration Services with respect to any lease,

assignment or sublease, as the case may be, that is the subject of such transaction for the duration of the term of such lease, assignment, or sublease, including any renewals or extensions thereof, at no cost to XXX,LLC. XXX,LLC.

To the extent that there is any question or conflict among the construction Project Administration or Lease Administration Services described in: (i) this Agreement, including this Section 8 and (ii) Schedule "C" or "D" hereof, as applicable, the description that is most inclusive and sets forth the service(s) with the greatest benefit to XXX,LLC or most extensive level of detail and specificity, in the opinion of XXX,LLC, shall control.

Unless otherwise provided herein or in any subsequent agreement between XXX,LLC and Broker, compensation for Additional Services shall be payable in accordance with the terms of Schedules C, C-2, C-3, and D respectively.

**9. XXX,LLC's Unqualified Right of Refusal**

Notwithstanding anything to the contrary, it is expressly agreed that XXX,LLC shall have the unqualified right, in its sole and absolute discretion, to refuse to enter into any assignment or sublease for any reason whatsoever without incurring any obligation to Broker for the payment of commissions or otherwise. Broker further agrees that in no event shall XXX,LLC be obligated to institute any legal or other proceedings to compel the landlord, an assignee or a sub-tenant to conclude the transaction or to fulfill any of the landlord's, assignee's or sub-tenant's obligations in the event of any default under any of the transaction documents or agreements. It is understood that any offers that Broker presents are subject to the required approval by the appropriate officers or committees of XXX,LLC, and that such offers will not be deemed to have been accepted until a satisfactory contract, lease, or other appropriate agreement has been fully executed and delivered.

**10. Taxes**

XXX,LLC shall not be billed for Federal, State, or local taxes and all of the Basic Services shall be billed with any taxes deemed to be included in the Rate Schedule, and Broker shall submit all required tax filings and pay all required taxes in connection therewith.

**11. Confidentiality**

Broker acknowledges that all non-public information and material regarding XXX,LLC, including but not limited to, its operations, business practices, or security procedures obtained by the Broker, its agents or employees is to be treated as confidential and agrees not to disclose any such non-public information to a third party without XXX,LLC's prior written consent.

## **12. Publicity**

Broker shall not use XXX,LLC's name or the name of Legg Mason or any adaptation or variation of XXX,LLC's name or the name of Legg Mason in any advertising, promotional material, or other publication, or otherwise publicize or communicate Broker's relationship with XXX,LLC without XXX,LLC's prior written consent. Broker shall not advertise the Existing Space in default of the relevant terms or prohibitions thereof.

## **13. Insurance**

I. For all Services hereunder other than the Project Administration Services (the insurance requirements for which are set forth in Exhibit C) Broker shall take out, pay for, and maintain the following insurance, while it is performing Basic Services and/or Lease Administration Services:

- a. Workers' Compensation and Employer's Liability Insurance as required by law; and
- b. Commercial general liability insurance written on an occurrence basis (including contractual liability and personal injury coverages) in the amount of not less than \$10,000,000 combined single limit. The insurance companies issuing such insurance shall have an AM Best Rating of not less than A-VII. XXX,LLC will be an additional insured in commercial general liability insurance maintained as required under this Agreement, and XXX,LLC shall be furnished a certificate of insurance evidencing such insurance which certificate shall provide that the insurer will endeavor to give XXX,LLC thirty (30) days prior written notice of cancellation.
- c. Professional liability or errors and omissions coverage with limits of not less than \$3 million. If requested by XXX,LLC, Broker shall furnish a certificate from the insurance company or companies that the policy or policies are in effect and that the insurers will endeavor to provide thirty (30) days' prior written notice of cancellation from the insurance company to XXX,LLC.
- d. Compliance with this requirement to carry insurance shall not relieve Broker from liability under any provision of the Agreement.

II. Other than in connection with Project Administration Services (the insurance requirements for which are set forth in Schedule C), XXX,LLC shall obtain and keep in force commercial general liability insurance written on an occurrence basis (including contractual liability and personal injury coverages) and such other coverages as may be customarily obtained by XXX,LLC for its current operations, but not less than \$10,000,000 in annual policy limits. The insurance companies issuing such insurance shall have an AM Best Rating of not less than A-VII. Broker will be an additional insured in all liability insurance maintained with respect to each property for which Basic Services and/or Lease Administration Services are



provided and for which XXX,LLC carries insurance or is required to carry insurance under its agreement for occupancy for each respective property, and Broker shall be furnished a certificate of insurance evidencing such insurance which certificate shall provide that the insurer will endeavor to give Broker thirty (30) days prior written notice of cancellation. All such liability policies shall be primary and non-contributory with any liability insurance carried by Broker with respect to any claims arising out of the performance or non-performance of Broker's duties and activities within the scope of this Agreement or arising from any action or activity on, or condition of, any property for which Basic Services and/or Lease Administration Services are provided. Broker agrees (a) to notify XXX,LLC and the insurance carrier promptly after Broker receives actual notice of any such loss, damage or injury; and (b) to take no action (such as admission of liability) which might bar XXX,LLC from obtaining any protection afforded by any policy XXX,LLC may hold or which might prejudice XXX,LLC in its defense to any claim, demand or suit within limits prescribed by the policy or policies of insurance. Broker shall aid and cooperate with XXX,LLC in every reasonable way with respect to such insurance and any loss thereunder. All property damage insurance policies shall contain appropriate clauses pursuant to which the respective insurance carriers shall waive all rights of subrogation with respect to losses payable under such policies; and XXX,LLC waives any claims against Broker, its partners, directors, officers, agents, servants and employees, which is covered by such insurance or would be covered under any property insurance, whether or not required, including any deductibles, co-insurance or self-insurance retentions, irrespective of the cause thereof.

#### **14. Indemnification**

(a) With respect to all Services hereunder other than the Project Administration Services (for which the applicable indemnity provisions are set forth in Exhibit C) Broker shall indemnify and hold harmless XXX,LLC and its agents and employees from and against all claims, damages, losses and expenses (including reasonable attorneys' fees) arising out of the providing of Basic Services and/or Lease Administration Services if the claim, damage, loss or expense:

- (i) is attributable to bodily injury, emotional distress, sickness, disease, death, fraud, theft or to injury to or destruction of tangible property, including the loss of use resulting therefrom; and
- (ii) is caused by willful misconduct or a negligent act or omission in connection with providing of Basic Services and/or Lease Administration Services by Broker, its employees or agents or anyone for whose acts any of them may be liable.

This indemnity shall not apply, however, to the extent the claim results from XXX,LLC's negligence.

(b) This indemnification obligation is not limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for Broker under workers' compensation acts, disability acts or employee benefits acts.

