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Disclosure Protection: Franchises and Food Court Leases

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DISCLOSURE PROTECTION: FRANCHISES AND FOOD COURT LEASES

JAMES R. CATALAND¹

I. BACKGROUND.....	606
II. MARKETING THE OPPORTUNITY	609
III. DECISION-MAKING INFORMATION.....	610
IV. SUBSTANCE OF THE AGREEMENT.....	615
V. CURRENT LEGAL ENVIRONMENT.....	617
VI. CONCLUSION.....	623

The 1950s population migration to the suburbs spawned two enduring symbols of Americana—the fast food franchise and the enclosed suburban shopping mall. Through the 1960s, 1970s and 1980s, the fast food franchise and the shopping mall industries grew in dramatic fashion on parallel tracks. Many men of humble beginnings achieved great wealth and international fame as leaders of these seemingly diverse industries. The early development of malls and food franchises was aided by favorable tax laws² and unregulated marketing practices.

The shopping center industry continues to enjoy relative freedom from governmental regulation and operates within the framework of a long term, well-established body of favorable commercial landlord/tenant law. Conversely, certain “unfair and deceptive practices” in the sale of franchises have led to comprehensive consumer protection legislation at both the state and federal level. In 1978, the Federal Trade Commission promulgated a series of uniform disclosure requirements that a franchise or business opportunity seller must make when soliciting a prospective buyer.³ Often, the prospective buyer of a fast food franchise is an unsophisticated husband and wife, owner/operator, commonly referred to as a “mom-and-pop.” In the leasing of certain retail space in a modern, enclosed shopping mall⁴ or festival marketplace,⁵ the developer/landlord of the project targets the “mom-and-pop” as a potential tenant. However, the shopping center developer, unlike the fast food franchisor, is under no disclosure requirement, and short of committing outright fraud, has a free hand to do and say whatever he deems

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²Accelerated depreciation provisions in the tax code allowed for expense write-offs and operating losses even when the project yielded significant positive cash flow.

³Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 C.F.R. § 436.1 (2005).

⁴The enclosed mall is generally a large building with two levels, no windows, three to four large department stores and a food court, occupying approximately one million or more square feet.

⁵A festival marketplace is usually a theme project with a number of retail shops, a food court, no department stores, occupying approximately 200,000 square feet.

necessary to secure a deal with a new tenant. The franchisor, dealing with the very same mom and pop is restricted to compliance with detailed state and federal franchise and business opportunity regulations. This paper advances the proposition that the shopping mall developer, like the franchisor, should be subject to the same marketing restrictions and disclosure requirements.

I. BACKGROUND

The modern enclosed mall was created in 1954 by Viennese-born architect, Victor Gruen.⁶ The project known as Southdale Shopping Center in Edina, Minnesota, was the first shopping center to orient retail shops toward a central courtyard rather than the street or parking lot.⁷ Southdale “cost twenty million dollars, and had seventy-two stores and two anchor department-store tenants, Donaldson’s and Dayton’s.”⁸ Until this time, most storefronts or series of storefronts in a strip shopping center were oriented toward the street.⁹ Much like a typical “Main Street,” large picture windows displayed merchandise to persons walking or driving by the storefronts. Mr. Gruen, following the European model, positioned shops to face, not the street, but an interior courtyard creating an environment where the shops faced each other. By simply enclosing what was once an open courtyard, the shopping mall was born.¹⁰

A. Alfred Taubman,¹¹ the owner/developer of Southdale, Edward J. DeBartolo,¹² and the Simon brothers, Melvin, Herbert, and Fred,¹³ led the early development of the enclosed shopping mall. In the late 1980s, the Edward J. DeBartolo Corporation boasted more than 80 million square feet of retail space under management, ownership of the National Football League San Francisco 49ers, the National Hockey League Pittsburgh Penguins, and a number of thoroughbred racetracks.¹⁴ In December 1993, Melvin Simon & Associates formed Simon Property Group, Inc., and went public to become the largest U.S. Real Estate Investment Trust (REIT).¹⁵ In August 1996, Simon Property Group merged with the DeBartolo Realty Corp. and

⁶Malcolm Gladwell & Richard Avedon, *The Terrazzo Jungle*, NEW YORKER, Mar. 15, 2004, at 120.

⁷*Id.*

⁸*Id.*

⁹*Id.*

¹⁰*Id.*

¹¹*Id.*

¹²The Founder and Chief Executive Officer of The Edward J. DeBartolo Corporation, Youngstown, Ohio, which, at one time, was the largest shopping center developer in the world.

¹³The founders of Melvin Simon & Associates, Inc., Indianapolis, Indiana.

¹⁴DeBartolo Holdings, <http://www.debartolopropertygroup.com/news.htm> (select “The Legacy: Industry Shakers” hyperlink) (last visited Nov. 28, 2005); San Francisco 49ers, <http://www.sf49ers.com/team/OfficeBio.asp?FrontOfficeID=82> (last visited Oct. 18, 2005).

¹⁵International Council of Shopping Centers, <http://www.icsc.org>.

grew twice as large as its nearest competitor.¹⁶ The Simon Property Group now owns and manages 185 million square feet of retail shopping center space.¹⁷

Of the major players, A. Alfred Taubman is regarded as having the best-designed and most financially successful malls.¹⁸ Taubman malls are meticulously planned with respect to aesthetics, retail mix, location of vendors, and the use of corridors, stairways and escalators to enhance the shopping experience and generate greater sales for tenants.¹⁹

The typical process for developing a mall includes the offering of concessions and incentives to major department stores in exchange for written commitments to lease space in the proposed mall.²⁰ Three to five of these department stores will eventually become the “anchors”²¹ of the mall. The size, brand identity, and quality of the anchors are usually the defining elements of the ultimate commercial success of the mall. Typical anchor department stores include Sears, J.C. Penney’s, Dillard’s, Bloomingdale’s, Parisian, Saks Fifth Avenue, Lord and Taylor and Nordstrom. Once the anchors are secure, nationally known specialty retailers, such as The Limited, Gap, Abercrombie & Fitch, Nine West, and Victoria’s Secret, are solicited for occupancy in smaller storerooms. Remaining space is offered at premium rates to locally owned independent operators, and locally owned franchisees of regional and national chains. Rental rates for the local space are significantly higher and rental terms are generally more stringent.²² The sales pitch to the locals emphasizes the uniqueness and quality of the *commercial environment* created by the number, quality, and mix of major tenants.

Beginning in the early 1980s, mall developers created another amenity and income source for their enclosed malls—the food court.²³ Generally, the food court consists of ten to twelve food stalls surrounding a large common area with seating for four hundred to six hundred patrons. Each food stall is approximately a six hundred to seven hundred square foot rectangular space with a service counter facing the common seating area. Six to eight feet behind a service counter is a wall concealing the remaining food storage and preparation area. The food court concept has proliferated well beyond the enclosed mall. They are now part of many diverse

¹⁶*Id.*

¹⁷*Id.*

¹⁸Gladwell & Avedon, *supra* note 6.

¹⁹*Id.*

²⁰M. Rosie Rees & Theani C. Louskas, *Retail Leasing: Special Concerns*, in 2 NEGOTIATING COMMERCIAL LEASES: HOW OWNERS & CORPORATE OCCUPANTS CAN AVOID COSTLY ERRORS SPRING 2005, at 151, 154-56 (PLI Real Estate Law & Practice, Course Handbook Series No. N-518, 2005).

