

TIPS FOR DEALING WITH TENANTS IN TROUBLE (or perhaps, heading towards trouble)

A. Steps to Take When a Tenant Misses a Rent Payment, Threatens to Miss a Rent Payment or is Rumored to be in Trouble

1. Conduct complete review of lease, lease file and premises:
 - ? Schedule all lease documents – confirm holding fully signed originals
 - ? Determine balance of available lease security, including current balance of security deposit held, existence of signed guaranty, status of original letter of credit (confirm that letter of credit has not expired; confirm current balance of LOC; consider automatic reductions of LOC balance per Lease documents)
 - ? Consider special provisions of lease that landlord may wish to address in any negotiated resolution, such as building signage or ROFO or other expansion rights (office tenants), exclusives or co-tenancy rights (retail tenants), early termination options, renewal rights, etc.
 - ? Conduct current “corporate search” to confirm that named Tenant is in “good standing” (no name change, merger, etc.)
 - ? If Lease has been assigned/assumed, was original named Tenant (or any interim tenants) released, or do they remain legally obligated under the Lease?
 - ? Who is in occupancy of the Premises? Has there been a sublease or assignment without consent?
 - ? Condition of Premises – were any alterations made without consent?
2. Establish a Tailored Strategy for Exercise of Legal Remedies. As soon as possible, establish an overall strategy for handling the delinquency tailored to the particular circumstances of the defaulting tenant, the terms of its lease, and operational and other considerations for the property as a whole (such as retail co-tenancy requirements, loan covenants, etc.). Promptly take appropriate action, such as:
 - ? Send default notice to tenant, which may be either (a) a 3-day notice electing to terminate the tenant’s lease or (b) a non-termination default notice, depending on the overall strategy adopted for the delinquency;

We appreciate your feedback. Please feel free to contact me with any questions or comments.

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notice should include all penalties, late charges, interest, etc., with any 3-day notice having appropriate "only an estimate" language

- ? Consider application of available security deposit, including sending correct notices of application of deposit and immediate demand for replenishment of deposit; decision to apply the security deposit should be made as part of the overall strategy adopted for the delinquency
- ? If available, consider draw on letter of credit in accordance with the terms of the Lease (give proper notices, etc), by reference to strategy adopted
- ? Send demand to Guarantor, if applicable; proceed strictly in accordance with the terms of the Guaranty
- ? Be sure to use proper notice addresses and method of delivery [proceed per the Lease even if you know the tenant has moved; must proceed only per documents and official notices delivered pursuant to the Lease]
- ? Exercise any rights under the Lease to request financials, business plans, tax returns, bank statements, evidence of good standing
- ? However, if Tenant has declared bankruptcy, do not send default notice or take other action, except in consultation with legal counsel

3. Communicate/Investigate/Listen/Be Creative

- ? No substitute for real time meaningful conversation with the Tenant regarding what is going on, what the future is likely to hold
- ? Make it clear in any conversations and emails that you are just gathering information to take back for discussion; avoid any assurances that might be construed as an agreement to compromise; agree to nothing until you have all the facts and are able to evaluate all facts and circumstances and make a good and reasoned decision
- ? Consider market conditions; is the current rent above or below market; does the tenant have any assignment or sublease candidates
- ? Talk with your broker about the market and other opportunities
- ? Consider opportunities with other tenants in the project, such as lease of additional space by office tenant or relocation/expansion of retail tenant
- ? Consider tenant special rights, such as exterior or other special signage rights, ROFO, ROFR or other expansion rights, termination rights, exclusives and co-tenancies, including appropriate treatment if termination or negotiated resolution

B. Considerations for a "Lease Workout"

[CONSIDER AS A FIRST STEP SENDING A PRE-WORKOUT LETTER TO THE TENANT – SEE SAMPLE PRE-WORKOUT LETTER AT EXHIBIT A]