- (c) With respect to all Services hereunder other than the Project Administration Services (for which the applicable indemnity provisions are set forth in Exhibit C) Broker shall indemnify, defend (with counsel reasonably acceptable to XXX,LLC) and hold harmless XXX,LLC and its affiliates and subsidiaries and each and all of their officers, directors, employees, shareholders and agents from and against any and all liabilities, loss, claims or damages and expenses, including, without limitation, court costs, expert witness fees and reasonable attorneys' fees and disbursements caused to XXX,LLC or its affiliates and subsidiaries and each and all of their officers, directors, employees, shareholders and agents by any willful misconduct or negligent acts or omissions of Broker, Co-Brokers, sub-brokers or its agents or by the breach or alleged breach of any representation herein contained by Broker or breach of the terms and provisions of this Agreement, including, without limitation, claims for brokerage commissions or other compensation arising out of or in connection with the Basic Services by any party claiming to have dealt with Broker, limited as to the indemnity set forth in this Section 14(c) to the amount of commission paid to Broker, but including in all cases without applying such limitation, all fees or expenses, including, without limitation, court costs, expert witness fees and reasonable attorneys' fees and disbursements, incurred by XXX,LLC in order to enforce Broker's indemnity obligations hereunder.
- (d) With respect to all Services hereunder other than the Project Administration Services (for which the applicable indemnity provisions are set forth in Exhibit C) XXX,LLC agrees to and will indemnify, defend (with counsel reasonably acceptable to Broker), and hold harmless Broker, its affiliates and subsidiaries and each and all of their officers, directors, employees, shareholders and agents from and against all claims, losses, liabilities and expenses (including reasonable attorneys' fees, expert witness fees and court costs), arising out of or in connection with any of the activities described in this Agreement (other than Project Administration Services), except to the extent such claims, losses, liabilities and expenses arise by virtue of Broker's negligence or willful misconduct hereunder or breach of the terms and provisions of this Agreement.
- (e) The indemnities contained in this Section 14 shall survive the expiration or termination of this Agreement.

**15. Assignability**

Broker shall not assign, transfer, or convey its rights, obligations, or duties under this Agreement, including the right to payment in whole or in part, without XXX,LLC's prior written consent, and any attempted assignment shall be null and void.

**16. Choice of Law and Jurisdiction**

This Agreement and all amendments thereto shall be construed and enforced in accordance with the laws of the State of New York and exclusive jurisdiction for the

determination of any disputes hereunder shall be submitted only to the Supreme Court, Commercial Part (if applicable), sitting in Manhattan, New York City, and the parties hereto expressly submit themselves to the jurisdiction of that court.

**17. Status of Broker**

Broker represents that it is an independent contractor and shall not be considered XXX,LLC's agent for any purpose whatsoever and the Broker is not granted any right or authority to assume or create any obligation or liability or make any representation, warranty or agreement (express or implied) on behalf of XXX,LLC. Broker warrants and represents to XXX,LLC that it shall provide brokerage services and comply with its duties of reasonable care, individual loyalty, confidentiality, full disclosure and duty to account to XXX,LLC in its capacity as independent contractor and exclusive broker in connection with the Basic Services. In the event that Broker is terminated for and determined to be in material breach of its fiduciary duties to XXX,LLC, Broker agrees to give and shall be deemed to have given to XXX,LLC a general release exonerating XXX,LLC from further obligations under the terms hereof or any agreement with Broker. Such obligation shall survive the termination of any such agreement with Broker. Broker, by countersigning and returning this Agreement warrants and represents that it is a real estate broker duly licensed as such by the State of New York and is thereby authorized to transact brokerage business in that state and will be duly licensed or associated so as to be duly licensed and similarly authorized to perform brokerage services in any jurisdiction that XXX,LLC elects to have Broker provide such services. Broker agrees, warrants, and represents that any Co-Brokers, sub-brokers or other real estate agents which may be retained by Broker shall be solely responsible to and be the sole responsibility of Broker, including, without limitation, for the payment of any commission or portion thereof, and XXX,LLC shall have no privity of contract with or be responsible to or for the acts of, or commissions or portions thereof payable to, any such Co-Broker, sub-broker or real estate agent pursuant to the terms of this Agreement. This provision shall be included in all co-brokerage agreements between Broker, or any constituent entity or affiliate of Broker, and participating Co-Brokers, sub-brokers or other real estate agents, for the benefit of XXX,LLC. XXX,LLC shall have the right in its sole and absolute discretion, without any liability with respect to commission, to determine whether or not to enter into, proceed with, or consummate any proposed transaction at any time.

**18. Limited Liability.**

Each party's liability hereunder shall be limited to its assets; and no partner, director, officer, agent, servant, employee, representative or affiliate of either party shall have any personal liability in connection with this Agreement. Neither party shall be liable to the other for, and each party hereby waives any and all rights to claim against the other, any special, indirect, incidental, consequential, punitive or exemplary damages in connection with this Agreement, including, but not limited to, lost profits, even if the party has knowledge of the possibility of such damages; and, except for the indemnification obligations expressly set forth herein, in no event shall Broker's liability to XXX,LLC for the services set forth hereunder, except Project Administration Services and Lease Administration Services, exceed the fees paid to Broker in connection with this Agreement, excluding those fees paid for Project Administration Services and Lease Administration Services. For Project Administration

Services Broker's liability shall be limited to the greater of annual fees paid or Five Million Dollars (\$5,000,000). For Lease Administration Services Broker's liability shall be limited to the amount of One Hundred Thousand Dollars (\$100,000). Nothing contained in this paragraph or otherwise in this Agreement shall preclude or limit each party's right to claim and collect insurance payments and proceeds.

**19. Submissions**

Submission of this Agreement for review and execution shall convey no rights nor impose any obligations on either XXX,LLC or Broker until such time as this Agreement is fully executed, countersigned, and delivered by the parties hereto. Reference in any proposal prior to or other than this Agreement to: "standard rates", "standard provisions of other documents, exhibits, schedules, riders or forms", "as contained in other forms" or to language or formulae not specifically contained in this Agreement shall be deemed rejected and the provisions of this Agreement shall be deemed to control. Fees and other compensation for Additional Services, including Bulk Purchasing, Lease Auditing and Project Administration shall be line item enumerated with detail definitions of "work", "materials" and "labor" compensation calculations, defining "soft costs" and "hard costs" and any fee percentage application thereto; provided, however, no "costs" shall include application of a fee to shipping or delivery costs, insurance costs or sales taxes. The persons signing and countersigning this Agreement on behalf of their respective party represent to the other party that they are duly authorized to execute this Agreement and bind their respective party thereby.

Sincerely,

XXX,LLC, LLC

By: \_\_\_\_\_  
Vice President

Accepted and agreed to this \_\_\_\_\_  
day of , 200:

Broker, INC.

By: \_\_\_\_\_  
Name:  
Title:

**SCHEDULE A**

**Schedule of "Full Commission" Rates :**

(With a 30% discount to be applied to commissions for Offering Services)

Per "Sublease Year" on the "basic or fixed rent" (as defined in the AGREEMENT)

On the first year or any fraction thereof.....	5%
On the second year or any fraction thereof.....	4%
On the third year up to and including the fifth year.....	3 ½%
On the sixth year up to and including the tenth year .....	2 ½%
On the eleventh year up to and including the twentieth year.....	2%
On the twenty-first year and thereafter .....	1%

**SCHEDULE B**  
**Exempt Transactions**

All transactions at 123 Street for assignment or subletting and/or surrender.