²¹An anchor is usually a large retailer that is expected to draw customers to the mall. The anchor will have entrances from both the interior and exterior of the mall.

²²Rees & Louskas, *supra* note 20, at 155-56.

²³John C. Melaniphy, *Food Courts for Food Operators*, <http://www.melaniphy.com/artic7.htm> (last visited Nov. 28, 2005).

projects, from urban office buildings, resorts, strip shopping centers, schools, airports, zoos, amusement parks, and other locations where people congregate in large numbers. In most cases, the food court vendor is a local, single unit mom-and-pop owner/operator of an original concept, or a single unit owner of a fast food franchise.

To achieve a profitable sales level, the vendors in the food court rely heavily upon the developer/landlord and the particular project to generate sufficient customer traffic. In an enclosed mall, amusement park or a festival market environment, the financial viability of the food court tenant is totally dependent on the project's ability to attract customers. For all practical purposes, food court tenants cannot survive without the effective performance of the developer/landlord's obligations.

Though franchising has been a business option for more than one hundred years, the birth of the modern fast-food franchise is identified with the development deal made in 1954 between Ray Kroc²⁴ and the McDonald brothers of San Bernardino, California.²⁵ The rapid growth in franchising closely parallels the development of the enclosed suburban mall. The fast-food franchise is founded on the assumption that a successful restaurant in one location can succeed elsewhere if the menu, decor, and service levels are uniform. Led by men of humble beginnings such as Ray Kroc, Dave Thomas,²⁶ and Tom Monahan,²⁷ the late 1960s and early 1970s saw the birth and explosive growth of McDonald's, Burger King, Wendy's, Domino's Pizza, Pizza Hut, Kentucky Fried Chicken, Long John Silver's, and seemingly, any restaurant concept capable of being replicated. In the 1980s, with locations becoming more difficult to secure, franchisors welcomed the opportunity to open franchisee-owned restaurants in the new food courts of regional malls. Several chains, such as Chick-fil-A,²⁸ Sbarro,²⁹ and Arthur Treacher's Fish & Chips,³⁰ developed their growth strategies almost exclusively on food court locations. For many franchisors, the potential mom-and-pop food court vendor is a great vehicle for expanding their franchise networks. Consequently, both the mall developer and the franchisor covet a business relationship with the mom-and-pop.

²⁴At the time, Ray Kroc was a middle-aged milkshake machine distributor who through his involvement with McDonalds ultimately defined the "fast-food franchise."

²⁵JOHN MARIANI, *AMERICA EATS OUT* 164 (1991).

²⁶Mr. Thomas, an orphan, is the late founder and spokesperson for the Wendy's hamburger chain.

²⁷Mr. Monahan is the founder of Domino's Pizza and former owner of the Detroit Tigers baseball team. He is also the founder and current Chairman of the Ave Maria School of Law, Ann Arbor, Michigan.

²⁸Chick-fil-A, primarily located in shopping centers, offers a menu of chicken sandwiches, salads and drinks.

²⁹Sbarro, primarily located in shopping centers, offers a menu including pizza and a variety of Italian pasta dinners.

³⁰Arthur Treacher's Fish & Chips offers an assortment of fried, grilled and baked seafood items. Its growth, through the late 1980s to the late 1990s, was exclusively in food court locations.

II. MARKETING THE OPPORTUNITY

Beginning with acres of available parking, a well-planned suburban mall has a tremendous advantage over the aging commercial districts in most cities. From the outset, malls are described and marketed as unique environments, properly planned, and operated for efficiency and success in the transaction of retail business. They are touted as bringing together a diverse group of selected vendors to satisfy every need of a potential consumer. Along with food courts, many malls now include banks, dental offices, hair salons, grocery stores, drugstores, government agencies, and movie theaters. The focus of the marketing is not on a particular space within the mall, but rather on the total environment of the mall. The marketing of mall space emphasizes the fact that the mall has everything one would find in a city's main retail business district with none of the corresponding problems associated with limited parking, traffic density, and geographically dispersed retail shops. With the mall, emphasis is on convenience, acres of free parking, proximity to suburban housing developments, and safe ingress and egress. In many communities, the mall is the primary commercial setting, often at the expense and demise of downtown shopping districts.

The specific marketing of food court space focuses on the mall itself, but also cites the unique environment of the food court and the opportunity for sales to mall customers and employees. A particular space within the food court as a practical matter is irrelevant. The actual size of the food court stall is only relevant in the context of accommodating the operator's equipment for food and beverage storage, preparation, and service. Though unstated, rentals are not based on the size of the space or prevailing rental rates outside the mall (they tend to be much higher in the mall), but rather on the "value" the landlord attaches to the opportunity to participate in the mall environment. A vast multitude of restaurant operators are usually vying for a handful of spaces, skewing the relative bargaining positions heavily in favor of the landlord. Just like any other business opportunity promoter, the challenge of the landlord is to convince the mom-and-pop that the unique mall environment and the ability of the landlord to generate customer activity represents a great opportunity for their financial success. In non-mall food courts, whether in an urban office building, amusement park, airport, or train station, the marketing approach is the same. It is the "unique" environment and the self promoted marketing competence of the landlord that allegedly provides the tenant with an exclusive opportunity to conduct a successful business.

A fast-food franchise is marketed to prospects as an opportunity to independently participate in a proven business system. Franchisors promote the strength of the brand, product quality, sales of comparable units, advertising and marketing support, training and product development. Belonging to an existing, successful system is strongly emphasized.

The solicitation of the potential mom-and-pop food vendor by the mall landlord and the franchisor is very similar. The landlord maintains that the unique food court environment will assure the vendor of success. Likewise, the franchisor argues that joining its proven franchise system is the path to financial reward. In the sale of a franchise and the leasing of food court space, the developer and the franchisor are sometimes targeting the same mom-and-pop. The franchisor wants to grow its system and the developer wants a food court tenant with the added strength of an established brand. Essentially, both opportunity promoters want the same thing from

the same entity. The sales pitch to the mom-and-pop focuses on seizing the opportunity to belong, whether it is in the food court or the franchise system, or both.

Often, the franchisor and the landlord work together (whether knowingly or not) by proposing that the food court, in conjunction with the franchise, is the right combination for success. The fruits of this approach are demonstrated by the fact that many food courts are now tenanted by franchisees of fast-food chains.³¹ Although dealing with the same prospect and a nearly identical objective in substance and scope, the franchise sales process must comply with strict marketing and disclosure requirements while the food court leasing process is totally free of any local, state, or federal regulation.

III. DECISION-MAKING INFORMATION

During the food court leasing process, certain information may be provided to the prospective tenant to allow for an “informed” decision. This information includes the number of employees working within the mall or project, customer traffic counts, average sales per square foot, and the sales volume of other tenants within the food court. However, the mall-leasing representative is not required to present any specific information in any specific order to the prospective tenant. In fact, there is no prohibition against providing any information, either in writing or orally, and there are no requirements that the information provided be accurate or follow any particular format. The landlords’ leasing representatives are generally free to submit whatever information they deem important or necessary to make a deal.³² The prospect may be able to gather some anecdotal information from existing tenants, but since all the statistical information emanates from the records of the landlord, there is no realistic opportunity to verify the accuracy of the provided information.

