

**MODEL LEASE  
CLAUSE**

## Clarify that Mitigating Damages Doesn't Mean Accepting Undesirable Prospects or Deals

While you may not be able to totally contract out of it, you should be able to limit your duty to mitigate damages in the event of a tenant default. For most landlords, the primary target for mitigation limitation is the duty to use reasonable efforts to re-let the premises of a defaulting tenant that's abandoned or been evicted from the space. The strategy: Spell out the things you don't have to do to meet your mitigation duty, namely, bend your standards or provide preferential treatment just to get a substitute tenant into the space. Here's a Model Lease Clause that you can adapt, with the help of counsel, to your own situation and needs.

### MITIGATION OF DAMAGES

- a. Commercially Reasonable Efforts.** Both Landlord and Tenant shall each use commercially reasonable efforts to mitigate any damages resulting from a default of the party under this Lease.
- b. Criteria for Substitute Tenant.** In the event that Landlord regains possession of all or part of the Premises as a result of a default by Tenant under this Lease, Landlord's obligation to mitigate damages shall be deemed satisfied in full if Landlord undertakes to lease the Premises to another tenant ("Substitute Tenant") in accordance with the following criteria:
  - i.** Landlord shall have no obligation to market, advertise, solicit, or undertake negotiations with any other prospective tenants for the Premises until Landlord obtains full and complete possession of said Premises including, without limitation, the final and unappealable legal right to re-let the Premises free of any claim of Tenant.
  - ii.** Landlord shall not be obligated to offer the Premises to any prospective tenant when other similar premises in [Building/Shopping Center/Facility] suitable for that prospective tenant's use are currently available, or will become available within [insert time period, e.g., three months].
  - iii.** Landlord shall not be obligated to lease the Premises to a Substitute Tenant for a rental rate that is less than the current fair market rental rate then prevailing for similar [insert type of use, e.g., office, retail, restaurant] space in comparable [buildings/shopping centers/facilities] in the same market area as [Building/Shopping Center/Facility].
  - iv.** Landlord shall not be obligated to enter into a new lease under terms and conditions that are unacceptable to Landlord under Landlord's then current leasing policies for comparable space in [Building/Shopping Center/Facility].
  - v.** Landlord shall not be obligated to enter into a lease with any proposed Substitute Tenant that does not have, in Landlord's reasonable judgment, sufficient financial resources or operating experience to operate the Premises in a first-class manner.
  - vi.** Landlord shall not be required to expend any amount of money to alter, remodel, improve, or otherwise make the Premises suitable for use by a Substitute Tenant. However, Landlord reserves the right to make such expenditures if:
    - (A)** Tenant pays any such sum in advance to Landlord before Landlord's execution of a lease with such Substitute Tenant as security, which payment shall be separate from and not a substitute for or offset against any damages or other sums to which Landlord may be entitled as a result of Tenant's default under this Lease;
    - (B)** Landlord, in its sole discretion, determines that any such expenditure is financially justified in connection with entering into any lease with such Substitute Tenant.

- vii.** Landlord shall not be obligated to enter into a lease with any Substitute Tenant whose use would, in Landlord's reasonable judgment:
  - (A)** Disrupt the tenant mix or balance of *[Building/Shopping Center/Facility]*;
  - (B)** Violate any restriction, covenant, or requirement contained in the lease of another tenant of *[Building/Shopping Center/Facility]*;
  - (C)** Adversely affect the reputation or public image of *[Building/Shopping Center/Facility]*; or
  - (D)** Be incompatible with the operation of *[Building/Shopping Center/Facility]* as a first-class *[building/shopping center/facility]*.
- c. Mitigation Obligation Deemed Satisfied.** Upon compliance with the above requirements regarding the re-letting of the Premises after a Lease default by Tenant, Landlord shall be deemed to have fully satisfied Landlord's obligation to mitigate damages under this Lease and under any law or judicial ruling in effect on the date of this Lease or at the time of Tenant's Lease default.
- d. Tenant Waiver.** Tenant waives and releases to the fullest extent legally permissible, any right to assert in any action by Landlord to enforce the terms of this Lease, any defense, counterclaim, or rights of setoff or recoupment respecting the mitigation of damages by Landlord, unless and only to the extent that Landlord maliciously or in bad faith fails to act in accordance with the requirements of this clause.