## **SCHEDULE C**

### **PROJECT ADMINISTRATION SERVICES TERMS AND CONDITIONS**

#### **SECTION I. SCOPE OF SERVICES**

1.1 **Services.** From time to time upon the request of XXX,LLC evidenced by the issuance of a project authorization in the form attached hereto as Exhibit C -1 (a "Project Authorization"), BROKER shall perform the Project Administration Services described in Exhibit C -2 ("Services") with respect to one or more of XXX,LLC's construction projects (a "Project") on the terms and conditions set forth herein. Upon execution of the Project Authorization by XXX,LLC and BROKER, each Project referenced in such Project Authorization shall be deemed incorporated into and made a part of this Agreement. BROKER shall perform the Services for each Project in accordance with the schedule set forth in the Project Authorization for such Project. The execution by XXX,LLC and BROKER of a Project Authorization shall constitute Broker's authority to proceed to provide Services with respect to the applicable Project, and BROKER shall not be obligated or authorized to perform any Services with respect to any Project until a Project Authorization for such Project has been signed by XXX,LLC.

1.2 **Additional Service Providers.** XXX,LLC and BROKER acknowledge and agree that XXX,LLC may require the services of architects, space planners, engineers, general contractors, interior decorators and /or other consultants and contractors in connection with one or more Projects ("Additional Service Providers"). BROKER shall cooperate with and coordinate such Additional Service Providers in order to achieve XXX,LLC's objectives for such Projects, and BROKER acknowledges and agrees that such cooperation and coordination shall be provided at no cost to XXX,LLC during Phase I in accordance with the provisions of this Agreement. At the request of XXX,LLC, BROKER shall advise XXX,LLC with respect to the use of Additional Service Providers; but it is expressly agreed and understood that BROKER shall not be responsible for the engagement of any Additional Service Providers, and all Additional Service Providers shall be engaged directly by XXX,LLC and shall be compensated by XXX,LLC.

#### **SECTION 2. BROKER'S DUTIES AND STATUS**

Force Majeure. Broker's obligations hereunder shall be suspended to the extent and for so long as the performance of such obligations are prevented or hindered in whole or in part by reason of strikes, acts of God, federal, state, county, or municipal laws, rules, orders, or regulations, or for any other cause which are beyond the reasonable control of BROKER. When such a suspension occurs, BROKER shall inform XXX,LLC; and BROKER shall resume the performance of its obligations hereunder as soon as is reasonably practicable.

#### **SECTION 3. LIMITATION OF BROKER'S SERVICES**

3.1 Technical Matters. BROKER shall assist XXX,LLC in the evaluation of regulatory requirements related to each Project including zoning ordinances, public facilities requirements and other requirements of the jurisdiction in which each Project is located ("Technical Matters"). In addition, BROKER shall advise XXX,LLC as to experts to use for Technical Matters and shall coordinate the work of such experts with that of the other consultants, contractors, suppliers and service providers working on each Project in accordance with Section 1.2 above. Notwithstanding the foregoing, XXX,LLC acknowledges that BROKER is not an expert in and is not responsible for

Technical Matters, and XXX,LLC shall rely solely on the judgments of the experts XXX,LLC hires with respect to such Technical Matters. BROKER acknowledges and agrees that BROKER's assistance, advice, and coordination with regard to Technical Matters shall be provided at no cost to XXX,LLC during Phase I in accordance with the provisions of this Agreement.

3.2 No Guaranties. XXX,LLC acknowledges and agrees that BROKER's obligation under this Agreement is to use best efforts to cause each Project to be completed in accordance with plans and specifications, budgets and schedules approved by XXX,LLC, but that BROKER shall not be deemed to have given any guaranty or warranty that any of the foregoing can be accomplished and shall not be liable for the errors, omissions or breaches of contract by any other party providing goods or services to any Project, including the architect and general contractor for any Project. BROKER, however, shall promptly notify XXX,LLC when it reasonably anticipates that a Project cannot be constructed in accordance with the plans and specifications, budgets and schedules approved by XXX,LLC.

#### **SECTION 4. INDEMNIFICATION**

4.1 Broker's Indemnity. With respect to the Project Administration Services Broker shall indemnify, defend (with counsel reasonably acceptable to XXX,LLC) and hold harmless XXX,LLC, its subsidiaries and affiliates and the employees, partners, officers, directors, members, shareholders and agents of each from any and all losses, liabilities, costs and expenses (including, without limitation, reimbursement of actual attorney's fees, expert witness fees and court costs) incurred either as a defendant or witness and arising out of claims by third parties and sustained or incurred by or asserted against XXX,LLC by reasons of or arising out of Broker's negligence, intentional misconduct or fraud in connection with this Agreement, any Project or the Project Administration Services, except to the extent covered by insurance carried by XXX,LLC and/or any Additional Service Provider.

4.2 XXX,LLC's Indemnity. With respect to the Project Administration Services XXX,LLC shall indemnify, defend (with counsel reasonably acceptable to Broker) and hold harmless Broker, its subsidiaries and affiliates and the employees, partners, officers, directors, members, shareholders and agents of each from and against all losses, liabilities, costs and expenses (including, without limitation, reimbursement of actual attorney's fees, expert witness fees and court costs) incurred either as a defendant or witness and arising out of claims by third parties in connection with this Agreement, any Project or the Project Administration Services, except to the extent such claims arise out of Broker's negligence, intentional misconduct, fraud, or acts other than are within the scope of Broker's services and obligations under this Agreement, and except to the extent covered by insurance carried by Broker and/or any Additional Service Provider.

4.3 The indemnities contained in this Section 4 shall survive the completion or termination of any Project and the termination of this Agreement.

#### **SECTION 5. INSURANCE**

5.1 Broker's Insurance. With respect to the Project Administration Services Broker shall carry the following insurance, at its own expense:



(i) Workers' compensation insurance, to the extent of the statutory limits required by applicable law, and employer's liability insurance in the minimum amount of \$1,000,000, which insurance shall contain a waiver of subrogation against XXX,LLC, its parent, subsidiaries, and affiliates.

(ii) Commercial General Liability Insurance on an occurrence basis (Primary and Umbrella/Excess) with limits of not less than Ten Million Dollars (\$10,000,000) per occurrence for bodily injury, personal injury and property damage. Coverages must include the following: blanket contractual liability, products and completed operations, independent contractors and severability of interest. XXX,LLC shall be named as an additional insured under such insurance.

(iii) Professional liability (errors and omissions) insurance in the amount of not less than \$2,000,000. Such insurance coverage shall be on a claims made basis and shall remain in force for the term of this Agreement and for two (2) years following expiration or termination of this Agreement.

(iv) Upon not less than ten (10) days' prior written request from XXX,LLC, Broker shall obtain and provide to XXX,LLC, at Broker's sole cost and expense, a fidelity bond reasonably acceptable to XXX,LLC, covering Brokers' obligations for Project Administration Services.

The foregoing policies are collectively referred to as "Broker's Policies." XXX,LLC shall be named as an additional insured under Broker's Commercial General Liability Insurance in XXX,LLC's capacity as owner of each Project. Broker's Commercial General Liability policy shall be primary and any commercial general liability insurance policy carried by XXX,LLC shall be non-contributory thereto with respect to any claims arising out of the performance or non-performance of the Project Administration Services. Broker shall provide XXX,LLC with certificates of insurance evidencing Broker's Policies within ten (10) days of the execution of this Agreement. Broker's Policies must be maintained with companies having an A.M. Best's rating of A-VII or better. All certificates shall provide that the insurer will endeavor to give XXX,LLC at least thirty (30) days' prior written notice in the event of cancellation or non-renewal of the applicable insurance coverage.

