Medicinal Cannabis Entrepreneurs as Commercial Tenants: Assessment and Treatment

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Editors’ Synopsis: Within the past decade, the number of jurisdictions that permit the use of marijuana for medicinal purposes has more than doubled. While leasing to an establishment that grows or sells medical marijuana may be lucrative, such a tenant can also create a host of issues for the unwary landlord. This article explores those issues, which range from the liability that might inhere in the landlord for tortious acts committed on the premises and under the influence of Cannabis to environmental and health problems that can arise from the maintenance and storage of the tools of the grower’s trades, and offers suggestions as to how a landlord might best seek to protect its interests.

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I. INTRODUCTION

This essay affords, from the landlord’s perspective, insights into leasing space in a commercial building to a medical marijuana-related enterprise (MME). Sixteen states and the District of Columbia have approved the sale of ingestible versions of the genus Cannabis to licensed patients.1 Another twelve states’ legislatures have proposed legislation permitting medicinal Cannabis use as of March 1, 2011.2 If the federal law enforcement community maintains its present posture, retailing to prescription holders likely is entrenched. However, uncertainty persists about the federal posture on enforcement under the Controlled Substances Act of 1970,3 which schedules

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Cannabis as a drug that cannot be sold, transported, or possessed for sale without felony liability for the actor. In October 2009, the U.S. Department of Justice (DOJ) issued a letter stating the Obama Administration’s preference that U.S. district attorneys not prosecute purveyors and users of Cannabis acting in clear compliance with the requirements of state law. In February 2011, however, the U.S. attorney for the District of Northern California advised the Oakland city attorney and the California attorney general that it would not defer to that city’s licensing of commercial—unattached to a dispensary operation and growing in bulk—cultivators. This response undoubtedly annoyed the city because the licensing and application fees for the six growers Oakland hoped to license would have raised more than $1 million for the city.


4 See Memorandum from David Ogden, Deputy Atty., Gen., to selected U.S. Atty’s (Oct. 19, 2009), available at http://www.justice.gov/opn/documents/medical-marijuana.pdf [hereinafter Ogden Memo]. The memo cautioned against the use of limited federal resources in prosecuting individuals complying with state medical marijuana laws but does not ban all such prosecutions. Instead, it served as a “guide to the exercise of investigative and prosecutorial discretion.” Id. The letter notes that prosecution of “commercial enterprises that unlawfully market and sell marijuana for profit” continues to be an enforcement priority. Id. The Department warned that “claims of compliance with state or local law may mask operations inconsistent with the terms, conditions, or purposes of those laws.” Id. Furthermore, federal prosecutors are not expected to charge, prove, or otherwise establish any state law violations, and compliance with state law does not create a legal defense to a violation of the Controlled Substances Act.

5 See Letter from Melinda Haag, U.S. Att’ y, N. Dist. of Cal., to John Russo, City Att’y, City of Oakland (Feb. 1, 2011) (on file with author) [hereinafter Haag Letter]. In that letter, U.S. Attorney Haag announced her office’s intention to enforce the Controlled Substances Act’s prohibitions against “manufacturing and distribution activity involving marijuana, even if such activities are permitted under state law.” Id.

Despite ambiguity about the federal government’s enforcement policy,\(^7\) in difficult economic conditions governments will continue to seek new sources for sales tax revenues.\(^8\) Perhaps federal authorities perceive that temporary non-prosecution of licensed medical marijuana enterprises may reduce the incentive to export American firearms to Mexican drug cartels.\(^9\)

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\(^8\) For example, see Proposition M (“Taxation of Medical Marijuana Collectives”) which, on March 8, 2011, was approved by a vote of 58.76% to 41.24%. See CITY OF LOS ANGELES, PRIMARY NOMINATING AND CONSOLIDATED ELECTION OFFICIAL ELECTION RESULTS MARCH 8, 2011 (March 25, 2011), http://ens.lacity.org/clk/elections/clkelections316771183_04262011.pdf (last visited June 4, 2011). The ordinance will impose a five percent tax on all “gross reimbursements” that Los Angeles-based dispensaries receive from their patients. This tax could generate, according to city sources, as much as $10 million annually. In Arizona, HB 2557 creates a nonprofit medical marijuana dispensary transaction privilege tax classification and imposes that tax and a use tax on these dispensaries, with the tax rate for the tax base being set at 300 percent. See H.B. 2557, 50th Legis., 1st Reg. Sess. (Ariz. 2011), available at http://www.azleg.gov/legtext/50leg/1r/bills/hb2557p.pdf. (This legislation was held in committees and was not put to a floor vote.)

Whatever the federal motivations,\textsuperscript{10} medical marijuana prescribing appears to be trending toward acceptance in a majority of American states by this decade’s end. This trend presents both opportunities and constraints for commercial landlords in communities that adopt ordinances authorizing growing and dispensing activities in states where medical marijuana laws apply.

This essay does not comprehensively analyze each state (or applicable local) government’s rules for establishing and monitoring medical marijuana entrepreneurs. This essay does present real property issues for landlords to contemplate in deciding whether—and how—to rent space in their buildings to medical marijuana establishments or “MMEs.” In any state where medical marijuana cultivation and dispensing are permitted, the landlord’s initial step is to become familiar with the state statutes and accompanying administrative regulations implicating real estate matters, primarily physical occupancy requirements for growers and retailers. Arizona, among the most recent adopters of medical marijuana enterprise statutes and regulations,

\textsuperscript{10} Federal motivations are complicated by the apparent intention of individual U.S. Attorney’s Offices to provide separate statements of policy as to enforcement of federal law in their respective jurisdictions. See, e.g., Haag Letter, supra note 5. On May 2, 2011, U.S. Attorney Dennis K. Burke announced that the District of Arizona will carefully watch the implementation of Arizona’s Medical Marijuana Act for evidence that cultivation of modest amounts for dispensary use does not turn into “large marijuana production facilities”. Burke clarified that even landlords will be prosecuted for knowingly facilitating “the actions of traffickers,” which one infers means facilitating growing large quantities of Cannabis in the chain of distribution to licensed users purchasing through dispensaries. See Letter from Dennis K. Burke, U.S. Att’y, Dist. of Ariz., to Will Humble, Dir. of the Ariz. Dep’t of Health Serv. (May 2, 2011) [hereinafter Burke Letter], available at http://www.justice.gov/usao/az/reports/USAO_Medical_Marijuana_May_2011_Letter.pdf. In the Eastern and Western Districts of Washington, the U.S. Attorneys notified the Governor of Washington that they intended to enforce the Controlled Substances Act if that state diverted from the non-profit course it had set in 1998 in favor of a regime of for-profit dispensaries. Letter from Jenny A. Durkan, U.S. Att’y, W. Dist. of Wash., and Michael C. Ormsby, U.S. Att’y, E. Dist. of Wash., to Christine Gregoire, Governor, State of Washington (Apr. 14, 2011) [hereinafter Durkan–Ormsby Letter] (on file with author), available at http://seattletimes.nwsource.com/html/localnews/2014951007_potpreneuers04m.html.
illustrates a typical pattern of governance in terms of the legislative and administrative scope of regulatory coverage.

II. REPRESENTATIVE STATE REGULATORY LANDSCAPE

Following the passage of the Arizona Initiative Measure, effective December 14, 2010, Arizona’s legislature passed the Arizona Medical Marijuana Act and authorized the State Department of Health Services to promulgate regulations added to the Arizona Administrative Code. In addition, local communities may adopt ordinances creating their own regulatory schemes (where not barred by conflict preemption) that mandate compliance by MME operators. Some local ordinances duplicate regulations on dispensary licensing, but most touch instead on certain land use considerations, such as the physical separation of dispensaries from churches, schools, and one another.

