

**MODEL LEASE
CLAUSE**

Limit Tenant Right to Sell Items Subject to Another Tenant's Restrictive Covenant

There may be room to maneuver around a provision in one shopping center tenant's lease that bars you from leasing to another tenant that sells the same particular item(s). Rather than lose the lease, maybe you can cut a deal among the parties that allows the new tenant to sell the restricted item subject to an annual sales cap. This Model Lease Clause was created by a veteran New York City landlord attorney to allow for a general restaurant's limited sales of burritos, tacos, and fajitas subject to an existing Mexican restaurant tenant's restrictive covenant. Talk to your attorney about adapting the clause to your own situation and products involved.

LIMITATION ON TENANT SALES OF RESTRICTED ITEMS

- a. Limitation on Sales of Restricted Items.** As a material inducement for Landlord to enter into this Lease, Tenant agrees that the sale of burritos, fajitas, and tacos (collectively, the "Restricted Items") from all or any part of the Premises may not collectively exceed in any single calendar year the Sales Limitation. The "Sales Limitation" means sales of the Restricted Items in an amount that does not exceed 10% of the combined annual total revenue for all products, foods, and drinks sold in the Premises in any single calendar year. Tenant agrees that any breach or violation, whether material or immaterial, substantial or insubstantial, minor or otherwise, of this Section (a) shall:
- (i) Constitute an incurable material event of default under the Lease beyond any applicable grace period and without the requirement of notice from Landlord; and
 - (ii) Entitle Landlord, in its sole discretion, to exercise such remedies as it deems appropriate to terminate the Lease, enjoin any violation or breach of this Article, and/or recover any damages, including consequential damages, to which Landlord may be exposed by virtue of any breach or violation of this Article.
- b. Tenant Duty to Report Sales.** Tenant agrees, without notice or demand from Landlord, to deliver to Landlord, within 30 days (TIME BEING OF THE ESSENCE) after the end of each and every calendar year during the term a complete and accurate written statement signed by a senior officer of Tenant certifying to:
- (i) The total revenue for all products, foods, and drinks sold in the Premises in the immediately preceding calendar year; and
 - (ii) The total sales of Restricted Items during the immediately preceding calendar year.
- Tenant shall utilize only cash registers equipped with sealed continuous and cumulative totals (or computer equipment performing substantially similar functions) to record all sales and revenue and which shall number consecutive rings or such other devices for recording sales and revenue as Landlord shall approve to record all sales and revenue. Tenant agrees to maintain accounting controls and books of account, in form adequate for auditing purposes, in accordance with generally accepted accounting principles to assure the proper recording of all sales and revenue.
- c. Landlord Right to Audit Sales.** Landlord shall have the right at any time after the due date for each statement required to be furnished pursuant to Section (b) hereof, to audit all of the books of account, documents, records, returns, papers, tax returns, original sales records (including, without limitation, cash register tapes, sales slips, bank statements and deposit slips, credit card records, mail orders, telephone orders, computer records, and such other sales records, if any, which would normally be examined by an independent accountant pursuant to generally accepted auditing standards in performing an audit of the Tenant's sales and revenue), and files of Tenant relating to its sales and revenue. Tenant, on request of Landlord, shall make all such matters available for such examination at the office of Landlord. Such examination and audit may be made by any accountant designated in writing by Landlord from time to time. In addition to all rights and remedies of Landlord at law, in equity, or under the Lease, Tenant shall pay to Landlord on demand and as additional rent the cost of such audit in the event that one or more of the following are true:
- (i) The sales or revenue shown by Tenant's statement is found to be inaccurate;
 - (ii) Tenant fails to maintain sufficient records of Tenant's revenue to enable Landlord to perform such audit in accordance with generally accepted auditing standards; or
 - (iii) Landlord fails to timely receive a statement by its due date.
- d. Terms Survive.** All terms of this Article shall survive the expiration or earlier termination of the Lease.