5.2 XXX,LLC's Insurance. With respect to the Project Administration Services XXX,LLC shall carry the following insurance, at its own expense:

(i) For properties owned by XXX,LLC with fee title, all-risk property insurance, covering the full replacement cost of the property at which the Projects are performed, and for all other properties such property insurance as is required under the applicable occupancy agreement under which XXX,LLC occupies such properties.

(ii) XXX,LLC will provide (or will cause its general contractor to provide) at its expense builders risk insurance for construction that covers special risk perils including earthquake, flood, fire, and theft of materials stored at or within 1,000 feet of each Project site. Loss of

Broker's tools and equipment are not covered by such insurance, and XXX,LLC shall have no liability for their loss.

(iii) Commercial general liability insurance, in limits of not less than \$10,000,000 combined single limit for bodily injury and property damage, including contractual liability coverage.

The foregoing policies are collectively referred to herein as the "XXX,LLC's Policies." Broker shall be named as an additional insured under XXX,LLC's Commercial General Liability Insurance in Broker's capacity as project manager of each Project. XXX,LLC's Commercial General Liability policy shall be primary and any commercial general liability insurance policy carried by Broker shall be non-contributory thereto with respect to any claims arising out of the condition of the real property which is the site of each Project. XXX,LLC shall furnish to Broker a certificate of insurance evidencing such coverage within ten (10) days of the execution of this Agreement. The insurance companies issuing such insurance shall have an AM Best Rating of not less than A-VII. The insurance certificate shall provide that the insurer will endeavor to give Broker not less than thirty (30) days written notice prior to policy cancellation or non-renewal of the applicable insurance coverage.

5.3 Mutual Waiver. With respect to the Project Administration Services all property damage insurance policies required of each of the parties hereunder shall contain appropriate clauses pursuant to which the respective insurance carriers shall waive all rights of subrogation with respect to losses payable under such policies; and each party waives any claims against the other party for any damage to its property which is insured or which is required to be insured pursuant to this Agreement, including any deductible, self insured retention or self insurance irrespective of the cause thereof.

## Exhibit C - 1

### Project Authorization

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TO: Broker X, Inc. ("Broker")

**1.0 PROJECT  
DESCRIPTION:**

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**2.0 LOCATION:**

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**3.0 ESTIMATED RSF:**

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**4.0 ESTIMATED PROJECT SCHEDULE:**

The parties expect the Project will commence on \_\_\_\_\_ and be completed by \_\_\_\_\_ (the "Project Schedule").

**5.0 PROJECT MANAGER**

The Project Manager for the Project shall be \_\_\_\_\_, or such other individual as designated by BROKER from time to time and reasonably approved by XXX,LLC x, LLC.

**6.0 FEES**

The fees for the Project shall be in accordance with that certain letter agreement for brokerage services between XXX,LLC x, LLC and Broker dated \_\_\_\_\_, 200\_\_\_\_.

XXX,LLC x, LLC

By: \_\_\_\_\_

Name:

Title:

Agreed and accepted on this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_\_\_  
Broker X, Inc.

By: \_\_\_\_\_

Name:

Title:

## **Exhibit C - 2**

### **Project Administration Services**

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In addition to the to the Basic Services described in Section 1 of this Agreement, Broker shall provide the following construction Project Administration Services to XXX,LLC in connection with any project undertaken pursuant to the Agreement (the "Project"):

- 1) Establish reporting guidelines, Project protocol, and Project standards for the "Project Team", which team shall include: Architect, Designer, Engineers, General Contractor, Building Department Expediter, Attorneys.
- 2) Meet with XXX,LLC and Project Team to establish Project format, program, schedule and budget.
- 3) Establish Project schedule and coordinate the Project Team to ensure that all consultants are performing on schedule and in concert.
- 4) Assist the architect with site condition verification during preconstruction.
- 5) Oversee the development of a Project budget and schedules and monitor the design development and construction processes for budget and schedule impact.
- 6) Oversee the development of construction documents for the Project, coordinating design, architectural and engineering consultants and existing conditions to minimize conflicts, and to maintain schedule, budget and quality control.
- 7) Review architectural and engineering plans and specifications for adherence to XXX,LLC requirements.
- 8) Chair budget review meetings and provide cost reporting consisting of both consultant fees and construction costs on a regular basis.
- 9) Chair regular preconstruction meetings for review of open design issues, pricing issues and project coordination.
- 10) Chair regular on site construction meetings to coordinate the Project Team.
- 11) Coordinate building department filings and approvals with building department expediter, architect, attorney, and contractor.
- 12) Coordinate the pre-purchase of long lead items.
- 13) Provide value engineering services through design development.
- 14) Prepare bid packages with the Project Team and bidders lists for general contractors.
- 15) Evaluate general contractor bids, and make recommendation to XXX,LLC.
- 16) Negotiate the general contractor contract in conjunction with XXX,LLC's attorney.

## **Exhibit C - 2**

### **Project Administration Services**

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- 17) Monitor project cost and schedule status.
- 18) Review all requisitions for payment, and change orders, and coordinate the approval and payment process and collect partial and final general releases and lien waivers.
- 19) Maintain records of contracts, change orders and payments.
- 20) Review the construction at least once per week with the architect and engineers to determine that the work conforms with the contract documents, resolve inconsistencies and field conditions, and maintain quality controls.
- 21) Coordinate trade fixture installation with XXX,LLC's vendor and general contractor.
- 22) Coordinate XXX,LLC vendors and direct purchased items with general contractor.
- 23) Review claims for extras, from contractors and consultants, negotiate fair value and make recommendations to XXX,LLC.
- 24) Coordinate the compilation of the punchlist, and monitor and schedule the punchlist work.
- 25) Obtain and review warranties and verify they are proper and complete.
- 26) Coordinate with building department expediter and attorney to verify all New York City Building Department requirements are satisfied and represent XXX,LLC at Building Department inspections as required.
- 27) Negotiate and administer the close out of all construction and consultant contracts.
- 28) Interface with XXX,LLC, general contractor, and moving company to facilitate moves and occupancy.

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## **EXHIBIT C - 3: PROJECT ADMINISTRATION FEE**

### **SCHEDULE**

#### **Compensation for Services**

The fees for the Project shall be in accordance with that certain letter agreement for brokerage services between XXX,LLC x, LLC and Broker dated 200x.

#### **Reimbursable Expenses**

In addition to the Project Administration Fee, reimbursable expenses will be billed at actual cost, and may include the following reasonable expenses: reproduction of drawings, messenger service, overnight delivery, out-of-town travel, parking, and, if required to stay overnight from time to time, lodging and meals.

#### **Terms of Payment.**

BROKER shall issue invoices to XXX,LLC at the end of each month stating, in reasonable detail, the portion of each Project Fee earned and payable for such month and the reimbursable expenses incurred for such month. Such fees and expenses shall be due and payable by XXX,LLC to BROKER within thirty (30) days of receipt by XXX,LLC of Broker's invoice. All other payments due from one party to the other under this Agreement shall be due and payable thirty (30) days following demand therefore. Delinquent payments hereunder shall earn interest from the date due until paid at the lesser of: (i) the rate of one and one-half percent (1 and 1/2%) per month or (ii) the maximum rate permitted by law. Project Fees at the election of XXX,LLC may have credited against them any portion of the allocation of the commissions or fees (to be provided to XXX,LLC by Broker) to be utilized by Broker pursuant to the terms of this Agreement to reduce transaction costs of XXX,LLC.