State statutes, being less fluid, are the landlord’s first benchmarks for deciding if it is eligible to rent its property to an MME. Fortuitously, Title 36 of the Arizona Code contains statutes that address real property requirements for MMEs. What statutory requirements exist relate to a secure facility entrance and plant cultivation within an enclosed locked facility, describing a secure area that only a cardholder can access. Regulations promulgated by Arizona’s Department of Health Services elaborate on the characteristics of the “locked facility” for grow sites but afford little additional assistance. A landlord next must review the applicable zoning ordinance. City land use ordinances among municipalities within Maricopa County have similar emphases but distinctive elements; reading one does not sufficiently acquaint one with every local ordinance.

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14 See ARIZ. REV. STAT. ANN. § 36-2806 (West, Westlaw through 1st Legis. Sess. of 2011).
III. LANDLORDS’ DUE DILIGENCE REVIEWS OF PRIVATE REGULATIONS

Landlords owning land within a commerce park or among a group of industrial and warehouse buildings that form a “project” must review the declaration of restrictive covenants for that project (sometimes known as the CC&Rs) before deciding to lease. Explicitly or implicitly, restrictive covenants may ban MMEs. The landlord must evaluate permitted use clauses and obtain legal advice on the construction of ambiguous texts. These CC&Rs are private, multiparty contracts among all owners within the project. Merely gaining approval from the city and state of location does not guarantee that the MME use will be allowed in a project, and any other owner of property in the project may move to enforce a prohibition against an unpermitted use. CC&Rs periodically prohibit uses that are legally impermissible. The Controlled Substances Act of 1970 makes possession, transport, and sale of Cannabis illegal acts and, in Gonzales v. Raich, the Supreme Court of the United States ruled that the Supremacy Clause of the U.S. Constitution affords Congress the right to criminalize the production and use of homegrown Cannabis even if states approve these activities for medicinal purposes. Other than the 2009 memorandum stating that the Department of Justice discourages the devotion of federal resources to prosecute users of Cannabis holding a medical prescription for its ingestion, the Department of Justice and U.S. district attorneys have been vague about their intentions concerning federal law enforcement. As a result, a lawsuit by another property owner or tenant in the project to compel closure of the

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17 See, e.g., DOUGLAS R. PORTER, LINDA AMATO & CHERYL SISKIN, COVENANTS AND ZONING: FOR RESEARCH/BUSINESS PARKS 70 (1986) (sample covenant that “no unlawful use shall be made of any Lot, and all valid laws, zoning ordinances and regulations of all governmental bodies having jurisdiction shall be observed”).


20 Id. at 32.

21 Cf. supra text accompanying notes 4–5. In addition, the Durkan–Ormsby Letter informed Washington Governor Christine Gregoire that, should she sign into law certain bills before the state legislature, the bills (in their joint opinion) would “create a licensing scheme that permits large-scale marijuana cultivation and distribution,” and that the DOJ would consider pursuing civil and criminal legal remedies against those setting up the growing facilities and dispensaries. Durkan–Ormsby Letter, supra note 10, at 2. These examples evidence that, in some districts, federal prosecutors may be attempting to influence the passage of state legislation.
MME’s operation could closely follow the commencement of criminal enforcement.

Another item frequently appearing in the project’s CC&Rs is the requirement for exclusively “first class” business operations within the project. If the CC&Rs declarant remains an owner of any of the property in the project, that party’s intention as to first class operations may be determinative in a contest between an MME’s potential landlord and another owner in the project. If no original or successor declarant remains, the issue of first class occupancies may hinge upon community standards measured by the remaining occupancies in the project. In either event, the thoughtful landlord will reserve an election in the lease that the prosecution of a suit to enforce a restriction contained in a declaration of restrictive covenants will be grounds for terminating the MME’s lease. Certainly, a judgment against the landlord enforcing a restriction contained in a declaration should be grounds for termination with landlord impunity, as the plaintiff’s judgment likely will take the form of an injunction. In all probability, some co-owners and co-tenants within a project will not find a dispensary or cultivation site to be a first class operation, notwithstanding the fact that statutes and ordinances like section 36-2806(G) of the Arizona Code prohibits consuming marijuana on the “dispensary property.”²² The Arizona legislature failed to define “consume” or the “dispensary property,” leaving unclear if those terms reach leased premises not owned by the dispensary’s owners or the common areas of a project, the latter of which are not typically part of the leased premises. Some critics will invoke the image of persons using their prescription products within the boundaries of the project, including in the parking lot.²³ While section 36-2802(C) does not permit smoking marijuana in “any public place,”²⁴ the common areas of private property are not “public places.” Thus, the State of Arizona, for one, has not resolved the problem of loitering on private land while ingesting Cannabis products.

The landlord who reviews the applicable federal and state statutes and administrative regulations in its jurisdiction and the CC&Rs applicable to

his building (if any) will be able to calculate the risk of becoming an MME landlord vis-a-vis unfamiliar third parties. Even in a weak commercial tenancy period, a landlord probably will decide to proceed cautiously in lease negotiations with an MME. In that event, the next imperative is to understand the types and extent of problems that can arise in the operation of an MME within commercial real estate improvements. The following elements are unique to MME operations from the perspective of botany and horticulture.

IV. DISPENSARY AND CULTIVATION SITE LEASING ISSUES

A. Premises’ Environmental Constraints

Smoke and odors: In multi-tenant buildings, but for section 36-2806(G) of the Arizona Code, smoke seepage into the air circulation system of the building would be a problem. In addition, Cannabis in its natural state (in most strains) gives off certain distinctive odors in the reproductive phase that other tenants sharing an air handling system in a multi-tenant building may not desire to inhale. As the Cannabis plants’ resins age, the heads of the trichomes rupture, exposing terpenes to the air.

Mold: Mold growth is a recurring issue during the raising of the Cannabis plants. The scientific explanation, in brief, is that if the grower’s containers are too tight during the curing process, gasses that enable the growth of mold will fail to vent.

Pests: Leading pests in the indoor growth of Cannabis include spider mites and white flies. Spider mites are especially aggressive pests during portions of the Cannabis growth cycle.

25 See Ariz. Rev. Stat. Ann. § 36-2806(G) (West, Westlaw through 1st Legis. Sess. of 2011). If, however, “consume” means smoking (an odd verbal construction, but ingestion can occur through the lungs as well as through the digestive tract), then customers and employees cannot smoke Cannabis within the interior of the premises and perhaps not in the common areas either.

26 See Gary Email, supra note 23 (smoke in the ventilation system disturbs other building tenants).

27 See Robert Connell Clarke, Marijuana Botany 95 (1981). For the effect of such odors on commerce, see Heath Urie, Boulder sniffs out problem with medical marijuana odors, Boulder Daily Camera (Mar. 29, 2011), available at http://www.coloradodaily.com/business/ci_17002230#axzz1FTXhAXy9 (cotenants and neighboring tenants complain of odor emitted from plants, and several tenants relocate as a result).

28 See Clarke, supra note 27, at 153.

29 See id. at 165.
Root fungus infections: These infections occur as a result of high indoor humidity, which ironically is desirable for other reasons during the curing process.30

Fertilizers, pesticides, and herbicides: A movement is afoot in the Cannabis grower community to use organic fertilizers and pesticides.31 This movement will not aid the marginal tenant struggling to generate revenue with a supply that lags due to dying or infested crops or an insufficient inventory of Cannabis plants or buds. Consequently, real risk exists that some MME growers will employ fertilizers, herbicides, and pesticides that contain components of hazardous substances or toxic materials regulated under federal or state environmental laws.32 Not only can this lead to contamination of the building or its air or water supplies, but the ungoverned use of such substances may leave unsafe pesticide residues in the end products that clients of the dispensary consume, exposing them to illness and injury.33

Water consumption: Growing Cannabis requires more water than is consumed by many industrial, commerce park, or back office occupants; this raises the inquiry as to who appropriately should bear the cost for disproportionate water use. The apparent solution is separate metering for the portion of the building where growing activity occurs, though this entails additional expense to the landlord unless the cost is passed through to the MME. If separate metering is not possible for logistical or engineering reasons, to keep peace in the multi-tenant building or project, the landlord must arrange for the MME grower to pay its fair share instead of a rate subsidized by other tenants. The same issue likely will arise for growers employing high intensity lighting on their premises in regard to electricity consumption.