In a commercial setting, outside a mall environment, a prospective tenant has access to a great deal of demographic information relative to most locations. Traffic counts on major highways, the number of homes within a one, five, and ten mile radius of the site, and corresponding disposable income statistics are available through a variety of quasi-governmental and commercial trade sources.³³ One could also easily discover the prevailing rental rates and crime statistics for most commercial areas of any major to mid-sized city in the United States. Because a mall is private property, no such public information is available or accessible.

Certainly, a prospective food court tenant would be interested in crime statistics, number of employees in the mall, average daily customer traffic within the mall, sales levels of the various categories of retailer within the mall, food court tenant failures, and rental rates of other similar tenants. The only access a prospective tenant has to this information is through the mall landlord via its sales and leasing representatives. Even if the information is provided, there is no certification of its accuracy or comprehensiveness. For many of the much smaller non-mall projects

³¹Melaniphy, *supra* note 23.

³²There have been a number of claims by food court tenants that leasing agents make promises, never in writing, that are not honored. *Id.*

³³Most local Chambers of Commerce, transportation departments, and census providers make this information readily available.

with new food courts, there may be very little history or operating experience to assess in the decision-making process. This situation makes a mom-and-pop extremely vulnerable to abusive and unfair practices that run the gamut from “puffing” to outright fraud. Unsupported earnings claims, unfulfilled promises of operational or marketing support, and misunderstood contractual obligations are some of the practices complained of by food court tenants:

First, a significant turnover in the number of “Ma and Pa” tenants was evident. These tenants discovered that the level of sales promised often did not materialize. Moreover, many food court tenants were shocked at the actual common area maintenance (CAM) charges (real estate taxes, mall common area operating expenses, snow removal, merchants association fees and often a special clean up charge for the food court itself). The final blow occurred when they discovered that they were not making any money. Many tenants were upset with promises made by the landlord’s leasing people, who often “guaranteed” (but never in writing) the level of activity that did not occur. Others were adversely affected by the addition of another food operator (often a national chain) with competitive products, especially after the leasing people promised that this would not happen.³⁴

Similar complaints were prevalent in the early days of franchising, primarily emanating from shady operators preying upon innocent victims (primarily moms-and-pops). This led to the development of consumer protection laws, both federal and state, aimed at protecting consumers from some of the unscrupulous business practices of franchise and business opportunity promoters. In 1978, The Federal Trade Commission promulgated “Disclosure Requirements and Prohibitions Concerning Franchise and Business Opportunity Ventures,” commonly referred to as the “Franchise Rule.”³⁵ The Franchise Rule requires discussion and disclosure of 20 specific items (and no others) contained in a single disclosure document.³⁶ Following the adoption of the Franchise Rule, the Midwest Securities Commissioners Association (now known as North American Securities Administrators Association, its successor) developed a similar uniform disclosure document, commonly referred to as the Uniform Franchise Offering Circular (UFOC).³⁷ The FTC allows franchisors the option to use the UFOC in lieu of its disclosure document.³⁸ Because of its relatively universal application, the UFOC has become the preferred format for most national franchisors. The following illustrates the nearly identical items to be included in each format:

³⁴Melaniphy, *supra* note 23.

³⁵16 C.F.R. § 436.1.

³⁶*Id.* § 436.1(a)(21).

³⁷North American Securities Administrators Association, UFOC Guidelines, http://www.nasaa.org/Industry_Regulatory_Resources/Uniform_Forms/3697.cfm (last visited Nov. 28, 2005).

³⁸Bus. Franchise Guide (CCH) ¶ 370 (Dec. 1995).

FTC Franchise Rule Disclosure Document

1. Identifying information as to franchisor
2. Business experience of franchisor's directors and executive officers
3. Business experience of the franchisor
4. Litigation history
5. Bankruptcy history
6. Description of franchise
7. Initial funds required to be paid by a franchisee
8. Recurring funds required to be paid by a franchisee
9. Affiliated persons the franchisee is required or advised to do business with by the franchisor
10. Obligations to purchase
Revenues received by the franchisor in consideration of purchases by a franchisee
12. Financing arrangements
13. Restriction of sales
Personal participation required of the franchisee in the operation of the franchise
15. Termination, cancellation, and renewal of the franchise
Statistical information concerning the number of franchises (and company-owned outlets)
17. Site selection
18. Training programs
19. Public figure involvement in the franchise
20. Financial information concerning the franchisor³⁹

Uniform Franchise Offering Circular (UFOC)

1. The franchisor, its predecessors and affiliates
2. Business experience
3. Litigation
4. Bankruptcy
5. Initial franchise fees
6. Other fees
7. Initial investment
8. Restrictions on sources of products and services
9. Franchisee's obligations
10. Financing
11. Franchisor's obligations
12. Territory
13. Trademarks
14. Patents, copyrights, and proprietary information
15. Obligation to participate in the actual operation of the franchise business
16. Restrictions on what the franchisee may sell
17. Renewal, termination, transfer and dispute resolution

³⁹16 C.F.R. §436.3.

18. Public figures
19. Earnings claims
20. List of outlets
21. Financial statements
22. Contracts
23. Receipt
- Exhibits
 - A. Franchise agreement
 - B. Equipment lease
 - C. Lease for premises
- Loan agreement⁴⁰

Detailed instructions for the proper completion of each item accompany both the UFOC and FTC formats.⁴¹ They each provide the exact order that items must appear. They also require that certain warning statements appear on the front of the disclosure document, that the information provided be current within 90 days, that there be a table of contents, and that a comment that either positively or negatively responds to each item be included in the disclosure document.⁴² The FTC requires that the appropriate heading precede each item.⁴³ If the franchisor chooses to make financial performance representations, the Franchise Rule requires the franchisor to have a reasonable basis for those claims and also to provide a document to potential franchisees substantiating those claims.⁴⁴

The disclosure mechanism is designed to provide a uniform method of evaluating one franchise from another. Most states have established a “business opportunity” disclosure scheme and have provided that compliance with the Franchise Rule is satisfactory compliance with the state business opportunity law. Some states including New York, Maryland, and Virginia require registration and approval of the disclosure document before a franchisor or business opportunity promoter may make any contact or sale within the state.⁴⁵

These state and federal disclosure requirements provide that relevant decision making information be delivered to the prospective opportunity buyer at the earlier of the “time for making disclosures” or the first “personal meeting.”⁴⁶

In 1995, the Federal Trade Commission began the process of a regulatory review of the Franchise Rule, in which it seeks public comment on whether there is a

⁴⁰ Bus. Franchise Guide (CCH) ¶ 5752 (June 1997); North American Securities Administrators Association, UFOC Guidelines, http://www.nasaa.org/Industry_Regulatory_Resources/Uniform_Forms/3697.cfm (select “UFOC Guidelines” hyperlink) (last visited Nov. 28, 2005).

⁴¹ 16 C.F.R. § 436.1; Bus. Franchise Guide (CCH) ¶ 5751 (July 1997).

⁴² 16 C.F.R. § 436.1(a)(21)-(24); Bus. Franchise Guide (CCH) ¶¶ 5751-5752 (June 1997).

⁴³ 16 C.F.R. § 436.1(a)(24); Bus. Franchise Guide (CCH) ¶ 5751 (July 1997).

⁴⁴ 16 C.F.R. § 436.1(b)(1)-(3).