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**SCHEDULE D**  
**Scope of Lease Administration Services**

(1) Lease Administration (Detailed Procedures)

The scope of Lease Administration shall also include the following:

- Upon access to XXX,LLC's lease documents and various corresponding documentation, a detailed Abstract will be completed on the lease documents provided (if necessary).
- Broker will analyze the lease and supporting documents to verify the appropriateness of the billed charges to the rent statements.
- Broker will identify the proper reasonableness of the escalation expenses being passed through to XXX,LLC as the tenant. This review of the Escalations takes into account Broker's knowledge and experience of escalations (CAM, Operating, CPI, Porter's Wage, Utility and other) and pass through expenses allowable, based on industry standards as well as from the lease terms.
- Broker's final phase includes the preparation of a report on Broker's findings, recommendations and any potential concerns.

(2) Lease Administration Fees for Lease Administration and Detailed Procedures

<u>Broker Estimated Cost proposal (per lease)</u>		<u>Without Abstracting</u>	<u>With Abstracting</u>
Detailed Lease Abstract per Lease	Hours	N/A	1.50
Review and prepare billing schedule	Hours	.50	.50
Analyze Lease Language to Billing	Hours	.75	.75
Executive Review, Report & Recommendation	Hours	.50	.50
Total Time (by hours)		1.75	3.25
Average cost per hour		\$ _____	\$ _____
Total maximum cost per lease		\$ _____	\$ _____
for Lease Administration including			
Detailed Procedures			

(3) Lease Audit Additional Procedures and Fees

There shall be no Lease Audit fee for any Existing Space or any Relocation Space, and for all other locations the Lease Audit fee shall be \_\_\_\_\_. If any significant findings do occur, XXX,LLC may need additional assistance in procuring such findings. Without additional fee or cost to XXX,LLC, Broker services for all locations would include a formal protest letter to the landlord on XXX,LLC's behalf and, if appropriate, after Broker has performed a review of the ownership's books and records



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and based on Broker's findings, Broker would develop XXX,LLC's position by preparing the necessary documentation and arguments in order to request any refunds or overcharges from landlord, or make corrections that might be deemed necessary. In addition, Broker would advise and assist XXX,LLC's counsel as necessary and Broker would set the appropriate procedural modifications to insure continued compliance in the future. These Lease Audit Additional Procedures are subject to the maximum amounts for Lease Auditing Fees of \_\_\_\_\_.

(4) Success Fee

For all audit reviews where Broker is successful in actually realizing savings (and refunds if applicable) for XXX,LLC, Broker shall receive, from the proceeds of any such savings actually received by XXX,LLC, a "success fee" equal to two percent (2%) of such actual savings realized, net of the costs and all expenses incurred by XXX,LLC to Broker (and others) in order to realize such actual savings. Broker, as part of the Lease Audit Additional Procedures described in (3) above, shall, at no additional cost to XXX,LLC, assist and participate in any litigation, legal proceedings, arbitration or other such mechanism by or through which such savings could be realized. XXX,LLC shall be under no obligation to bring any action against any landlord to collect or obtain any savings or refunds, or to compromise or settle any litigation, legal proceedings, arbitration, or other such mechanism.

## **Handout IV. The Case Study of the Specific Leasing Transaction and Mark-UP**

CASE STUDY: SPECIFIC LEASING TRANSACTION  
FOR PRESENTATION TO THE REAL ESTATE  
BOARD OF THE CITY OF NEW YORK  
BROKERAGE - "THE DANGER ZONES"

V3 Epilum  
Indemnity  
Obligation

By: John B. Wood  
March 12, 1987

\_\_\_\_\_, 1987

Common Law  
1) Employer  
2) Procurement  
3) Common Law Antitrust  
4) Can fall in effect only

Who employs  
Who does the  
[ADDRESS]

Who has title?  
Broker's services  
said?

Re: The entire \_\_\_\_\_ floor in the  
building (the "Building") commonly  
known and referred to as \_\_\_\_\_

Emp'l.  
Procurement  
Cause

takes away  
already done

Gentlemen:

As an inducement to you (hereinafter sometimes referred  
to collectively as "Landlord") to enter into negotiations for the  
captioned leasing (the "Leasing") of the above-described premises  
(the "Premises") to \_\_\_\_\_ ("Tenant"), for a  
term of approximately ten (10) years, the undersigned ("Broker")  
confirms, covenants, represents, warrants and agrees as follows:

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1. Broker is duly licensed as a real estate broker in  
the State of New York.

2. No brokerage commission or compensation of any  
nature whatsoever will be due and payable to Broker unless and  
until all of the following conditions (the "Conditions") are  
satisfied: (a) a lease (the "Lease") between you and Tenant  
covering the Premises shall have been fully executed and  
unconditionally delivered by all parties thereto, (b) all  
approvals, consents and agreements to the Lease deemed necessary,  
appropriate or advisable by you, your counsel or the holder of  
any superior lease or mortgage, or required by the lessee or  
their counsel shall have been duly and timely obtained, (c)  
Tenant shall have deposited with you such advanced rent, security  
and/or guaranty(s) as may be required under the terms of the  
Lease, (d) Tenant shall have commenced the payment of regular  
installments of rent (exclusive of any rental payable at the time  
of execution of the Lease), and (e) Tenant shall have taken  
possession of the Premises and the term of the Lease shall have  
commenced without the Tenant being in default thereunder. If for  
any reason whatsoever, including your default, willful or  
otherwise, all of the foregoing conditions a through e are not  
fulfilled, no brokerage commission or other compensation shall be  
payable to Broker and Broker hereby acknowledges that in such  
instance it shall have no right to file a lien against the  
Building, Premises or any interest of you therein under Sections  
2 and 10 of the New York Lien Law or an affidavit of entitlement  
to a commission under Section 294-b of the New York Real Property

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each installment is due dependent  
on T not in default

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Law, notwithstanding the provisions of section 34 of the New York Lien Law, the provisions of which Broker hereby expressly waives. Broker agrees to indemnify Landlord and hold Landlord harmless from and against any damages, costs and expenses (including attorney's fees) arising out of Broker's breach of the foregoing provisions.

3. Broker warrants and represents it is the sole procuring cause of the Leasing and has dealt with no other broker, person, corporation or other entity other than William A. White and Tishman East, Inc. (owner's leasing agent) in connection with the Leasing or the negotiations prior thereto and no other person, corporation or other entity of any kind other than Broker is, or will be in any way, involved as a broker, finder or in a similar capacity with respect to the Leasing. Broker agrees to indemnify and hold you harmless from and against any liability, claim, damage, cost or expense (including, but not limited to, attorneys' fees and disbursements) arising out of or with respect to any claims made by any broker or other entity for commission or other compensation with respect to the Lease or the negotiations leading thereto; provided, however, the Broker's liability arising under this indemnity shall not exceed the amount of any commission paid or payable to Broker and the above referred to costs and expenses (and Landlord shall be entitled to deduct any costs, damages, and expenses from any amount thereafter becoming payable to Broker hereunder), unless a Court or arbitrator, as the case may be, shall find that there has been a breach of Broker's representations made herein, in which event the foregoing limitations on liability shall not apply.