30 See id.
Landlords’ Economic Constraints

1. Insurance Dilemmas Under Environmental and Economic Stresses

Mold is a four letter word in every insurance underwriter’s lexicon, and some are already advising landlords that they will afford no coverage for the adverse consequences of indoor cultivation of Cannabis on the building’s systems and with respect to claims by its other occupants. Indoor air quality, property damage, and theft issues all require the underwriter’s consideration in the context of an MME operation. And essentially no insurance covers government seizures of marijuana products.

2. Traffic, Parking, and Related Impacts on Future Tenant Opportunities

If the MME operation generates substantial traffic due to its location, then parking sharing issues may arise within the project, impacting not only existing occupants but potential future occupants with concerns about the parking stall-to-requirements ratio. Additionally, customers of the MME who may be “under the influence” at any time during their visits to the dispensary may create an atmosphere of discomfort for other tenants or visitors to the project. State statutes or local ordinances may not prohibit ingestion.

34 See, e.g., Pat Curry, Higher Homeowners Premiums? Blame it on the Mold, BANKRATE (September 23, 2003), http://www.bankrate.com/brm/news/insurance/mold-covered1.asp (describing sizable jury awards and insurance claim payouts as informing the insurance industry’s decision to impose new policies’ moratorium because of the growth in mold-related claims, until forms revised to exclude coverage for water-related claims).

35 See, e.g., Greenpoint Ins. Advisors, LLC, Tips on Real Estate Lease Requirements for Medical Marijuana Dispensaries and Growers (January 8, 2011), http://www.marijuanabusinessinsurance.com/2011/01/08/medical-marijuana-lease-building-real-estate-dispensary-collective (“[T]he standard or major insurance companies such as State Farm, Allstate, Farmers, Travelers, and Hartford do not insure building[s] with medical marijuana tenants”).

36 See, e.g., Kelley Weiss, Marijuana Dispensaries Struggle to Insure Shops, NATIONAL PUBLIC RADIO (Mar. 25, 2010), http://www.npr.org/templates/story/story.php?storyID=124900834 (Michael Aberle, insurance agent for Statewide Insurance Services, a niche insurance agency for MME operations, confirms that insurance does not cover assets confiscations or arrests damages). But see infra note 50.


of marijuana products in the parking areas of private property; therefore, landlords should not count on law enforcement officials to intervene with MME visitors to private property except when responding to a report of the commission of a crime.

3. **Suits Implicating Quiet Enjoyment Covenants**

Other tenants, inconvenienced in a material way by any of the environmental or other issues they perceive as nuisances, may file legal claims ranging from express breach of contract to violations of the good faith and fair dealing covenant to gross negligence in the landlord’s admitting an MME tenant to its building or project. Notably, landlords, at times, negotiate an exclusion from the tenant’s obligation to indemnify and hold harmless the landlord for acts of gross negligence.

4. **Image Issues and Crime Prospects**

Other tenants in a project hosting an MME potentially will see fewer customer visits as a result of a revised reputation of the project. This fact could decrease lease renewals or increase demands for reductions in rent stemming from the lagging (and therefore misrepresented) image of the business premises. It is human nature to expect that crime in the project will increase, as persons sufficiently desperate for drugs or cash may attempt to break into the dispensary or the cultivation site or may accost invitees of the dispensary operator to steal their marijuana supply or cash. The adjacency

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39 Securing a right to terminate may be simpler in the context of a retail sales project, where the tenant more likely can demonstrate what a landlord was not entitled to do. Professor Randolph notes that should a tenant make such a demonstration, it “might be permitted to terminate its own rental obligations and . . . recover consequential damages in the form of the costs of outfitting” its premises for an enterprise rendered inoperable due to neighboring tenant interference. 3 MILTON R. FRIEDMAN, FRIEDMAN ON LEASES § 27.6.1, at 27-52 (Patrick A. Randolph, Jr. ed., 5th ed. 2010).

40 See CAL. POLICE CHIEFS ASS’NS TASK FORCE ON MARIJUANA DISPENSARIES, WHITE PAPER ON MARIJUANA DISPENSARIES 8–10, 22–23 (2009), available at http://www.procon.org/sourcefiles/CAPCAWhitePaperonMarijuanaDispensaries.pdf (containing information about theft crime data against dispensary operations). As to crimes against persons, the arena of landlord premises’ liability exceeds the scope of this essay; two accessible primers on the subject are Bradford S. Purcell, **Liability for Criminal Acts of Third Parties: Targets, Liability Theories and Defenses** (Aug. 5, 2010), http://www.wdc-online.org/index.php/download_file/262, and Wilton H. Strickland, **Premises Liability: A Notable Rift in the Law of Foreseeable Crimes**, 83 FLA. BAR J. 20 (Dec. 2009). If California’s struggles with this issue since its Supreme Court’s decision in Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207 (Cal. 1993), are any indication, the determining issue in landlord negligence analysis appears to be foreseeability. See, e.g., Clevenstine v. Prof'l Sec. Consultants, No. D056205,
of MME operations to owners and tenants of neighboring projects may cause concern about the impact upon the value of their tenancies, their property’s appraised value, or the safety of their employees and invitees. This atmosphere may make the project or building less competitive in rental rates after an MME occupancy commences.\footnote{2011 WL 773479 (Cal. Dist. Ct. App. Mar. 7, 2011) (unpublished decision) (holding that, although parking mall structure assault was bizarre and extreme compared to prior known incidents in vicinity, “the foreseeability of a perpetrator’s commission of an assault upon a mall patron, while the patron was unloading her car for mall business, was impossible to anticipate,” and that there was “some reasonable amount of foreseeability” exceeding mere possibility, perhaps extending as far as reasonable probability).}

5. Volatility of MME Tenancies

Inexperienced MME operators will enter each jurisdiction that newly creates a dispensary marketplace. Even the government’s requirements of medical expertise and experience in operating a dispensary do not guarantee that most of the MME’s controlling parties will have the seasoning and judgment to operate a new MME facility. This creates the potential for failure of these operators to fulfill the full economic terms of their leases.

The decision whether to decline the advantageous stream of revenue from a single MME tenancy is multifaceted. The negative potential consequences do not mandate rejecting MME tenancies as unacceptable risks. Those risks instead caution prudence on the landlord’s part. For instance, if the landlord’s economic condition means it is barely hanging on to the building or project prior to the date a potential MME is to commence paying rent, the landlord should consider whether they can survive until the MME proves its worthiness as a tenant and neighbor to the landlord and to the other occupants. The economics of the new tenancy’s immediate cash flow boost versus the long-term potential economic consequences may inform the landlord’s judgment not to lease to a new MME tenant prospect. In any case, as MME businesses represent a new paradigm in landlord–tenant relations in most American jurisdictions, the landlord is well-advised to

\footnote{But see Brian M. Doherty, \textit{How Los Angeles Became the Wild West of Medical Marijuana}, OPPOSING VIEWS (April 12, 2010), http://www.opposingviews.com/i/how-los-angeles-became-the-wild-west-of-medical-marijuana (stating that Los Angeles area landlords who are fortunate to have space that complies with new city dispensary rules have tripled their rents and started demanding five-figure “signing fees” from dispensaries scrambling to find suitable locations). \textit{Cf. infra} text accompanying notes 54–55. The economic analysis ultimately is whether a full project at market rates or a partially empty project at substantially above market rates with an MME tenancy is better for the landlord’s long-term leasing strategy and cash flow.}
keep its MME tenant on a short leash concerning operating issues in the project.