⁴⁵ Bus. Franchise Guide (CCH) ¶ 5000 (Dec. 2000).

⁴⁶ 16 C.F.R. § 436.1(a).

continuing need for the Rule and, if so, how to improve the Rule in light of changes since its promulgation in the late 1970s.⁴⁷ Early participants in the review process, including a number of major franchisors, maintain that

[P]re-sale disclosure is a cost-effective way to provide material information to prospective franchisees so they can assess the costs, benefits and potential financial risks involved in entering into a franchise relationship. In particular, pre-sale disclosure enables prospective franchisees to investigate the franchise offering by providing information not readily available, such as the franchisor's litigation history and franchisee failure rates.⁴⁸

"Based upon the record and the Commission's law enforcement experience over the last twenty years," the staff concluded that pre-sale disclosure is still warranted to protect prospective franchisees and enable them to conduct a due diligence investigation of the franchise offering, "thereby giving the prospect a better understanding of the significant financial risks and legal obligations involved in purchasing a franchise."⁴⁹ The staff, while acknowledging some problems,⁵⁰ observed that official complaints were made against less than 5% of all franchise systems operating in North America.⁵¹ The staff concluded that the vast majority of the official complaints are post-sale, contractual in nature, and subject to state law. The staff also made the following conclusion:

Most important, in many instances, injury to franchisees can reasonably be avoided. A franchise purchase is entirely voluntary. Prospective franchisees can avoid harm by comparison shopping for a franchise system that offers more favorable terms and conditions, or by considering alternatives to franchising as a means of operating a business. Further, the Franchise Rule ensures that each prospective franchisee receives disclosures that explain the terms and conditions under which the franchise will operate. Prospective franchisees are also free to discuss the nature of the franchise system with existing and former franchisees. Under these circumstances, the Commission can hardly conclude that prospective franchisees who voluntarily enter into franchise agreements after receiving full disclosure, nonetheless cannot reasonably avoid harm resulting from a franchisor enforcing the terms of the franchise agreement.⁵²

⁴⁷BUREAU OF CONSUMER PROTECTION, FED. TRADE COMM'N, DISCLOSURE REQUIREMENTS AND PROHIBITIONS CONCERNING FRANCHISING: STAFF REPORT TO THE FEDERAL TRADE COMMISSION AND PROPOSED REVISED TRADE REGULATION RULE (2004), *available at* <http://www.ftc.gov/os/2004/08/0408franchiserulerpt.pdf>.

⁴⁸*Id.* at 6.

⁴⁹*Id.* at 8.

⁵⁰*See id.* The complaints received over a several year period included issues involving covenants not to compete, encroachment of franchisees' market territory, restrictions on the sources of products or services, limitations on legal rights, jury trial waivers and restrictive venue and choice of law provisions. *Id.* at 7.

⁵¹*Id.* at 11.

⁵²*Id.* at 10.

IV. SUBSTANCE OF THE AGREEMENT

A copy of the proposed franchise agreement, along with the required explanation of obligations, is provided to a prospective franchisee in the disclosure document. Unknown obligations and hidden costs are avoided by appropriate compliance with the Franchise Rule. The disclosure document provides a means for the prospective franchisee to comparison shop among the thousands of franchises available and chooses the one that best suits his or her particular needs. An individual may also eschew franchising entirely in favor of operating an independent business. Further, it is in the franchisor's best interest to have well informed franchisees that understand and accept the obligations imposed by the franchise relationship. The long-term stream of royalty payments from successful franchisees provides the financial viability and longevity of a franchise system. Franchisors and franchisees that recognize the benefits attendant to well-informed decision-making, overwhelmingly favor the continuation of the Franchise Rule.⁵³

The ultimate agreement between the landlord and the food court tenant, though titled "Lease," is far removed from the traditional "conveyance of an interest in real estate." The individual spaces offered to tenants are essentially identical. Being *in* the food court trumps any concern for a particular space. Any real estate element characterized by uniqueness is far outweighed by the exhaustive list of covenants found in every food court lease. The typical food court lease represents an ongoing business relationship more akin to a partnership or joint venture rather than the transfer of an interest in real estate. The arrangement confers to the landlord significant control over food court operations in general, and by implication, the tenant, in particular. While a commercial lease for non-mall space may have a provision proscribing a permitted use and a requirement to conform to local zoning ordinances, the food court lease goes much further in restricting and proscribing various operational provisions. A food court lease will include a detailed listing of permitted menu items and will prohibit the sale of any item not so included.⁵⁴ The permitted menu items are non-exclusive and the landlord, though often making oral assurances to the contrary, usually reserves the right to permit others to sell items identical or similar to those sold by tenant.⁵⁵ Other provisions control hours of operation, employee uniforms, marketing material displays, menu board design, overall color scheme, and the right of the landlord to relocate the tenant to another food court stall. Even more critical are the provisions referred to as "Occupancy Charges (OC)," which require additional fees to the tenant for mall operations, insurance, common area maintenance, taxes, and food court maintenance. These charges usually contain an annual escalator based on increases in the Consumer Price

⁵³See *id.* at 5-6.

⁵⁴See Simon Property Group Lease *infra* Appendix, Section 1.1 (m). "The premises shall be occupied and used by Tenant solely for the purpose of conducting therein the business of the retail sale of . . . [all menu items listed]. . . and Tenant shall not use or permit . . . the use of the premises for any other business or purpose."

⁵⁵See Simon Property Group Lease *infra* Appendix, Article VI Section 8.1. "Tenant expressly understands and acknowledges that its Permitted Use is nonexclusive, and that other tenants may sell items identical or similar to those sold by Tenant."

Index (CPI).⁵⁶ There is no provision requiring the landlord to make its expense records available for inspection. Even if available, these expenses are coupled in ways that make it difficult, if not impossible, for the tenant to comprehend or challenge any specific expense or identify to whom they were paid.

A separate obligation requires the food court tenant to participate in and pay for mall sponsored and directed marketing and promotional programs.⁵⁷ These mandatory programs are conducted on a seasonal basis with monthly tenant payments to the fund.

The lease also grants the landlord, as additional rent, a percentage (6-10%) of tenant sales in excess of a predetermined level.⁵⁸ The landlord is protected on the downside by the guaranteed minimum rent and the required pro-rata operating expense contributions from each tenant. Such contributions are defined and calculated in a manner that virtually guarantees that the landlord will incur no obligation for the operation, management, maintenance, and repair of the mall.⁵⁹ In reality, the landlord participates in the success of the tenant's business through the percentage rent provision while having no obligation to pay for any of the operating expenses.

In addition to the mom-and-pop tenant's inherent disadvantages relative to bargaining power over substantive economic issues, their legal rights and remedies are seriously limited or waived entirely in the typical food court lease.⁶⁰ Limitations on the right to assign or sub-let the premises, by the very nature of a food court, present special problems for the tenant. The authorized menu and "permitted use" in the lease gives the landlord a legitimate right to withhold approval for an assignee or sub-lessee offering menu items that do not conform to the original lease or are in conflict with menus of other food court tenants. As a practical matter, this situation also presents problems for a defaulting tenant in those states recognizing a landlord's duty to mitigate damages. The landlord can be very selective in its obligation to re-let space. If there are multiple vacancies and a solvent guarantor, the landlord has no incentive to mitigate damages with anyone other than a commercially strong tenant

⁵⁶See Simon Property Group Lease *infra* Appendix, Article I Section 1.1(k). "[T]he annual OC Charge shall be increased on the first day of each such calendar year or partial calendar year by an annual amount equal to three percent (3%) of the OC Charge payable by Tenant to Landlord for the immediately preceding calendar year" *Id.*

⁵⁷See Simon Property Group Lease *infra* Appendix, Article XIV Sections 14.1, 14.3.