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4. It is expressly agreed that you shall have the unqualified right, in your sole and absolute discretion, to refuse to enter into any lease of all or any part of the Premises for any reason whatsoever without incurring any obligation to Broker for the payment of commissions or otherwise. Broker further agrees that in no event shall Landlord be obligated to institute any legal or other proceedings to compel the Tenant to conclude the transaction or to fulfill any of the Tenant's obligations under the Lease in the event of any default or breach by Tenant.

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5. (a) Broker agrees that the sole compensation to be paid to it, in the event that the Conditions are fulfilled will be a commission equal to the sum of the products resulting from the applications of the applicable rates set forth in Schedule A hereto to the "fixed rent" (as hereinafter defined) for each applicable year of the Lease during the initial term of the Lease only.

(b) For the purposes of this Agreement "fixed rent" shall mean the aggregate base rental payable to Landlord by Tenant during each Lease Year which shall be exclusive of or have deducted from as is applicable the following items: (i) amounts payable by Tenant for utilities or utility services, heat or air

differs George

conditioning, or other services including but not limited to electricity, gas, water, sewer, or shared tenant services to be supplied to Tenant; (ii) any payments to be made by Tenant pursuant to any cost of living formulae, or on account of increases in real estate taxes, wages or labor costs or costs of maintaining or operating the Building (whether actual or estimated), or any other payments to be made by Tenant pursuant to any escalation formulae which increases the basic or additional rent; (iii) any payments to be made by Tenant on account of work, labor or materials furnished by Landlord, and the value of any work performed or caused to be performed by Tenant in lieu of such payments or otherwise in respect to the Premises or any portion of the Building; (iv) any payments to be made by Tenant based upon Tenant's gross receipts (commonly referred to as percentage rentals); (v) any payments to be made by Tenant in connection with Tenant's option to cancel, if any; (vi) any payments by Tenant of fixed rent which are waived by separate agreement; (vii) any payments to be made by Tenant for overtime or extra cleaning, utilities, heat, air conditioning, or other services; (viii) all costs and expenses assumed or incurred by Landlord, if any, in connection with Tenant's (or an affiliate's) lease obligations for space rented by Tenant (or an affiliate) from others outside the building including, without limitations, all rent, additional rent, expenses incurred in reletting such space and Tenant's moving costs; (ix) any costs and expenses assumed or incurred by Landlord in connection with any takeback of space by Landlord, as subtenant or otherwise, in connection with the Lease including, without limitation, all expenses incurred in reletting such space; (x) the cost of any work to be done for Tenant in excess of Building standard; (xi) any other credits given by Landlord to Tenant against rent for any reason, including but not limited to, rent concessions; and (xii) any matter or thing whatsoever including, but not limited to, any increases in rentals agreed upon after the Conditions have been fulfilled, and any payments in connection with the exercise by Tenant of a right of first refusal or purchase option contained in the Lease or a separate agreement to extend the term of the Lease or lease additional space in the Building or any extensions of the term of the Lease or any lease of additional space in the Building. With respect to any lease which provides for adjustments in annual fixed rent, if the annual fixed rent payable during any portion of the term of the Lease is not determinable on the date the Conditions (as defined in Paragraph 1) have been fulfilled, the annual fixed rent during such portion of the term of the Lease shall be deemed to be at the annual rate payable during the year immediately preceding such portion of the term of the Lease. If any overpayment of commissions shall have been made by Landlord, such overpayment shall be repaid promptly to Landlord and if not so repaid, Landlord may deduct the same from any other amounts due to Broker. Any underpayment of commission installments to Broker shall be promptly paid to Broker in the manner and at the times provided in Paragraphs 5 and 6. The term "Lease Year" shall mean the twelve-month period

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*beginning of term*  
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commencing on the date set forth in the Lease as the commencement of the term thereof and each twelve-month period thereafter.

(c) In the event of less than a twelve-month period at the end of the Lease term, such fixed rent shall be apportioned.

6. (a) Subject to the provisions of paragraphs 1 and 2 hereof, any commission which may become payable shall be paid by Landlord to Broker as follows: (i) 1/3 within ten (10) days after the execution of the Lease by Landlord and Tenant and the approval of same by Landlord's mortgagee, (ii) 1/3 within thirty (30) days after the date the Tenant takes possession of the Premises and commences paying the rent in full under the Lease (the "Intermediate Payment Date"), and (iii) the final 1/3 one year after the Intermediate Payment Date; provided that in each instance the Tenant is not at the time for payment of each installment in monetary or other material default under the Lease. ✓

(b) Notwithstanding the foregoing, if the Lease or separate agreement shall expressly provide for an option to cancel prior to the commencement of the term, then the first payment of such commission shall not be payable until the time for the exercise of such option to cancel shall have expired and, if the Lease shall be cancelled pursuant to such option, no commissions shall be due or payable therefor; and if the Lease or separate agreement shall expressly provide for an option to cancel subsequent to the commencement of the term, then such commission shall be payable only for the term of the Lease unaffected by Tenant's option to cancel. ✓

(c) Invoices for all installments of commissions payable hereunder shall be forwarded by Broker to Landlord at ~~10022~~, ~~Street~~, ~~New York~~, New York 10022 at least thirty (30) days prior to the date on which such commission is payable.

*Can commission be paid to parties other than Broker?*  
7. Broker represents that Herman W. Hertweck is employed by Broker and is not entitled to any commission or other compensation except out of the commission payable by you in accordance with the terms of this Agreement. If more than one party is executing this Agreement as Broker, the payment made by Owner to any one of the parties comprising Broker shall be deemed to constitute payment to all such parties. ✓

*Only one can affect results orally*  
8. This Agreement constitutes the entire agreement between the parties hereto with respect to the Leasing and the Premises and any other agreements, whether oral or written, heretofore entered into between the parties hereto with respect to the Leasing and the Premises are hereby cancelled and of no further force of effect. This Agreement cannot be changed except in a writing signed by both parties. The provisions of this

Agreement shall bind and inure to the benefit of the parties hereto and their respective successors and assigns.

9. It is understood that the Broker is an independent contractor and shall not be considered your agent for any purpose whatsoever and the Broker is not granted any right or authority to assume or create any obligation or liability or make any representation, warranty or agreement (express or implied) on your behalf or to bind you in any manner whatsoever.

10. In the enforcement of its rights hereunder the Broker agrees that it shall not seek or obtain a money judgment or exercise any other right or remedy against any of the general or limited partners or disclosed or undisclosed principals of Landlord nor any of its or their successors or assigns. The rights and remedies of the Broker shall be enforceable, and may be enforced, solely against your estate in the Premises.

11. Neither this Agreement nor the obligations of the Broker nor any payments due the Broker may be assigned without your prior written consent.

12. Broker agrees that (a) any payment of all or a portion of the commission made prior to fulfillment of all of the Conditions is actually an advance against the commission that may be payable hereunder and is not to be construed as an acknowledgement that any amounts are or will be due and (b) Broker shall immediately repay Landlord, upon demand, the commission or any portion of the commission so paid, after the failure to fulfill any such Condition.

Please sign a copy of this Agreement as confirmation of your agreement to pay said commission upon the conditions indicated.