V. LANDLORD LENDER CONSIDERATIONS

Prior to drafting the lease for review by the MME tenant prospect, the landlord needs to familiarize itself with its obligations and rights under its loan documents and, if appropriate, discuss the proposed MME tenancy with its creditors. Institutional lenders are anxious about everything that negatively impacts their balance sheets. The following are a few threats to those balance sheets implicated by the failure of an MME occupant to comply with every material law and regulation (recall that banks and insurance company lenders have myriad compliance obligations, so the notion of compliance is much on their institutional minds) and conservative reactions from the leasing community to MME occupancies.

A. Forfeiture of Collateral

Federal42 and state laws43 permit seizure of a criminal defendant’s assets that either (a) facilitated a criminal enterprise, or (b) derived from the criminal enterprise. While the seizure of real property precedes a state government’s determination whether sufficient cause exists to move the court for

42 See 21 U.S.C. § 853 (2006) (the criminal forfeiture procedure where violations of federal drug laws are implicated, e.g., those offenses codified in Title 21 of the United States Code). This provision is incorporated by reference into all other federal criminal forfeiture statutes through 18 U.S.C. § 982(b)(1) (2006). See also 21 U.S.C. § 881(a)(7) (subjecting to forfeiture “all real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year’s imprisonment”). The specific federal statute governing civil forfeiture of real property is found at 18 U.S.C. § 985 (2006). This essay will not address the arcane features of this process; notably, in rem forfeitures are conducted primarily in procedural accordance with the Supplemental Rules for Certain Admiralty or Maritime and Asset Forfeiture Claims. United States v. Schifferli, 895 F.2d 987 (4th Cir. 1980), reports one illustration of a “medical” marijuana forfeiture proceeding under section 881(a)(7) in which a substantial connection was found to exist between the building and the dentist’s writing of bogus medical marijuana prescriptions. Schifferli, 895 F.2d at 991. The disheartening dimension of this opinion for commercial landlords is that the tenant used the forfeited property for essentially legitimate dentistry purposes, as most of the illegal prescriptions were written elsewhere. Id. While some may take comfort in the Ogden Memo, Mikos notes that federal courts have refused to dismiss criminal prosecutions on the basis of similar DOJ written guidelines. See Mikos, supra note 7, at 641.

43 See, e.g., ARIZ. REV. STAT. ANN. § 13-4301 to -4316 (1956) (Arizona’s in rem forfeiture process is described at section 13-4311).
permanent forfeiture, such is often not the case under the federal civil forfeiture of rea-


45See, e.g., 18 U.S.C. § 985(b)(2) (government is not considered to have seized the property if it files a lis pendens and executes a writ of entry to inspect and inventory the contents of the realty). A lis pendens is a form of notice warning potential purchasers—including those who otherwise would participate in a lender’s foreclosure auction—that the real property in question is a defendant in the litigation. See Gaumer, supra note 44, at 68.

46See, e.g., Eric Moores, Reforming the Civil Asset Forfeiture Reform Act, 51 ARIZ. L. REV. 777, 785–87 (2009) (noting that seized assets are a necessary supplement to some agencies’ budgets, and that seize “treasure” is sufficient to fund the operations of some agencies). Two of the three Justice Department articulated goals for the asset forfeiture program are to “enhance cooperation among . . . law enforcement agencies, through the equitable sharing of assets recovered through this program” and to “produce revenues to enhance forfeitures and strengthen law enforcement.” See UNITED STATES ATTORNEYS’ MANUAL § 9-118.010. Pursuant to 21 U.S.C. §§ 853(n), 881(a)(7) (2006), “innocent owners” have a defense against the government’s forfeiture action: “[N]o property shall be forfeited . . . to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.” 21 U.S.C. § 881(a)(7) (2006). Innocent lien holders have the analogous defense to forfeiture; here, the court looks to what the mortgagee knew at the time it acquired the mortgage interest in the property. See, e.g., U.S. v. One Parcel of Real Estate Located at 6640 S.W. 48th Street, Miami, Dade County, Fla., 41 F.3d 1448, 1453–54 (11th Cir. 1995). However, since all right, title, and interest in property described in section 881(a) vests in the United States “upon commission of the act giving rise to forfeiture under this section,” 21 U.S.C. § 881(h), the federal government can, and will, argue in some instances that its lienhold rights, under the “relation back” provision, trump those of the mortgagee’s
likelihood of recourse to title insurance proceeds by the lender or the landlord is remote.47 The fact the MME is operating within the bounds of state law unfortunately provides no assurance to the Landlord that it will be able to avoid any such crisis.48 With customers coming and going in the common areas, there is no certainty about what occurs in this vicinity beyond what a video camera displays.

B. Uninsured or Underinsured Damage or Destruction to Collateral or Adjacent Lands

Even a certificate establishing its status as a named insured is insufficient to give a lender comfort that its coverage will be in the full amount of its loan. The lender will probably have to front the costs of restoration in the amount of the deductible, and the amount paid will probably not relate to a covered loss, such as mold or indoor air quality contributing to personal injury. In addition, pesticides or herbicides could damage portions of the property or contaminate soil or groundwater adjacent to the leased premises, which may be claims that the lender’s insurance does not cover.

rights relating back no earlier than the date of mortgage recording. The same relation back doctrine applies to criminal forfeitures under 21 U.S.C. § 853(c). See U.S. v. Finca No. 5991 Located in Barrio Pueblo, 726 F. Supp. 2d 61, 68 (D.P.R. 2010). This explains why a secured lender becomes quite nervous when the potential exists for a civil or criminal forfeiture proceeding regarding its real property collateral. To date, there have been only a handful of real property forfeiture cases involving medical marijuana operators, each affording “over the top” indications of commercial trafficking in marijuana based upon the numbers of plants or weight of processed marijuana seized, exceeding the inventory demand relative to the client base. See Tiago Pappas, Providing Property Owners Increased Certainty in the Conflicting Medical Marijuana Landscape, 39 REAL EST. L. J. 249, 260–272 (2010). The Haag Letter, supra note 5, and the Burke Letter, supra note 10, loudly suggest the intention of some U.S. Attorneys to quell mass production and bulk storage of Cannabis products reflecting drug syndicate incursion into the medical marijuana marketplace. Mr. Pappas is correct that a change in viewpoint about prosecutorial resource allocation within the executive branch of the federal government could lead to radically different enforcement policies. See Pappas at 273.

47 See D. BARLOW BURKE, LAW OF TITLE INSURANCE § 405[A] at 4-72-4-73 (Supp. 2002) (indicating that the policy exclusions arguably applicable in the asset forfeiture context include interests involving the police power, interests known to the insured but not to the insurer and not shown in the public records, and defects created by the insured).

48 See Pappas, supra note 46, at 267 (noting that knowingly leasing is a clear violation of federal law); and at 284 (noting the innocent owner defense is not available to those who knowingly lease to MMEs).
C. Suits by MME Clients Against the Owner for Violating Title III of the Americans With Disabilities Act

Certain medical marijuana patients have conditions that present symptoms like chronic pain and diminished mobility. Liability can arise because the facilities within the MME-occupied building or project do not accommodate the client’s debilitating condition. An ensuing suit may result in an injunction that requires the owner—and in all likelihood, the lender wanting to protect its collateral—to expend substantial sums for reconstruction of the non-complying facilities.

D. Personal Injury Suits by Persons Harmed by MME Clients Acting Under the Influence of Cannabis When Alleged Harm Occurs

Unless adequate insurance proceeds exist, personal injury suits could disastrously impact the financial viability of the owner, resulting in the owner’s incapacity to pay the mortgage note.