⁵⁸This level is referred to as the "natural breakpoint" and is computed by dividing the guaranteed minimum rent by the percentage rental rate. In effect, the landlord is guaranteed a rental rate that is never less than the agreed percentage of additional rent.

⁵⁹The pro rata share of the operating expenses is often based on the tenant's percentage share of overall *leased* space rather than its share of gross *leaseable* space. Vacancies merely increase the tenants' share and insure that no operating expenses are chargeable to the landlord.

⁶⁰Along with the customary waiver of trial by jury, typical mall lease language provides that "Tenant waives any and all rights of redemption granted by or under any present or future laws if Tenant is evicted or dispossessed for any cause, or if Landlord obtains possession of the premises due to Tenant's default hereunder or otherwise."

with identical or similar product offerings. As with most commercial leases, the remedy provisions included in a food court lease are heavily structured in favor of the landlord. The landlord has the right to “lockout” a defaulting tenant, seize the tenant’s equipment and other personal property, obtain attorney’s fees, and recover any expenses incurred in the re-leasing of the premises.⁶¹ The leases are nearly always personally guaranteed by the mom-and-pop, so the landlord is eventually made whole through payment from the guarantors’ other assets. Unlike the franchise disclosure system, there is no clearly identifiable mechanism to advise and protect mom and pop tenants from the many risks, pitfalls, and onerous provisions of the typical food court lease.

V. CURRENT LEGAL ENVIRONMENT

Aside from the potentially oppressive nature of the food court lease, there is also some evidence to suggest that mall owners, developers, and managers have engaged in unfair or deceptive practices.⁶² Though industry-wide failure rates are nearly impossible to determine and quantify, over the last two decades there certainly has been a great deal of turnover in food court tenants.⁶³ What was typically a retailing opportunity available to local vendors operating independent businesses; the modern food court is now leased primarily to franchisees of national or regional chains. Yet, there still exists a high turnover rate. Recessionary periods, competition from “big box”⁶⁴ discounters, and the homogenizing of many department store chains may have some effect on the decrease in visitors to the typical mall. Where once the traffic counts may have been sufficient to support even the weakest food court operator, now with a decreasing customer base, and increasingly higher occupancy costs (rent, utilities, and common area maintenance fees), only the strongest brands can operate successfully.

In many cities throughout America, the regional mall represents a virtual monopoly on retail shopping opportunities. In some cases, it is the *only* viable option for a local retail vendor. If the vendor is not in the mall, he runs the risk of losing overall business to competitors able to secure a space within the mall. Coupled with the substantial imbalance in bargaining positions and the burdensome nature of the food court lease, the uninformed mom-and-pop operators are ripe for exploitation. Appropriate disclosure of relevant information, uniformly presented in a single document written in “plain English,”⁶⁵ will solve many if not all consumer protection issues associated with the leasing of food court space. Imposing marketing limitations upon franchisors and not on mall landlords when they are each

⁶¹See Simon Property Group Lease *infra* Appendix, Article XVIII Section 18.1.

⁶²See Melaniphy, *supra* note 23.

⁶³*Id.*

⁶⁴This is the term commonly used to refer to the large stores, usually near the enclosed malls, offering toys, furniture, electronics, and clothing at lower prices than the comparable mall tenants. Retailers in this category include, among others, “Circuit City,” “Toys-R-Us,” “Rooms-To-Go,” “Wal-Mart,” and “T. J. Maxx.”

⁶⁵The “plain English” requirement was adopted and made a part of the UFOC in 1993. Bus. Franchise Guide (CCH) ¶ 370 (Dec. 1995).

soliciting the same target customer with the same inherent risk of abuse seems senseless. When one ignores the labels “landlord,” “tenant,” and “lease” and examines the actual offer being made, the marketing approach taken, the substance of the contractual agreement, and the true nature of the business relationship, a case can be made that the food court leasing process should be included within the definition of a “business opportunity.”

At the federal level, business opportunities are included in the FTC Franchise Rule. However, as part of the ongoing review of the Franchise Rule, the FTC staff recognizes that “business opportunities and franchises are distinct business arrangements that warrant different disclosure approaches.”⁶⁶ The staff recommends that the scope of the current Franchise Rule be modified and narrowed to “focus exclusively on franchise sales” with new rulemaking directed at business opportunities.⁶⁷ It is pure speculation to determine the language that will be used if and when a federal business opportunities rule is adopted.

Under state law, there are no reported cases that definitively reach and resolve the issue of whether or not the food court leasing process is included in business opportunity definitions. However, a 1985 reported opinion of the U. S. District Court for the District of Maine, reached the conclusion that payments under a food court lease for common area seating and promotional services can constitute the predicate payment for inclusion within the Maine Business Opportunities Act.⁶⁸ The court in *Fishermen’s Net, Inc.* denied a motion for summary judgment by a landlord claiming that the Act did not apply to a shopping center food court lease.

In 1986, the National Conference of the Commissioners on Uniform State Laws (NCCUSL) drafted a state “Uniform Franchise and Business Opportunities Act.” Section 101 of the proposed Uniform Act provides definitions of relationships and activities that are included within the Act and those that are not. Specifically excluded is “a disposition of an interest in real estate,”⁶⁹ which under traditional property concepts would include a food court lease. The definition of a “franchise fee,” a predicate payment for inclusion in the Act, excludes payments for the “lease of real property, fixtures, equipment, or supplies necessary to enter into or maintain a business.” Furthermore, the proposed Act specifically excludes from the definitions of “franchisee fee” and “initial payment” a “rental or cooperative advertising charge by a tenant in a shopping center.”⁷⁰ In paragraph five of the official comments, the drafters referred to the cited sections and rejected “the conclusion in *Fishermen’s Net, Inc. v. Weimer*, 608 F. Supp. 1283 (D. ME. 1985) (Bona fide shopping center rental or cooperative advertising charges can constitute an ‘initial payment’ or its equivalent under Maine business opportunity law).” There is no further indication why such a narrowly drafted provision significantly favoring the shopping mall

⁶⁶BUREAU OF CONSUMER PROTECTION, *supra* note 47, at 13.

⁶⁷*Id.* at 12.

⁶⁸ *Fishermen’s Net, Inc. v. Weiner*, 608 F. Supp. 1283 (D. Me. 1985).

⁶⁹ UNIF. FRANCHISE & BUS. OPPORTUNITIES ACT (withdrawn 1998), 7A PT. I U.L.A. 410 (2002).