Very truly yours,

\_\_\_\_\_

By: \_\_\_\_\_

By: \_\_\_\_\_

SCHEDULE A

STANDARD COMMISSION SCHEDULE

MANHATTAN, NEW YORK

Commercial Leases

First year or any fraction thereof.....	5%
Second year or any fraction thereof.....	4%
Third year up to and including the 5th year.....	3 1/2%
Sixth year up to and including the 10th year.....	2 1/2%
Eleventh year up to and including the 21st year.....	2%
Twenty-second year and beyond.....	1%



## **Handout V. The Case Study of the Exclusive Leasing Agency and Mark-up**

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 2. how many brokers over 2 yrs practice  
 3. how many salespeople over 2 yrs practice  
 4. how many may work  
 5. who's def. of attorney - I think my ju of 265 is very reasonable.

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 to get employed and then  
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CASE STUDY: EXCLUSIVE LEASING AGENCY  
 FOR PRESENTATION TO THE REAL ESTATE BOARD  
 OF THE CITY OF NEW YORK  
 BROKERAGE - "THE DANGER ZONES"

By: John B. Wood, Esq.  
 March 12, 1987

\* On specific deal  
 "defined premises"  
 as opposed to an open  
 of L.C. or in Bldg

(DATE)

if not record  
 owner - no lien  
 & no right against  
 parties

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 Employment Section  
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 2. for what property  
 gentlemen:

1. The undersigned ("Owner"), the owner of the lessee's  
 interest in, to and under those certain leases and amendments  
 thereto (collectively, the "Lease") between \_\_\_\_\_  
 ("Landlord") and Owner, dated \_\_\_\_\_, covering the  
 \_\_\_\_\_ (th) Floor (the "Property") in the building commonly  
 known and referred to as 175 Water Street, New York, New York,  
 (the "Building"), hereby grants \_\_\_\_\_ ("Agent")  
 the exclusive right (except as otherwise provided herein) to  
 obtain tenants for designated portions of the Property. In  
 connection therewith, Agent shall conduct the following activ-  
 ities:

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 no emp.

(a) advise Owner in the promotion and advertising of  
 the Property, including the development and implementation of  
 marketing strategies;

(b) assist Owner in the negotiation of leases, includ-  
 ing, without limitation, the preparation of tenant improvement  
 work letters, if any, and investigation of tenants' financial  
 conditions;

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 lease"  
 a "withhold" - is not a lease

*marketing  
not  
a bad  
gamble*

(c) undertake such other activities as is customary for a leasing agent, including placing of advertisements in New York City real estate publications, direct mailings to brokers and potential tenants in the community, canvassing of needs of potential tenants and advertising in trade publications which are subscribed to by target potential tenants (provided that all advertisements in publications shall be at Owner's direction and Owner's cost provided, however, the same shall be offset (recouped by Owner) from any commissions earned hereunder by Agent);

(d) cooperate with all co-brokers and sub-brokers to obtain tenants and promptly submit all offers to Owner;

*employment  
authorizations*

(e) obtain the consent of Owner with respect to the rental rates and the terms of all agreements entered into by Agent with co-brokers in connection with the Property; and

(f) provide the active involvement and the services at all times of Burton G. Hollenbeck and Garrett R. Bowden.

2. A. The initial term of this Agreement (the "Initial Term") shall commence as of the date hereinabove provided and shall continue for a period of sixty (60) days and thereafter may be cancelled by either party to this Agreement upon ten (10) days prior written notice given by one party to the other.

B. Agent agrees that it shall not accept or maintain any funds, whether by deposit or otherwise, paid by tenants or prospective tenants and shall direct that such funds be paid to Owner.

3. A. For purposes of this paragraph the following terms shall have the following definitions:

(i) "Non-Commissionable Lease" shall mean any lease entered into (a) with any of the individuals or entities listed on Schedule C (the "Listed Tenants") or (b) with Owner, Agent or any affiliate or successor of any of them;

(ii) "Commissionable Lease" shall mean each lease entered into other than a Non-Commissionable Lease; and

(iii) "Fee" shall mean the sum of the products resulting from the application of the rates set forth on Schedule B annexed hereto, to the annual fixed rentals (defined in paragraph 4 of this Agreement) during the stated term thereof.

B. If, during the term of this Agreement, any space in the Property is leased (other than by a lease constituting a Non-Commissionable Lease for which no commission or other compensation shall be payable), to any person, firm or entity, Owner agrees to pay Agent and Agent agrees to accept in full payment for all services rendered, whether or not Agent is the procuring cause of such leasing, a commission computed as follows:

(i) for each Commissionable Lease for which Agent is the sole procuring cause, one (1) Fee shall be payable to Agent; and

(ii) for each Commissionable Lease for which one or more brokers or Owner are a procuring cause, one-half (1/2) Fee shall be payable to Agent and one (1) Fee shall be payable to the other broker or shared with the other brokers.

C. In the event Agent procures a proposed tenant which is accepted by the Landlord and results in a cancellation or surrender of the Lease, or portions thereof, Agent shall be entitled to a commission calculated in accordance with Paragraph 3B hereof; except that the annual fixed rental shall be deemed to be the rentals then being paid for the portion of the space so cancelled or surrendered net of any payments made or concessions given by Owner to Landlord or to such proposed tenant, including any costs associated with fix up expenses or otherwise. No commission or other compensation shall be payable to Agent for any increase in space or any increase in rentals or by reason of any renewals or the extension of the term of any lease or for any lease for which Owner is the procuring cause.

D. Any commission paid pursuant to this Agreement shall be considered to cover any and all out-of-pocket administrative and overhead expenses incurred by Agent in connection with the leasing of the Property and the performance of its obligations hereunder. Unless otherwise agreed to by the parties, and except as otherwise provided herein with respect to advertising expenses in publications previously approved by Owner, Agent will not be entitled to receive reimbursement from Owner for any expense incurred by Agent whatsoever.

4. For the purposes of this Agreement, "annual fixed rent" shall mean the aggregate base rental payable to Owner by the tenant under a lease during each twelve month period of the term of such lease, exclusive of net of the following amounts: (a) amounts payable, by reason of rent inclusion or otherwise, for electricity, or after hours utilities, utilities services, heat and/or air-conditioning or other services; (b) real estate tax escalation adjustments; (c) operating expense, percentage rent or

what if accepted by O.

override direct pmt.

6% 1st yr  
12 mos min  
to max 12 mos  
1/2 yr 6%

Can get amortizing over terms for higher 90 applications

Why not 11 factors

hi tax 2% fixed rent

value of covered by abatements come from 1st yrs request  
no 90  
not rent amt  
turn but from month

wage rate escalation adjustments, cost of living increases or any other escalation adjustments or lease cancellation payments; (d) any rent paid or credited by Owner to a tenant by reason of Owner's retaining as subtenant or otherwise any portion of the premises demised to such tenant; (e) with respect to extraordinary construction work, repairs and/or decorating (or other work) which Owner has agreed to perform for such tenant, any amounts (x) undertaken to be paid by Owner to the tenant, or (y) given as an allowance to the tenant (either by way of a credit against rentals or in a lump sum); (f) any moving costs of tenant paid by Owner or credited to tenant; and (g) any other credits given by Owner to tenant against rent for any reason, including but not limited to, rent concessions. With respect to any lease which provides for adjustments in annual fixed rent, if the annual fixed rent payable during any portion of the term of the lease is not determinable on the date the Conditions (as defined in Paragraph 5) have been fulfilled, the annual fixed rent during such portion of the term of the lease shall be deemed to be at the annual rate payable during the year immediately preceding such portion of the term of the lease. If any overpayment in commissions shall have been made by Owner, such overpayment shall be repaid promptly to Owner and if not so repaid, Owner may deduct the same from any other amounts due to Agent. Any underpayment of commission installments to Agent shall be promptly paid to Agent in the manner and at the times provided in Paragraph 5. In the event of less than a twelve month period at the end of any lease term, such annual fixed rent shall be apportioned.