Other likely creditor anxieties that might result from the leasing of a portion of the collateral to an MME include the loss of occupancy due to a tenant exodus on the scheduled expiration of lease terms; the diminution in the property’s income if the balance of the collateral generates lower rents following an MME occupancy; possible judgments obtained by neighboring owners for nuisance claims that may terminate the MME tenancy; other tenants’ endeavors to terminate their leases of portions of the project because of the landlord’s breach of the covenant of quiet enjoyment arising from the MME’s operations; and the specter of absolute and several liability under federal and state environmental law for cleaning up a release of hazardous substances at the MME’s premises.49

The prudent landlord considering an MME tenancy will scrutinize its loan agreement and the deed of trust for provisions that require prior creditor approval of non-standard leases. At times, loan documents require routine use of a lender-approved form lease for tenants leasing certain threshold quantities of square footage. Because the industrial and commerce park lease forms currently used in the marketplace require substantial amendment for an MME tenancy, the failure to obtain lender approval of a

modified lease form invites a claim of breach of the loan covenants, particularly should anything go awry with the MME’s occupancy.

When the landlord presents the potential MME lease to its lender, more information—rather than less—will increase the likelihood of fair consideration by the lender, who may have an instantly negative reaction to the proposal. Of particular interest to the lender is the prior operating experience of the MME’s director and the expertise of the MME’s medical supervisor in practice areas relevant to pain relief and comfort care. Because the director and medical supervisor seemingly have the most to lose, in terms of reputation and money, in the event of the MME’s failure, the landlord will want those persons to guarantee the performance of the lease’s monetary and non-monetary obligations.

VI. DRAFTING THE MEDICAL MARIJUANA ENTERPRISE FORM LEASE

Vetting the terms of a standard lease form in the context of an MME tenant requires careful thought and drafting before lease negotiations begin. The prudent attorney will insert text addressing each of the aforementioned issues, perhaps along the lines contained in Appendix A to this essay, grouped according to the following standard lease topics.

A. Term, Renewals, and Early Landlord Termination Rights

The lender’s ability to deal with its institutional anxiety may influence the term of the lease, but whatever term the landlord selects, it must include early landlord termination rights. A U.S. attorney’s prosecution of the MME operation under the Controlled Substances Act or other drug laws must be grounds for termination of the lease at the election of the landlord.50 Prosecution of the landlord under federal or state forfeiture statutes presents sufficient risk to merit an early out clause for the landlord’s benefit. A second

50 While the landlord’s termination remedy for mere prosecution may now seem painful should a seizure of assets commence, the astute, moneyed MMEs may take the palliative course of paying a premium to MMD Insurance Specialists in Sacramento, California, for coverage against raided operations. MMD Insurance Specialists’ medical marijuana raid endorsement purportedly protects legally operating medical cannabis businesses against the economic impacts of a raid by state or local law enforcement agencies—provided the MME’s operations have adhered to all specified state and local Cannabis-related guidelines, and the MME is found innocent of all raid-related charges. See Medical Marijuana Insurance Specialist Offers Pot Raid Coverage (Feb. 4, 2011), http://www.mmdinsurance.com (follow link on left side of webpage entitled “State Raid & Legal Defense”). This press release does not indicate whether a landlord or its lender may be added as additional insureds or named insureds.
basis for early termination must be the rendering of a judgment by a civil court finding the operation to constitute a public or private nuisance or a violation of the covenant of quiet enjoyment in a co-tenant’s lease. If a landlord terminates the MME tenant’s lease because the MME is a nuisance or due to violation of another tenant’s covenant of quiet enjoyment, the landlord has to be certain that the action will not give the MME tenant grounds for filing suit for breach of contract.

The tenant may seek an agreement that the landlord will not submit to the third party’s claim’s substance if sued, but will vigorously defend the claim. The landlord’s response should be its agreement to defend with a vigor equal to the tenant’s commitment to reimburse the landlord for the costs of the defense. As in other commercial leases, the landlord should condition the tenant’s renewal options upon no default existing at the time the tenant exercises the option. An MME tenant default should include a pending investigation of the MME’s operation by law enforcement authorities, with a sufficient “cure” period to allow the tenant to cause an official dismissal of any allegations or pending actions. The MME tenant may want an early termination right if the MME is subject to new regulations with which it cannot afford to comply, or if the regulations exclude the MME’s principals from licensure. The landlord may want to entertain such discussions, but the tenant should pay an early termination fee in such event (perhaps together with the value of unamortized tenant improvement costs and brokers’ commissions), and the landlord must consult with its lender before agreeing to such a provision.

The lease should also contain a clause addressing hours of operation of the dispensary. While a cultivation site may need to be staffed twenty-four hours per day, a dispensary that is open all night is a natural target for mischief, and the landlord should prohibit such operations, if for no other reason than to put co-tenants at ease about the safety of their property and premises.

**B. Use Clause and Landlord’s Right to Inspect**

The use clause needs to be narrowly drawn, describing the types of Cannabis products to be sold and whether or not growing will be a use. Whatever the use clause’s specifics, it must include a statement that the ob-

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51 Some projects may serve up such a claim under the restrictive covenants of record. See, e.g., THE PERIMETER CENTER, SCOTTSDALE, AZ. FIRST AMENDED AND RESTATED DECLARATIONS OF EASEMENTS, CONDITIONS, COVENANTS, AND RESTRICTIONS § 7.2 (1996), available at http://156.42.40.50/UnofficialDocs/pdf/19960032725.pdf (stating that if any restriction is violated, that violation “is hereby declared to be and to constitute a nuisance.”).
ligation to comply with all federal, state, and local statutes—including ADA requirements for access to the premises by persons with disabilities, such as chronic pain and motor limitations, and environmental laws and regulations—belongs solely to the tenant. This latter requirement should include the tenant’s appropriate disposal of waste products of Cannabis cultivation, preparation, and packaging or repackaging of products the tenant dispenses. No landlord or co-tenant desires to discover that twenty-four hour dumpster-diving is occurring in the common areas of its project. All byproducts of cultivation, drying, and curing should be disposed of in airtight and opaque containers so as not to attract attention by human or insect senses and invite unwanted visitors (human or otherwise) into the common areas.

Landlords must secure the right to inspect the MME’s premises during normal business hours. The landlord’s project managers should periodically inspect to confirm the absence of issues implicating hygiene, fire hazards, and indoor air circulation and quality (including odors), and should notify the tenant if any such items appear neglected. Eventually, the authorities likely will shut down any tenant substantially out of compliance with laws and regulations. The MME that is shut down cannot pay any rent. If the MME is not operating to some reasonable standard of professionalism in the medicinal Cannabis industry, the landlord needs to be prepared to exercise its remedies without delay and can do so by remaining informed of the status of the tenant’s operations.

C. Environmental Compliance Covenants

All such covenants have to be draconian in terms of the expense of compliance, including with respect to disposal of hazardous waste products and containers. The landlord should require the prospective tenant to schedule (in the lease’s exhibits) all the fertilizers, herbicide, and pesticide products it intends to maintain on the premises and to update the schedule and deliver it to the landlord on a regular basis—at least biannually. If the landlord would require such disclosure of a paint store, dry cleaner, or print shop, it has no basis for acting differently towards the MME. The landlord should require that the product brand names and other identifiers, and not just the generic manufacturer’s name, be provided on the schedule. Brands of chemicals from the same manufacturer may have different potencies and side effects.

D. Tenant Improvements and Premises Security

Until all the pertinent state and local regulations and rules become well-established in ultimate form, landlords must beware of representing or war-
ranting anything about the suitability of the premises and the project for the MME operation, other than stating that the underlying zoning allows a medicinal Cannabis operation, subject to the tenant obtaining all required permits and licenses. The lease should make clear that the tenant has to pay all costs of permits, licenses, and other approvals; that no landlord reimbursement for tenant improvements that are unique to the operation of the MME (and that may include some types of ADA or bolstered security requirements) is forthcoming; and that the MME tenant alone is obligated—in Arizona, at least—to comply with Arizona Administrative Code Section R9-17-305, which requires detailed disclosure of the physical dispensary floor plan and the implementation of substantial physical barriers to the unauthorized access of the premises. Of course, the landlord must agree to reasonably cooperate with producing required application materials within the landlord’s personal knowledge and control. Finally, as state and local MME regulations evolve, additional premises requirements might arise that the MME will not be able to satisfy by asserting that it has been “grandfathered.” In those instances, the cost of refitting the premises to comply must remain the tenant’s obligation. Indeed, the landlord should consider a lease term allowing it to elect, in its reasonable discretion, to require greater physical security than mandated by laws and regulations. Security guards in the parking lot of a busy dispensary afford one illustration of a specialized need that justifies additional tenant expense, particularly if client loitering contributes to the circumstances.