⁷⁰*Id.*

developer would be included in the Act. To date, none of the states regulating business opportunities has adopted the proposed uniform act or any of the specific language that would preclude the food court leasing process from inclusion in that state's business opportunity law. Most states have adopted broad definitions that permit inclusion of a wide range of activities in their statutes. Florida, for example, defines a "Business Opportunity" as follows:

[T]he sale or lease of any products, equipment, supplies, or services which are sold or leased to a purchaser to enable the purchaser to start a business for which the purchaser is required to pay an initial fee or sum of money which exceeds \$500 to the seller, and in which the seller represents:

1. That the seller or person or entity affiliated with or referred by the seller will provide locations or assist the purchaser in finding locations or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases, currency or card operated equipment, or other similar devices or currency-operated amusement machines or devices on premises neither owned nor leased by the purchaser or seller;
2. That the seller will purchase any or all products made, produced, fabricated, grown, bred, or modified by the purchaser using in whole or in part the supplies, services, or chattels sold to the purchaser;
3. That the seller guarantees that the purchaser will derive income from the business opportunity which exceeds the price paid or rent charged for the business opportunity or that the seller will refund all or part of the price paid or rent charged for the business opportunity, or will repurchase any of the products, equipment, supplies, or chattels supplied by the seller, if the purchaser is unsatisfied with the business opportunity; or
4. That the seller will provide a sales program or marketing program that will enable the purchaser to derive income from the business opportunity.⁷¹

The Florida courts have ruled that meeting any one of the enumerated elements is sufficient to constitute a business opportunity.⁷² In Indiana, the headquarters of Simon Properties, Inc., a "business opportunity" is defined similarly but only requires that "the seller represents that: (A) the investor may or will earn an amount in excess of the initial payment as a result of the investment."⁷³

Texas provides the requirement that the seller represents that "the purchaser will earn or is likely to earn a profit in excess of the initial consideration paid by the purchaser."⁷⁴ Texas also provides that its business opportunity act "be liberally

⁷¹FLA. STAT. ANN. § 559.801(1)(a)(1)-(4) (West 2005).

⁷²State v. Herman, 466 So. 2d 435 (Fla. Dist. Ct. App. 1985).

⁷³IND. CODE ANN. § 24-5-8-1(3)(A) (West 2005).

⁷⁴TEX. BUS. & COM. CODE ANN. § 41.004(a)(1) (Vernon 2005).

construed and applied to: (1) protect persons against false, misleading, or deceptive practices in the advertising, offering for sale or lease, and sale or lease of business opportunities; and (2) provide efficient and economical procedures to secure that protection.”⁷⁵

Most state business opportunity statutes provide definitions of relationships excluded from its operation. At the present, no state statute specifically excludes the marketing of a shopping center lease. Under Texas law, any party seeking exclusion from the operation of its business opportunity law has the burden of proving the exemption.⁷⁶ Florida also provides definitions of transactions and relationships excluded from the business opportunity statute. None of the exclusions have any connection to a mall lease. Indiana similarly does not preclude mall leases but does provide an exemption for a “substantial seller,” which is defined in terms of net worth “according to current financial statements certified by an independent certified public accountant”⁷⁷

The common elements in state business opportunity statutes that may arguably include the food court leasing process are:

- (1) The sale or lease of products or services that enable the purchaser to start a business;

Obviously, the “lease” of a food court stall is for the purpose of starting a business. The landlord also provides janitorial, food court maintenance, and marketing services in connection with the lease.

- (2) The purchaser is required to pay an initial sum of money to the seller, which exceeds \$500.

The food court tenant typically makes a rental deposit beyond the five hundred dollar (\$500) threshold and, before commencing business, expends considerably more money building or remodeling the food stall to suit its operation.

- (3) The seller guarantees that the purchaser will derive income from the business opportunity that exceeds the rent charged.

The guarantee of income in excess of the rent charged is implied and understood in the mall lease relationship and very often is verbally communicated to the prospect by proffering the sales levels of other tenants of the food court.⁷⁸

- (4) The seller will provide a sales program or marketing program that will enable the purchaser to derive income from the business opportunity.

⁷⁵ *Id.* § 41.002(a)(1)-(2).

⁷⁶ *Id.* § 41.005.

⁷⁷ IND. CODE ANN. § 24-5-8-1.

⁷⁸ Numerous sales volume predictions and oral “guarantees” made by landlords to Arthur Treacher’s Fish & Chips franchisees were countered by a clause permitting the tenant to terminate the lease without recourse if the “guaranteed” sales level was not reached by the end of the second lease year. The vast majority of franchisees in that situation elected to exercise the option.

In the contractual relationship between the landlord and food court tenant, the landlord takes responsibility, and charges a fee, for the marketing and promoting of the food court and its tenants.⁷⁹

Any business opportunity situation where the purchaser is totally or significantly dependent upon performance of specified services by the seller is inherently risky. This is the typical situation with food court tenants. In fact, the financial success of a franchisee operating in a food court is more dependent on the landlord than the franchisor. As good as the franchisee's operation may be, if the landlord is not the "rainmaker" he purports to be, even the best operating food court tenant, without customers, is doomed to fail.

Specific inclusion of the food court leasing process in business opportunity statutes will dramatically reduce the abuses that have been suffered by mom-and-pop tenants over the last two decades. With proper disclosure, prospective tenants will become informed on the background, experience, and business history of the landlord and its key executives.⁸⁰ Each disclosure format includes a section titled "Litigation History." In the proposed Franchise Rule revision, it is recommended that this section include, not only the claims brought against the franchisor, but also the "material franchisor-initiated litigation against franchisees involving the franchise relationship."⁸¹ The recruiting and leasing stage of the landlord/tenant relationship often bears no semblance to the relationship once the lease document is signed. The litigation disclosure can provide an important insight into the landlord's approach to dispute resolution.

One of the most problematic issues with mom-and-pop start-up business ventures is the realistic assessment and projection of income and expense. In the franchise disclosure mechanism, the prospect is given a detailed account of all initial funds required to commence business and all recurring obligations required to be paid by the franchisee to the franchisor or any of its affiliates.⁸² If a food court landlord were required to make such disclosures, the mom-and-pop tenant would get a realistic view of the many hidden expenses included in a food court lease. Broad terms such as "common area maintenance" can include a myriad of costs associated with landscaping, sidewalks and parking lots, equipment, and janitorial services. In addition to mall-wide common area maintenance services, on a continuing basis, for an additional monthly fee, the mall provides tray and janitorial services exclusively to the food court tenants.⁸³ A prospective tenant should know the scope and historical expense of these fees before entering into a lease.

⁷⁹See Simon Property Group Lease *infra* Appendix, Article XIV Sections 14.1, 14.3. Customary language included in most food court leases provides for a co-operative promotional and media fund "the primary purpose of which is to provide sums necessary for professional advertising and promotional services which benefit the tenants in the Center."

⁸⁰16 C.F.R. § 436.1(a)(1)-(5); Bus. Franchise Guide (CCH) ¶ 5752 (June 1997).

⁸¹BUREAU OF CONSUMER PROTECTION, *supra* note 47, at 103.

⁸²16 C.F.R. § 436.1(a)(7)-(8); Bus. Franchise Guide (CCH) ¶ 5752 (June 1997).

⁸³See Simon Property Group Lease *infra* Appendix, Exhibit C, IV.

The companies providing the maintenance are often affiliated with the landlord. A prospective tenant, with proper disclosure, may also find that payment to a marketing fund includes the salary of the mall's marketing director, as was the case at the Avenues Mall in Jacksonville, Florida during the mid-1990s. In these conflict of interest situations, there is no incentive for the landlord to minimize or reduce the tenant's obligation for maintenance expenses. The franchise disclosure document must include "a statement setting forth the name of each person (including the franchisor) the franchisee is directly or indirectly required or advised to do business with by the franchisor, where such persons are affiliated with the franchisor."⁸⁴ It would be very enlightening to know the relationship to the landlord of the various "outside" companies that provide maintenance, repair, insurance, and promotional services to the mall. Ultimately, the mall tenants pay for these services.