5. A. Any commission due Agent shall be deemed earned in full and shall be payable only upon the satisfaction of all of the following conditions (the "Conditions"):

(a) (i) a written lease for the applicable space in form reasonably satisfactory to Owner and Owner's attorneys is unconditionally executed and delivered by Owner and the tenant and (ii) the security deposit, if any, and advance rent required to be paid under such lease at the time of its execution is paid by the tenant;

(b) the term of the lease commences; and ✓

(c) the tenant, under such lease, enters into possession of the leased premises and thereafter pays the second installment of the annual rent required to be paid pursuant to such lease or assignment after entering into possession.

remember  
our last  
course?  
which term

or  
work  
constitutes  
conducting  
business  
must be  
specific

but what  
if tenant  
assigns?  
or Subtenant?

3rd rent  
paid

VS: Commission  
lawrence  
earned  
&  
payable  
may own  
rule  
payable

?  
portion?

B. Owner agrees to pay each commission, if earned as hereinabove provided, one-third (1/3rd) within ten (10) days after satisfaction of Conditions, one-third (1/3rd) six (6) months after the first commission payment and one-third (1/3rd) six (6) months after the second commission payment; provided in each instance, the tenant is not at the time for payment of each installment in monetary or other material default under the respective lease.

C. If for any reason whatsoever (a) the tenant does not take possession of the demised premises and commence the payment of rent (other than deposits of rental called for under the lease prior to the commencement of the regular periodic installments of rental), or (b) for any other reason whatsoever, including but not limited to, acts, omissions, negligence or the willful default of Owner, its agents, employees or representatives, or otherwise, a lease shall not be entered into between the Owner and a tenant, then in any such event, no commission or brokerage, or any portion thereof, shall be deemed to be due, payable or earned, or shall be paid to Agent or any other broker by the Owner, and the Owner is and shall be relieved from liability for the payment of any and all commissions, claims or charges whatsoever in respect of such transaction. It is expressly agreed that Owner shall have the unqualified right, in its sole and absolute discretion, to refuse to enter into any lease with a tenant for any reason whatsoever without incurring any obligation to Agent or any other broker for the payment of commissions or otherwise.

6. Agent may employ or use co-brokers or sub-brokers acceptable to Owner, pursuant to agreements reasonably acceptable to Owner, to obtain tenants for the Property. With respect to any prospective lease or tenant, Owner may request Agent, as Agent for Owner (or in such other capacity as the parties may agree), to enter into agreements directly with such brokers on terms approved in advance in writing by Owner. Such co-brokers or sub-brokers shall be paid by Owner upon terms and conditions agreed to by Owner and such co-brokers or sub-brokers. Owner agrees to conduct through or apprise Agent of all negotiations.

7. Agent shall promptly submit all inquiries, offers and applications which it receives for space in the Property to Owner, setting forth all details with respect thereto, and will keep Owner advised, in writing, promptly, of all inquiries, applications and offers which it has received or is soliciting with the names and addresses of prospective tenants involved, and the names and addresses of any inquiring brokers. Agent shall not execute any lease on behalf of Owner or commit Owner to make any lease. Agent shall supply Owner with such other reports and

7. As Broker  
wired to other  
last term 1/3rd  
commission?

It's default?

↑ maybe terminated only

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interest  
into  
it I think

from  
common  
law

See?  
w/o this  
provision  
would  
hurt  
Broker

information with respect to the leasing program as Owner may reasonably request.

8. Agent shall submit monthly (and within ten days after the date of expiration or earlier termination of this Agreement) to Owner a written list of all prospective tenants for the Property to whom Agent represents it has presented the Property or with whom it conducted active negotiations on specific terms. Such list shall set forth the date, times and location of such negotiations, all details with respect to the subject matter thereof, the proposed space to be leased, the name of the person with whom such negotiations were conducted and the outcome of such negotiations. Such list shall not contain any names with whom active negotiations were not conducted within six (6) months prior to the expiration or earlier termination of this Agreement. If within three (3) months after the expiration or earlier termination of this Agreement, Owner shall lease any space to any tenant(s) whose name appears on the list furnished within ten (10) days after the expiration or earlier termination of this Agreement, Agent shall be entitled to a commission computed as if this Agreement had not expired or been terminated, except that Owner shall not, in any event, pay any commission on account of any Non-Commissionable Lease.

9. Agent agrees to indemnify Owner and hold it harmless, to the extent of commissions paid or payable by Owner from any liability, cost or expense, including reasonable attorney's fees and disbursements incurred by reason of any claim made against Owner by any person or entity for commission, compensation or damages for loss of commission by reason of any act or statement made by Agent. In the event any claim is made or suit instituted on a particular lease transaction under which Owner claims the benefit of the foregoing indemnification, then

- (a) Owner shall give Agent immediate notice thereof in writing;
- (b) Agent shall have the right to defend against such claim or action by counsel of its own choosing, provided such counsel is reasonably satisfactory to Owner; and
- (c) Agent shall not settle any claim which exceeds Agent's liability hereunder without Owner's consent.

10. This Agreement sets forth the entire understanding between the parties hereto and cannot be changed except in writing signed by both parties.

*Waive trial by jury*

11. This Agreement shall be construed in accordance with the laws of the State of New York and shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns except that Agent shall have no right to assign this Agreement without the prior written consent of Owner and any such purported assignment shall be null and void.

12. Any notices required or permitted to be given by either party under this Agreement shall be in writing and sent by registered or certified mail, postage prepaid, return receipt requested and addressed as follows:

To Agent at: [ADDRESS]

To Owner at: [ADDRESS]

Notices shall be deemed given when so mailed. Either party may change its address for notices by giving notice thereof to the other party pursuant to this Paragraph.

If the foregoing is in accordance with your understanding, kindly so indicate by signing and returning a duplicate original of this letter whereupon the same shall constitute an agreement between Owner and Agent.

Very truly yours,

\_\_\_\_\_

By: \_\_\_\_\_  
Partner

Accepted and Agreed to:

\_\_\_\_\_

By: \_\_\_\_\_  
Senior Vice President



SCHEDULE A

[Schedule of designated portions of the Property]

SCHEDULE B

<u>Annual Fixed Rental</u>	<u>Rate (%)</u>
Lease Year 1	5%
Lease Year 2	4%
Lease Year 3	3½%
Lease Years 4-6	1½%

The "Rates" shall be prorated for the last Lease Year in a term constituting less than twelve (12) months.

SCHEDULE C

1. Peter Andel;
2. Northwest Mutual Life;
3. Peter Hurst Organization;
4. Thomas Nationwide; and

together with any affiliates or related individuals or entities of any of the foregoing.