E. Common Areas, Signage, and Rules and Regulations

Tenants sometimes forget that common areas are for the benefit of all the tenants and remain at all times under their landlords’ control. Every landlord has to prohibit the smoking of Cannabis in parking fields and driveways. Beyond concerns for traffic safety, setting the proper tone for the project’s character is a paramount consideration for both the landlord’s and the tenant’s economic viability. If employees of the MME are using the dispensed products, they should not be smoking in obvious areas (in front of a main entrance to a building) or enabling smoke to enter into the ventilation system of the MME building. The landlord should retain the right to review the images saved on any video cameras trained in the parking fields in the event other project lessees complain about the “wrong appearance” of operations within the project. Customers of the MME must not inhale or

ingest *Cannabis* in the parking fields, drive aisles, or curb cuts; such consumption should be prohibited under project rules and the lease agreement, whether or not the parties believe the issue is addressed under state laws or regulations. Reports from frustrated residents of Eagle Rock, California to the DOJ about patients smoking *Cannabis* outside of local dispensaries before maneuvering their vehicles into busy urban traffic demonstrate the probability that *Cannabis* use on the premises will occur without policing.\(^{53}\) The lease should also require turning out illuminated window or fascia signs for the MME outside operating hours. No legitimate reasons exist to invite non-customers of the business to its location after business hours. While some MME tenants may seek to display hip, sophisticated exterior signage, the landlord must exercise some discretion in approving such signage to maintain project character and comply with project CC&Rs.

F. Rent and Landlord Audit Rights

Certain MME business operators, to entice reluctant landlords to make a deal, offer to pay a percentage of rent or grant equity positions in the MME.\(^{54}\) Should privity of contract—the lease—be insufficient to establish grounds for forfeiture of the landlord’s assets, sharing in the profits of the MME will put the landlord fully in the government’s gun-sights, strongly suggesting that the landlord’s assets derive from a criminal enterprise.\(^{55}\) Sharing in the MME’s revenues undermines any innocent landlord defense that may be available, so landlords need to be certain no revenue in the nature of “percentage rent” or “equity kickers” appears in the lease or any ancillary document. The landlord should, however, secure an audit right for the tenant’s income in the lease. This task transcends the mere review of the MME’s sales tax return paperwork; it extends to reviewing, on the MME’s premises, the full gamut of sales receipts and other records the MME must maintain to comply with laws at the lease’s inception and thereafter (other than those patient records maintained by the MME in confidence under the Health Insurance Portability and Accountability Act and state-analogous legislation or regulations). If the MME does not comply with tax and other

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\(^{55}\) See id.
reporting requirements, the landlord should know this in advance of the government’s acquiring the same knowledge. The landlord’s lender doubtlessly would approve of its borrower’s exercise of appropriate vigilance.

G. Utilities and Other Operating Expenses

Because indoor cultivation sites use excessive water as contrasted with most other industrial processes and a great deal of electricity for heat lamps, consumption patterns are uneven in a multi-tenant building that houses an MME, or in a multi-building project having but one utility meter. Any excessive consumption of water or electricity should be solely the reimbursement obligation of the MME. Likewise, other extraordinary expenses of the project’s operation resulting from the MME tenancy should be this tenant’s burden, such as the cost of evening security guards, extra janitorial service, or supplemental air conditioning or handler system maintenance.

H. Insurance and Indemnity Covenants

The landlord must consider how the tenancy of an MME impacts the premises owner’s casualty and liability insurance coverage. After addressing the appropriate questions to its agent, including whether the premium cost will increase as a result of implementing MME uses, the landlord must draft suitable lease provisions. Given the unfamiliar nature of this type of tenancy in many jurisdictions, questions often arise about rent interruption insurance premiums, for example.

If a dispensary or grow site requires specialized insurance for a dispensary or grow site, the MME tenant will have to procure coverage with sufficient policy limits to reflect the current realities of damage awards for injury to persons and loss of property. Some insurance companies will not insure a grower MME, although several specialty insurance underwriters apparently will insure for a dispensary’s theft-related claims. If an MME operation

56 A Boulder, Colorado city ordinance suggests an illustration of failure to keep up with exposure potential by providing that any licensee of the city must maintain workers’ compensation insurance, together with public liability insurance with minimum limits of $150,000 for any one person and $600,000 for any one accident, and public property damage insurance with a minimum limit of $100,000 for any one accident. See CITY OF BOULDER ORDINANCE 4-1-8 (1981), available at http://www.colocode.com/boulder2/chapter4-1.htm. These limits of coverage seem spectacularly measly today for tenancies in any character of building.

will increase the cost of the landlord’s insurance in the common areas or entire project, the landlord should not allocate the extra premium evenly among the other tenants in a multi-tenant project. Instead, the surcharge should be for the MME operator’s account alone. Dispensary insurance will cover neither law enforcement seizures of Cannabis products nor the assets of the MME, with rare exceptions.58

A standard commercial lease clause provides for a hold harmless and indemnity covenant from the tenant for matters occurring within the premises; but in the context of the MME, the standard text affords insufficient protection for the landlord. Despite cameras trained upon the parking lot and building entrances, persons may try to reach the tenant’s “stash” of plants, processed leaf, or prepared products.59 The MME tenant must indemnify his landlord against the damage done to the building and other tenants’ premises and property by those who invade the project despite security measures. The indemnity of the MME tenant and lease guarantors must also reach losses from forfeiture proceedings (whether temporary loss of rents or the landlord’s permanent loss of assets), damages caused by environmental calamities such as chemical spills and indoor air contamination, forfeitures of the lender’s collateral, and claims for personal injury and property damage caused by invitees of the MME in the common areas of the building or project.

I. Assignment and Subletting Clauses

The MME’s sale of its business will likely result, in any jurisdiction where medical Cannabis is permitted, in some background investigation of the successor’s principals. Whether or not this is true, a landlord’s creditor will want the landlord to conduct its own thorough due diligence of any proposed successor. The landlord must require access to comprehensive documentation on the financial and operating histories of all principals affiliated with any proposed subtenant or assignee who intends to continue

58 See supra note 50.

operating the MME.\textsuperscript{60} Furthermore, the lease should identify anything less than full disclosure of a prior criminal record—including non-violent criminal convictions and arrests—as a legitimate basis for the landlord to disapprove the transfer (that is, failure to disclose should be “commercially reasonable” grounds for refusal of transfer consent). The lease should require production of all organizational agreements of the successor prospect—including articles of organization, operating agreement, buy-sell agreements, and tax returns for the organization and its principals—and disclosure of all professional licenses that each principal has held during adulthood.

J. Surrender and End of Term Clauses

In Arizona and, likely, other states permitting MMEs, grow sites have to be enclosed.\textsuperscript{61} Metal gates, bars, or similar barriers around the cultivation area likely are not reusable tenant alterations. Landlords must include in their lease forms that, at the end of the lease term, the tenant must remove all landlord-identified undesirable, specialized alterations and repair all damage incurred in their removal. Generally, the obligation of dismantling the MME’s operation at the lease term’s end must be solely that of the MME tenant, because the landlord will not possess licenses to handle remaining plants or parts of plants, soils, any fungicides or pesticides used in the growing operation, or products of any other agriculturally related activity, all of which could conceivably be hazardous materials in their own right. Whether or not the residue of \textit{Cannabis} has any economic value, the landlord should not return the security deposit to the tenant until the tenant has removed all the evidence of the cultivation operation—including odors—in even the slightest quantities and, depending on health factors, has sterilized the interior of the premises to eradicate the effects of industrial-strength chemicals. Patient records, charts, or prescriptions remaining within the premises may implicate federal HIPAA regulations. Landlords should not deface or destroy any documents appearing to be patient records if a

\textsuperscript{60} See Fox, \textit{supra} note 54, at 11 (suggesting that the landlord request a business plan from the proposed lease transferee). However, a landlord should assume that if the original MME tenant, soon after opening the MME for business, is in the market to sell its assets and assign its location, the response of “we’ll strive to maintain the status quo” is not a business plan that has much chance of success unless the original tenant was a stalking horse for the real operator, a possibility that itself is worthy of exploration.

hastily vacating MME tenant leaves them within the premises at the lease’s end.