The franchise disclosure process requires a discussion of the term of the arrangement, the conditions under which the franchisee may renew or extend, and the conditions under which the franchisor may refuse to renew or extend.⁸⁵ In the food court situation, the right to renew, extend, or terminate the lease should be clearly stated. As a practical matter, a franchisee can always terminate the franchise relationship without further liability by ceasing operations. Doing that in a lease situation creates an accelerated obligation for rent and other charges accruing over the entire balance of the lease. Clearly, the long-term financial risk in the leasehold situation is significantly greater.

If the franchisor makes any representation with respect to a specific level of potential sales, income, gross or net profit for that prospective franchisee, or which states other facts that suggest such a specific level, the representation must be supported with significant information to justify the representation. The disclosure document must carry a caution that the figures presented are "only estimates of what we think you may earn."⁸⁶ A similar requirement from landlords will either stop them from making any such earnings claims, or in the alternative, provide the prospective tenant with the information to make appropriate and realistic budgets and earnings projections.

In addition to a rental deposit, the developer requires the food court tenant to make landlord specified tenant improvements, at his own expense, and pay a proportional amount for food court trays and other common use supplies.⁸⁷ The estimated high/low range of these expenses should be provided before the execution of a lease. The sum of money that must be committed to these purposes is significantly greater than the \$500 threshold used in business opportunity statutes. The mall also provides ongoing marketing programs in which food court tenants must participate and to which they must contribute funds.⁸⁸ These programs are of great significance since they are usually the only form of advertising undertaken by

⁸⁴16 C.F.R. § 436.1(a)(9).

⁸⁵16 C.F.R. § 436.1(a)(15)(i)-(iii); Bus. Franchise Guide (CCH) ¶ 5752 (June 1997).

⁸⁶16 C.F.R. § 436.1 (b)(4).

⁸⁷See Simon Property Group Lease *infra* Appendix, Exhibit C, IV.

⁸⁸See Simon Property Group Lease *infra* Appendix, Article XIV, Sections 14.1, 14.3.

mom-and-pop vendors. The marketing plan, alone, may be sufficient to include the landlord/tenant arrangement in most business opportunity statutes.

VI. CONCLUSION

The potential abuse and harm to individuals and small businesses is just as great, if not greater, for the food court tenant as it is for the fast food franchisee. By virtue of the offer and the manner of marketing, the franchisor and the mall landlord are each engaged in the sale of a business opportunity. It is shortsighted to suggest that the “mom-and-pop” needs government protection from the franchisor but not from the mall landlord. The required disclosures set out in the Franchise Rule and the Uniform Franchise Offering Circular, with minor modifications, are relevant to the decision one must make when entering into a food court lease. A prospect should know the failure rate of food court tenants, crime statistics, initial fees, ongoing fees, affiliated entities, and the names and addresses of similarly situated tenants. The economic issues and legal complexity of a shopping center lease preclude all but a few experienced attorneys in the effective representation of local tenants. The franchise disclosure format with its “plain English” requirement is much more straightforward and easier to comprehend by laymen and generalist attorneys.

A case can be made that the major mall developers would never knowingly undertake unfair or deceptive practices to secure a food court tenant. Likewise, McDonald’s, Wendy’s, Domino’s, and other major fast food franchisors are unlikely to be anything but honest and fair. Nevertheless, the major franchisor receives no exemption from compliance with the Franchise Rule. More pertinent, however, is the fact that the proliferation of the food court in literally thousands of projects, other than a regional mall, has brought many new developers into the mix. The background, financial stability and operating experience of these new players is certainly the kind of relevant information that a prospective tenant should have in making a long-term lease decision.

Preferably, the FTC should specifically include the food court leasing process in any new business opportunity rulemaking. Further, if such a case presents itself, counsel for a food court tenant suffering losses as a result of reliance on a landlord’s broken promises or misleading information should bring an action under state business opportunity laws. The appropriate court can then examine all the circumstances, interpret the statutes, and perhaps, settle the issue once and for all.

APPENDIX

Selected Sections of Simon Property Group Standard Food Court Lease (2004)

ARTICLE I

Section 1.1. Basic Lease Information.

....

(k) Operating Cost Charge ("OC Charge"): Provided Tenant's Commencement Date occurs on or before December 31, 2004 Tenant's Base Year OC Charge shall be: Twenty-six and 38/100 Dollars (\$26.38) per square foot of Store Floor Area per annum (computed on an annualized basis for any partial calendar year), subject to adjustment as set forth herein. In the event Tenant's Commencement Date is January 1, 2005 or thereafter, Tenant's Base Year OC Charge shall be increased in accordance with the following. For and with respect to each and every calendar year or partial calendar year after the 2004 Base Year, the annual OC Charge shall be increased on the first day of each such calendar year or partial calendar year by an annual amount equal to three percent (3%) of the OC Charge to payable by Tenant to Landlord for the immediately preceding calendar year (computed on an annualized basis for any partial calendar year).

....

(m) Permitted Use: The premises shall be occupied and used by Tenant solely for the purpose of conducting therein the business of the retail sale of original batter fish, fish sandwich, broiled fish, original batter shrimp, breaded shrimp, chicken dinners, clam chowder, chips, grilled seafood and chicken salad sandwiches, hushpuppies, krunch pup, baked potato, coleslaw, filled fruit pie desserts and non-alcoholic and hot and cold beverages and Tenant shall not use or permit or suffer the use of the premises for any other business or purpose.

Section 4.5. Taxes.

....

B. Tenant's Share. Tenant's shall pay to Landlord, as additional rent, its proportionate share of all calendar year or fiscal year Taxes, such proportionate share to be prorated for periods at the beginning and end of the Lease Term which do not constitute full calendar months or years. Tenant's proportionate share of any such Taxes shall be that portion of such Taxes which bears the same ratio to the total Taxes as the Store Floor Area bears to the average rentable floor area rented or occupied in the Center (hereinafter called "Rented Floor Area") during the calendar year or fiscal year in which such taxes constitute a lien upon the Center. The floor area of (i) Major Tenant spaces whether such spaces are vacant or occupied, (ii) any tenant in a freestanding premises, (iii) theaters, (iv) restaurants, (v) kiosks, (vi) storage spaces, (vii) any tenant with no frontage on the enclosed mall of the Center, and (viii) Common Areas, as hereinafter defined, shall not be included in the Rented Floor Area and in the rentable floor area, and contributions to Taxes received by Landlord from such tenants (less any tax payments recaptured against any other rents or payments due Landlord) shall be deducted from Taxes prior to the calculating of

Tenant's proportionate share. *For the purposes hereof, the Rented Floor Area shall be deemed to be not less than eighty-five percent (85%) of the rentable floor area in the Center (excluding the floor area of all (i) Major Tenants (ii) any tenant in a freestanding premises, and (iii) common areas.*

ARTICLE VI

COST TO OPERATE THE CENTER

Section 6.1. Expense of Operating the Center.

Landlord will operate, manage, maintain and repair or cause to be operated, managed, maintained or repaired, the Center, to the extent the same is not done by any Major Tenant.

