




**WILSON CRIBBS + GOREN**  
REAL ESTATE LAW

## KEY TERMS IN RETAIL LEASES

NOVEMBER 10, 2017

**PRESENTED BY:**  
LEANN KARIM AND ANTHONY MARRÉ

COPYRIGHT ©2017



## CO-TENANCY

- A clause in retail leases that provides for a remedy if key tenants or a certain number of tenants leave or fail to operate in the shopping center. This clause provides the tenant with some form of protection to compensate for loss of traffic.
- There Are Two Forms of Co-Tenancy:
  - Opening Co-Tenancy
  - Ongoing Co-Tenancy

COPYRIGHT ©2017

**WILSON CRIBBS + GOREN**  
REAL ESTATE LAW

2

## Opening Co-Tenancy

Notwithstanding anything contained herein to the contrary, Tenant shall not be obligated to (a) open for business to the public in the Leased Premises or (b) commence paying Base Rent to Landlord until the following is satisfied (and as of the date that Tenant is ready to open for business remains satisfied) (the "Opening Co-Tenancy"):

- Three (3) of the four (4) Donald, Huey, Dewey and Louie (the "Anchor Stores"), or mutually agreed upon replacements, are occupied and open for business to the public;
- At least seventy (70%) percent of the aggregate leasable retail area of the Shopping Center (including outparcels), excluding the Leased Premises, is occupied and open for business to the public in the Shopping Center; and
- The tenants operating under the trade names of Optimus, Bumblebee, and Ratchet, or mutually agreed upon replacements, are open and operating within the Shopping Center.

Should Tenant elect to open for business prior to the satisfaction of the Opening Co-Tenancy requirement, Tenant, in lieu of Base Rent, Percentage Rent or any other charges due Landlord, shall only be required to pay Reduced Rent (being fifty percent (50%) of Base Rent due), until such time as the Opening Co-Tenancy is satisfied and Tenant receives written notice from Landlord that the Opening Co-Tenancy is satisfied, at which time Tenant shall commence paying Percentage Rent in lieu of Reduced Rent.

In the event said Opening Co-Tenancy remains unsatisfied for twelve (12) consecutive months from the date Tenant commenced payment of Reduced Rent, Tenant shall also have the right to terminate this Lease upon thirty (30) days written notice to Landlord. If Tenant does not elect to terminate the Lease and/or Tenant's termination notice is not received by Landlord on or before the first (1<sup>st</sup>) day of month thirteen (13), Tenant's right to terminate the Lease as provided in this Section shall become null and void and Tenant shall immediately commence payment of contract rent in accordance with the Lease.

Landlord shall provide Tenant with written statements certifying the then current Shopping Center occupancy level within thirty (30) days following receipt of Tenant's request.



COPYRIGHT ©2017

WILSON CRIBBS + GOREN  
REAL ESTATE LAW

3

## Ongoing Co-Tenancy

Notwithstanding anything herein to the contrary, if at any time after the first (1<sup>st</sup>) full Lease Year of the Lease Term the following occurs in excess of sixty (60) consecutive days (the "Operating Co-Tenancy") for reasons other than the expiration and/or non-renewal of any respective tenant's lease agreement:

- Less than three (3) of the four (4) Anchor Stores, or mutually agreed upon replacements occupying not less than 90% of the Anchor Store's respective premises, are occupied or leased and open for business to the public in the Shopping Center; and
- Less than seventy (70%) percent of the aggregate leasable retail area of the Shopping Center, excluding the Leased Premises, is occupied and open for business to the public in the Shopping Center

Tenant shall be entitled to pay, in lieu of Base Rent and/or Percentage Rent, Reduced Rent until such time as the Operating Co-Tenancy is satisfied and Landlord has provided Tenant written notice hereof.

In the event said Operating Co-Tenancy remains unsatisfied for twelve (12) consecutive months from the date Tenant commenced payment of Reduced Rent, Tenant shall also have the right to terminate this Lease upon thirty (30) days written notice to Landlord. If Tenant does not elect to terminate the Lease and/or Tenant's termination notice is not received by Landlord on or before the first (1<sup>st</sup>) day of month eighteen (18), Tenant's right to terminate the Lease as provided in this Section shall become null and void and Tenant shall immediately commence payment of contract rent in accordance with the Lease.

During the Term of this Lease and provided Tenant is open for business to the public in the Shopping Center at the time of its written request, Landlord shall provide Tenant with written statements certifying the then current Shopping Center occupancy level within thirty (30) days following receipt of Tenant's request.



COPYRIGHT ©2017

WILSON CRIBBS + GOREN  
REAL ESTATE LAW

4

WILSON CRIBBS + GOREN  
REAL ESTATE LAW

## OPERATION



Operating tenants are important to a landlord—especially in light of any co-tenancy clauses that might be present in leases for a shopping center. As such, many landlords will require tenants to continuously operate during their lease terms. However, some tenants will negotiate the right to cease operations at the premises but continue to pay landlord rent due under the lease. This provision is commonly known as the right to go dark. Go dark clauses give tenants the opportunity to vacate an unprofitable space.

- There Are Two Forms of Operation:
  - Go Dark Operation
  - Continuous Operation

COPYRIGHT ©2017

WILSON CRIBBS + GOREN  
REAL ESTATE LAW

5

## Go Dark Operation



Tenant shall not have a "continuous operation" covenant under this Lease, and Tenant, at its sole discretion, may elect to not open, or to close its business at the Premises at any time and from time to time for an indefinite period or periods of time, and such event shall not be a breach of Tenant's covenants set forth in this Article, provided Tenant continues to pay rent and meets its other financial obligations under the Lease.

If Tenant discontinues the use of the Premises for the operation of a Transformer retail store business for more than one hundred eighty (180) consecutive days (and such discontinuance is not due to remodeling, assignment or sublease, casualty, condemnation or other Unavoidable Delays), then as Landlord's sole and exclusive remedy and in lieu of any damages or awards (including, without limitation, any acceleration of rent), Landlord shall then have the right and option to terminate this Lease and recapture the Premises from Tenant upon thirty (30) days written notice to Tenant which termination shall be void and this Lease shall continue in full force and effect if Tenant reopens its operations in the Premises, fully fixtured, stocked and staffed with the good-faith intention to remain open, within such 30-day period.

If Landlord exercises said option to terminate and recapture, and if Tenant has not reopened its operations in the Premises, fully fixtured, stocked and staffed with the good-faith intention to remain open, prior to the date of cancellation set forth in the notice, Tenant shall vacate the Premises within thirty (30) days after the date of Landlord's notice of its exercise of the termination and recapture option set forth herein, but in no event shall Tenant be required to vacate prior to the expiration of such 30-day period, and the term of this Lease shall in such event be automatically terminated as of the date on which Tenant vacates the Premises. Upon such termination of the Lease and the recapture of the Premises hereof by Landlord, both Landlord and Tenant shall be immediately thereupon released and relieved from and of any and all obligations or liabilities thereafter to accrue hereunder, but not for any such obligations or liabilities accrued under the Lease prior to such termination and recapture date.

COPYRIGHT ©2017

WILSON CRIBBS + GOREN  
REAL ESTATE LAW

6

WILSON CRIBBS + GOREN  
REAL ESTATE LAW

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: Key Terms in Retail Leases

Also available as part of the eCourse

[Commercial, Retail, and Ground Leases: Drafting, Negotiating, and Issues to Avoid](#)

First appeared as part of the conference materials for the  
2017 Bernard O. Dow Leasing Institute session  
"Key Terms in Retail Leases"