VII. CONCLUSION

The uniqueness of the MME tenancy implicates heightened vigilance by landlords and their counsel to limit conflicts with the MME, the landlord’s lender, the landlord’s other tenants, neighboring owners, and regulatory bodies. The potentially lucrative nature of rent streams from such tenancies⁶² should not blind the landlord to regulatory requirements and the concerns of lenders and other tenants of the project where the MME prospect desires to locate. Careful thought prior to and during the process of lease drafting and artful negotiation of the lease’s provisions should lead to the appropriate landlord judgment—with the input of its lender and insurers—whether to accept the non-routine risks that accompany leasing to a MME operation in a fluid enforcement environment at all levels of regulatory oversight.

⁶² See, e.g., Margaret Jackson, Denver Warehouse Owners Reap Growth Spurt from Medical-pot Growers, DENVER POST, November 11, 2010, available at http://www.denverpost.com/business/ci_16580455#ixzz1FTg1pCU (industrial brokers estimate that medical-marijuana grow houses leased more than one million square feet of warehouse space over the preceding year, propping up a commercial real estate market with a glut of vacant space). One wonders, nonetheless, if the medicinal marijuana dispensary and cultivation site business model is sustainable in the healthcare industry. Notably, in a seventeen-page “health special” section of four articles dealing with treatment of chronic pain in Time Magazine, no reference appears to the words marijuana or Cannabis in the detailed exposition of palliative treatments for pain. See TIME, March 7, 2011, at 63–90.
Appendix A
Sample Lease Clauses

1. Term: The term of this Lease shall be __ years and __ months, subject to the right of Landlord to terminate Tenant’s tenancy summarily either for (i) breach of any Tenant covenant of this Lease, whether financial or otherwise, contained herein, or (ii) any of the Early Exit Causes (as defined below), irrespective of the obligations or fault of either party.

1.1 Early Exit: Anything to the contrary in this Lease notwithstanding, Landlord shall have the right in Landlord’s sole election, upon five (5) days prior written notice to Tenant or, if sooner, on the effective date of any court order, to terminate this Lease in the event of any of these causes (each, an “Early Exit Cause” and collectively, the “Early Exit Causes”):

a. The seizure by any governmental authority seeking forfeiture of the building(s) housing the Premises, whether or not the court forfeiture proceeding has commenced. See supra note 42.

b. The entry of judgment (whether or not final) having the effect (whether by restraining order, injunction, declaration or otherwise) of establishing that Tenant’s use of the Premises or the Common Areas constitutes a nuisance, whether public or private.

c. The commencement of an action under any federal, state or local law (ordinance) or regulation seeking remediation of the Premises or any portion of the building housing the Premises as a result of violation by Tenant of any mandate pertaining to environmental sensitivity or commission of waste, irrespective of Tenant’s intent in connection violating the mandate and irrespective of the course of the action following its commencement.

d. A final, appealable judgment having the effect of establishing that Tenant’s operation violates Landlord’s contractual obligations (i) pursuant to any private cove-
nants of record (including the Governing Regulations) restricting Landlord’s building housing the Premises or (ii) of good faith and fair dealing to any third party, including other tenants of the building housing the Premises or occupants or owners of any other building within the Project.

c. An event that (i) requires closure of the building for more than 180 consecutive days for remediation of materially adverse circumstances created by Tenant’s use of the Premises, or for more than 210 nonconsecutive calendar days within a 360 consecutive day period, or (ii) causes Landlord’s insurance carrier to cancel all coverage on the building housing the Premises (the “Building”), unless Tenant procures coverage for the entire Building within 5 calendar days thereafter, and commences (and thereafter continues) to pay any premium cost in excess of the premium (pre-cancellation) paid by Landlord without credit or offset against the rent reserved under this Lease. This shall not include fire and other natural calamity events, unless the source of any such event is directly related to Tenant’s operation, such as a heat lamp—related fire in any Cannabis cultivation site.

1.2 In addition to the Early Exit Causes in subsection 1.1, Landlord further may elect to terminate this Lease upon thirty (30) calendar days written notice to Tenant at any time that (i) fifty percent (50%) or greater of the number of square feet in the building or the Project (if a multi-building project) have become vacant following the execution and delivery of this Lease or (ii) the rents reserved as set forth in a rent roll for the building or the Project (if a multi-building project) have been reduced by 50% or more following the execution and delivery of this Lease, fire and other natural calamity events excepted.

1.3 Tenant may elect to terminate this Lease upon no less than ninety (90) calendar days written notice in the event that a government with jurisdiction over Tenant’s business conducted within the Premises imposes new regulations (including within this definition taxes, permit fees or infrastructure mandates) that render Tenant’s continuing use of the Premises commercially impracticable as a result of increased transaction costs; provided, however, (i) Tenant may not avail itself of this provision at any time that Tenant is in monetary default hereunder, and (ii) Tenant shall include in its notice to Landlord the specific bases in the new regulations for its belief that it cannot continue in business within the Premises, and shall afford Landlord a period of forty five (45) days to elect, in Landlord’s sole and absolute discretion, whether to “rescue” Tenant either through a cash contribution toward the increased costs of Tenant’s doing business or through reduction in Tenant’s rent reserved hereunder, in which event Landlord and Tenant shall meet and confer in good faith to discuss continuing the tenancy of the Premises. In addition, Tenant’s notice shall specify the date (at least 90 days following the notice date) upon which Tenant shall have (i) removed all its equipment, trade fixtures and inventory, (ii) sterilized as necessary to remediate all environmental issues that have affected the Premises during the course of Tenant’s occupancy thereof any of the Premises, the Building or any Common Areas of the Project, and (iii) returned all keys to the Premises and tendered to Landlord the combinations to all safes or other locked fixtures that shall remain in the Premises. The provisions of this subsection 1.3 shall be overridden by (x) any of the Early Exit Causes in subsections 1.1 or 1.2, in the event one or more such cause(s) arises during the ninety (90) days interval prior to the effective date of Tenant’s termination under this subsection or (y) failure of Tenant to pay all rent, additional rent and other charges due under this Lease through and including the noticed date of termination, in which event Tenant’s notice shall be deemed
rescinded as if never delivered to Landlord—thus, rent and other charges due hereunder shall continue to accrue.

1.4 Any of the foregoing Landlord elections to terminate shall apply equally in the initial term of this Lease or during any extension term, and shall apply equally to the initial Premises and any expansion space housing any portion of the Premises.

2. Use: Landlord’s Right to Inspect Premises: The Premises shall be used for any of the following uses that Landlord has initialed below next to the item provided, and for no other purpose or purposes whatsoever, strictly subject to the terms of the subsections of this Section 2 (collectively, the “Permitted Use”):

2.1 Sale of prescription Cannabis in bud form
Sale of prescription Cannabis in leaf (smoking) form
Sale of prescription Cannabis in edible/drinkable product form
Cultivation of Cannabis plants, not to exceed _____ plants
Processing of Cannabis plant parts and resins into products
Storage of Cannabis products for transport elsewhere by permit

2.2 The maximum number of non-employee persons permitted to occupy the Premises’ interior shall not exceed ____ persons at any time.