Section 6.2. Tenant's Share of Operating Costs.

In consideration of Landlord's operation, management, maintenance and repair of the Center as provided herein, Tenant shall pay to Landlord, as additional rent, for and with respect to each and every calendar year during the Lease Term (prorated for any partial calendar year), in equal monthly installments due and payable in advance on the first day of each and every month during the Lease Term commencing with the Commencement Date, the OC charge as calculated pursuant to Section 1.1 herein.

Section 8.1. Use of Premises.

The premises shall be occupied and used by Tenant solely for the Permitted Use set forth in Article 1. Tenant expressly understands and acknowledges that its Permitted Use is nonexclusive, and that other tenants may sell items identical or similar to those sold by Tenant. Tenant hereby warrants that it has the full and unfettered right to use the Trade Name set forth in Article 1, for the entire Lease Term and that such use will not in any way infringe on the rights of others. The Permitted Use is a material consideration to Tenant entering into this Lease so as to permit Landlord to maintain an appropriate tenant mix, or balance, both to the quality and quantity of sales, within the Center in order to achieve the maximum Gross Sales for all tenants and to assure the continued operation of a full service regional shopping center development.

ARTICLE XIV

PROMOTIONAL FUND AND ADVERTISING

Section 14.1. Provisions relating to Promotional Fund.

Landlord may, at its option, create and maintain an advertising and promotional fund (hereinafter referred to as the "Fund"), the primary purpose of

which is to provide sums necessary for professional advertising and promotional services which benefit the tenants in the Center. In the event the landlord does create and maintain the Fund, Tenant agrees to contribute to such Fund, beginning upon later to occur of (a) the Commencement Date, or (b) the date the Fund is created, the Promotional Fund Fixed Contribution set forth in Article 1, payable in equal monthly installments, in advance, on the first day of each and every month (prorated for partial months). The Fixed Contribution shall be increased annually commencing with the creation of the Fund based upon the increase of the Consumer Price Index (as hereinafter defined) during the preceding twelve (12) month period. In addition to its other obligations contained herein, Tenant agrees that it shall participate and cooperate in all special sales and promotions sponsored by the Fund. The failure of any other tenant or any Major Tenant to contribute to the Fund shall not affect Tenant's obligations hereunder.

The term "Consumer Price Index" as used in this lease shall mean "United States City Average All Items for All Urban Consumers (CPI U, 1982 --84 --100)" published by the Bureau of Labor Statistics of the U.S. Department of Labor. If the publication of the Consumer Price Index of the U.S. Bureau of Labor Statistics is discontinued, comparable statistics on the purchasing power of the consumer dollar published by a responsible financial periodical selected by landlord shall be used for making such computations.

Section 14.3. Media Fund.

Landlord may, at its option, create and maintain a Media Fund, the exclusive purpose of which shall be to pay all costs and expenses associated with the purchase of electronic, print or outdoor advertising for the promotion of the Center. In the event landlord does create and maintain the Media Fund, Tenant agrees to contribute to such Fund, beginning upon the later to occur of (a) the Commencement Date or (b) the date the Media Fund is created, the Media Fund Charge set forth in Article 1, payable in equal monthly installments, in advance, on the first day of each and every month (prorated for partial months).

The Media Fund Charge shall be adjusted annually by a percentage equal to the percentage increase or decrease in the electronic, print and outdoor advertising rates of the media used for advertising and promotions in the preceding calendar year in the media market in which the Center is located, provided, however that said charge shall not be less than as originally set forth herein. Following the close of each calendar year, Landlord shall furnish Tenant a statement for the preceding calendar year showing the amounts expended by Landlord for media advertising. Tenant hereby authorizes Landlord to use Tenant's Trade Name and a brief description of Tenant's business in connection with any media advertising purchased pursuant to this section.

ARTICLE XVIII

DEFAULT BY TENANT

Section 18.1. Right to Re-Enter.

The following shall be considered for all purposes to be defaults under and breaches of this Lease: (a) any failure of Tenant to pay any rent or other amount

when due hereunder *after ten (10) days written notice with right of cure*; (b) any failure by Tenant to perform or observe any other of the terms, provisions, conditions and covenants of this lease for more than *thirty (30) days* after written notice of such failure; (c) any determination by Landlord that Tenant has submitted any false report required to be furnished hereunder; (d) anything done by Tenant upon or in connection with the Premises or the construction of any part thereof which directly or indirectly interferes in any way with, or results in work stoppage in connection with, construction of any part of the Center or any other tenant's space; (e) the bankruptcy or insolvency of Tenant or the filing by or against Tenant of a petition in bankruptcy or for reorganization or arrangement or for the appointment of a receiver or trustee of all or a portion of Tenant's property, or tenants of assignment for the benefit of creditors; (f) if Tenant abandons or vacates or does not do business in the Premises; (g) this Lease or Tenant's interest herein or in the Premises or any improvements thereon or any property of Tenant are executed upon or attached; (h) the Premises come into the hands of any person other than expressly permitted under this Lease; or (i) any claim or lien is asserted or recorded against the interests of Landlord in the Premises or Center, or any portion thereof, on the account of, or extending from any improvement or work done by or at the instance, or for the benefit of Tenant, or any person claiming by, through or under Tenant or from any improvement or work the cost of which is the responsibility of Tenant. In any such event, and without grace period, demand or notice (the same being hereby waived by Tenant), Landlord, in addition to all other rights or remedies it may have, shall have the right thereupon or at any time thereafter to terminate this Lease by giving notice to Tenant stating the date upon which such termination shall be effective, and shall have the right, either before or after any such termination, to re-enter and take possession of the Premises, remove all persons and property from the Premises, store such property at Tenant's expense, and sell such property if necessary to satisfy any deficiency in payments by Tenant as required hereunder, all without notice or resort to legal process and without being deemed guilty of trespass or becoming liable for any loss or damage occasioned thereby. Nothing herein shall be construed to require Landlord to give any notice before exercising any of its rights and remedies provided for in Section 3.3 of this Lease. Notwithstanding anything to the contrary herein contained, if Tenant commits any default hereunder for or precedent to which or with respect to which notice is hereby required, and commits such defaults within twelve (12) months thereafter, no notice shall thereafter be required to be given by Landlord as to or precedent to any such subsequent default during such twelve (12) month period (as Tenant hereby waives the same) before exercising any or all remedies available to Landlord.

FOOD COURT

EXHIBIT C.

IV. SERVING TRAYS.

If Landlord elects to provide reusable serving trays in the Food Court area, Tenant shall use such reusable trays in its operation at the Premises. For this service, Tenant shall pay its proportionate share of the total cost of initially providing such reusable serving trays and, thereafter, the total cost of replenishing the supply of such

reusable serving trays. Tenant's proportionate share of such cost shall be determined by a fraction, the numerator of which is one (1) and the denominator of which is the number of Food Court spaces reserved for tenants for the sale of food that is intended to be consumed by their customers in the Food Court Seating Area. Said sum shall be due and payable to Landlord within ten (10) days after billings are rendered to Tenant. If Landlord elects not to provide reusable serving trays in the Food Court area, then Tenant shall provide disposable serving trays for use in its operation at the Premises. Landlord shall collect the reusable serving trays from the Food Court Seating Area, clean the debris from the reusable serving trays and return to Tenant. Tenant shall be responsible for the sanitation of such reusable serving trays.