2.3 The provisions contained in the Section below captioned “Common Areas” shall be incorporated by reference into the definition of the Permitted Use; and a violation by Tenant’s invitees of any of those provisions shall be deemed Tenant’s violation of the Permitted Use. Tenant understands and agrees that it shall be strictly responsible for the compliance by its invitees of the provisions pertaining to use of the Common Areas, and that Landlord shall have utterly no responsibility for the invitees’ compliance with any of those provisions.

2.4 Landlord shall have the right, at any time any portion of the Premises is occupied by Tenant’s principals, agents or contractors, including at times when the Premises is not open for business to the public, to enter the Premises for the purpose of insuring compliance with the covenants, warranties and representations of Tenant under this Lease and, for that purpose, Landlord may be accompanied by any contractors of Landlord’s choosing; and either may photograph or video-record in any medium the activities of Tenant, so long as such visual records are not provided to anyone with an interest in possessing Tenant’s trade secrets (excluding government employees).

3. Compliance with External Mandates: The parties acknowledge that myriad regulations and local, state and federal laws and private persons shall govern the operation of Tenant’s use. Tenant alone will be responsible for compliance with all mandates and requirements of any nature.

3.1 Tenant’s foregoing obligation shall encompass all laws and regulations from any governmental authority with jurisdiction over Tenant’s use that become effective before and during the Lease term, as same may be extended (collectively, the “Mandates”), regardless of the cost of such compliance. Tenant’s inability to comply with new Mandates shall be grounds for termination of this Lease consistent with the terms of Section 1.3 above; provided, however, that Tenant shall continue to be liable for all rent and other charges reserved in this Lease through the date of such termination and, without exception, through and including the date upon which Tenant has complied in full with the surrender and restoration obligations set forth in Section 6 below, which shall include any Mandates pertaining to dismantling and restoration of property following the cessation of a use like the Permitted Use.

3.2 Tenant’s foregoing obligation shall encompass satisfying at all times the obligations of an occupant of the Building or Project under the Governing Regulations as recorded in
the public records of [named] county from time to time. Tenant acknowledges that Landlord does not control the possibility that a majority of other owners of the Project may amend the Governing Regulations in a manner that is materially adverse to the Permitted Use.

3.3 To ensure Tenant’s compliance with Mandates or Governing Regulations, as the case may be, Tenant shall schedule (in Exhibit P hereto) every fertilizer, herbicide and pesticide-based products it shall maintain on the Premises, and, by a memorandum to Landlord in no less than six (6) month intervals during the term hereof, shall update the schedule of such materials in sufficient detail to constitute a “manifest” as described in [state environmental quality statute or regulation].

3.4 To ensure Tenant’s compliance with Mandates, Landlord shall have the right to review at the Premises Tenant’s receipts of sales and all other records Tenant shall from time to time maintain at this Lease’s inception and thereafter; provided, however, this right to review shall not extend to patient records maintained by Tenant pursuant to HIPPA and [state-analogous statutes or regulations governing patient privacy].

4. **Utilities and Project Services**: The Premises are metered for electricity and potable water as follows: [description] and receives these standard periodic services [description].

4.1. Any excessive consumption of water or electricity shall be Tenant’s sole reimbursement obligation to Landlord, such that no utilities user sharing the meter for the electricity or water, as the case may be, is paying a disproportionate share of these utilities metered to the Building or Premises, as applicable. If Landlord determines that the only reasonable means for proper allocation of electricity/gas/water usage costs is the installation of a separate meter serving the Premises, Tenant shall pay the expense of the meter and its installation cost within five (5) business days of the date upon which Landlord informs Tenant of its election to install a separate meter.

4.2 If any other extraordinary expenses of the [Building’s][Premises’] operation result from the Permitted Use, Tenant at its sole expense shall reimburse Landlord therefore; such extraordinary expenses may include, without limitation, the cost of evening security guards, supplementary janitorial service or HVAC system service and periodic maintenance. Landlord shall have the right to require Tenant to contract directly with vendors for these services in commercially reasonable quantities, and to provide Landlord satisfactory evidence of these contracts.

5. **Assignment**: The parties understand and agree that Landlord relied on the business acumen of Tenant’s principals together with the financial wherewithal and insurability in electing to enter into this Lease. Accordingly, Tenant agrees that the rights and privileges under this Lease cannot be transferred in any manner without the prior written consent of Landlord, which Landlord may grant or withhold in Landlord’s absolute discretion based upon full disclosure of the financial history and business experience of the proposed transferee, including its number of years of each principal’s business operations.67

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66 Power consumption will increase when Tenants cool a humid cultivation building’s interior and illumine specialty lights for indoor growing.

67 This clause intends, among other purposes, to allow the Landlord to do some informal investigation of the proposed Tenant’s principals’ business acumen and experience with the court system.
6. **Surrender:** Tenant’s covenant to comply with all applicable Mandates shall apply equally to dismantling Tenant’s operation at the end of the Term (whether the Term ends by expiration or earlier termination) and the surrender of the Premises.

6.1 Tenant hereby covenants to dispose, according to Mandates, all unused inventory, refuse and scrap materials and thereafter to clean to commercially acceptable standards (including sterilization of impermeable surfaces, wall to wall and ceiling to floor) all floors, walls, immovable fixtures and air ducts serving the Premises.

6.2 All Tenant alterations designated by Landlord for removal at the end of the Term shall timely be removed at Tenant’s sole expense; and Landlord shall not return the Security Deposit to Tenant until a Premises inspection discloses that the removal and cleaning has been completed.

7. **Insurance and Indemnity:**

7.1 **(Insurance)** Tenant must provide liability coverage in the minimum limits of $1 Million for each person and $2 Million in the aggregate, with a minimum of $500 thousand for damage to property, naming Landlord as an additional insured. Tenant’s insurance coverage shall be written by an insurer with a minimum Moody’s Financial Strength Rating (FSR) of Aa1 or otherwise as is acceptable in the sole discretion of Landlord. Further, Tenant shall provide coverage sufficient to replace its entire inventory (is that “crop” insurance?), and, if it exists, the functional equivalents of “dram shop” coverage and “drug police raid” coverage. Tenant shall require a waiver of subrogation from its insurer, and if this entails extra cost, Tenant pays the premium therefore; and such waiver of subrogation must apply to Landlord and its officers, directors, managers, equity owners and employees.

7.2 **(Indemnity)** In addition to the foregoing covenant to indemnify, and not in derogation of those obligations, Tenant agrees to indemnify and hold harmless Landlord from and against all those events identified herein as “Early Exit Causes” and, additionally from and against the effects upon Tenant’s business of public protests or demonstrations in the public right of way, it being understood that Landlord has no discretion to cause the removal of persons from the public right of way.

8. **Signs:** In addition to complying with any Sign Criteria exhibit attached to this Lease and all Mandates and Governing Regulations, Tenant covenants to obtain Landlord’s approval of the sign design and copy prior to commencing building of the sign panel. Tenant acknowledges that the image of the Building/Project requires the maintenance of reasonable standards of quality as a reflection on the character of all businesses within the Building/Project. Accordingly, Landlord shall determine in its sole discretion whether the copy and graphics of any Tenant exterior sign is compatible with the image reflected in the balance of tenant signs in the remainder of the Building/Project. No signs advertising Tenant’s business shall (i) be displayed in the windows of the Premises or (ii) illuminated after the closing time for the sales activities so as to be visible beyond the curbs of the rights of way adjacent to the Common Areas.

9. **Force Majeure:** Tenant agrees that it shall not rely on the doctrine of force majeure as to circumstances leading to Early Exit Causes.

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68 See Moody’s Rating Symbols & Definitions 16–17 (August, 2003), available at http://www.rbecpa.com/Moody’s_ratings_and_definitions.pdf. Landlord needs assurance that Tenant’s insurance carrier will survive the failure of Tenant, if there is a claim.