1. First, gather as much information as possible about the Tenant, the lease file, the market, available security and the space – talk, review, meet, ask questions [always maintain confidentiality]
2. Find out “what the tenant wants” – what are they asking for, and what do they think is reasonable – test the limits, and ask them about alternatives (offer nothing, let them know they need to be completely honest and work for it, no gifts)
3. Based on request made per the Lease above, don’t make any decisions until all information possible has been received – including tenant and guarantor (including original or prior tenant) financials
4. Once all information is gathered, sit down with all information and evaluate, consider, brainstorm – consider likelihood of Tenant pulling through; the benchmark times to determine whether success is likely; consider likelihood of recovery from available lease security; consider Tenant’s business plan and meet with the principals who are charged with implementing strategy
5. Conduct tenant/guarantor asset search, as applicable; if possible, obtain Tenant authorization to conduct current credit check

C. Issues to Consider in Implementing “Lease Workout” Amendment

1. If giving back space, consider timing, condition, demising construction, relinquishment of all rights relating to that space
2. Confirm treatment and status of all available lease security; confirm balance of security, existence of guaranty; status of letter of credit
3. If possible, better your security position – get more cash, a better guaranty, a bigger (or new) letter of credit
4. Never release any lease security unless you absolutely have to – if you do, trade it for something you want more, something tangible
5. Consider whether rent deferred or forgiven, not released unless certain conditions met
6. Alternative: Deferred rent relieved only if Tenant fully performs through a certain period, or if Tenant renews/extends its lease
7. Incorporate a “clawback provision” into the Lease Amendment – preferential treatment (such as deferred or forgiven rent; reduction of space, etc.) is expressly conditioned upon Tenant fully performing under the workout amendment -- otherwise, all bets are off and everything is owed, in full, including penalties, legal fees, etc.
8. Get specific tenant representations regarding its current financial condition and rep that financials provided are true, correct, complete; confirm tenant obligation to keep Landlord fully

informed of financial condition; provide business plan, provide financials quarterly, etc – add and confirm this even if the existing Lease does not provide for this

9. Add a strong confidentiality/non-disclosure provision – “ok Tenant, I am doing you a big favor, so don’t blow it and tell everyone else about your deal” - big ramifications if the obligation is breached

10. If possible, require Tenant to pay legal fees in connection with preparation and negotiation of workout amendment – they are the ones in default and they should make you whole for being willing to allow them to restructure their obligations

11. Use the workout amendment as an opportunity to clear out any confusing or expired provisions – wipe out options, eliminate old landlord obligations, etc.

12. Guarantor must specifically consent to the amendment and confirm that they continue to be bound

D. Leasing Practice and Standard Lease Provisions: New Considerations and Approaches to Address Troubled Tenant Concerns

BALANCE: LANDLORD PROTECTION VS. "TENANT'S MARKET" REALITY

1. Consider new tenant application/questionnaire – new considerations and requests for as much information as possible

2. Consider appropriate mix of cash security deposit, letter of credit, guaranty requirements or other security, including consideration of federal bankruptcy cap on recoverable damages and practical matters

3. Strictly enforce terms of standard letter of credit rider requirements, including bank for local draw; consider of standard letter of credit provisions of form lease, including stronger ratings for issuing banks issuing letters of credit

4. Evaluate appropriate arrangements (if any) regarding the funding of over-allowance tenant improvements

5. Strengthen provision regarding delivery of financial statements; consider adding ongoing obligation to keep Landlord informed of financial condition, provide business plan

6. Strictly implement guaranty requirements, delivery of guarantor financials; avoid changes to guaranty form

7. Consider rights conditioned upon Tenant financial strength – enforce criteria for expansions, extensions, release of letter of credit [be tough and specific regarding conditions for guaranty and letter of credit release or reduction]

EXHIBIT A

SAMPLE FORM OF PRE-WORKOUT LETTER

[ON LETTERHEAD OF _____]

_____, 20__

[Name and Address of Tenant]

Attention: _____

Re: Lease dated _____, 20__ (as amended, the "Lease") by and between [Landlord entity] ("Landlord") and _____ ("Tenant")/Premises commonly known as Suite ____ (the "Premises") located in that certain building at _____ (the "Building")

Dear _____:

This letter is sent as a follow up to our recent discussions regarding your Lease and Tenant's financial difficulties. Before proceeding with further discussions or any negotiations with respect to Tenant's Lease obligations, please review this letter and arrange for Tenant to provide the information requested. Once Landlord has (i) received from Tenant the information requested in this letter, and (ii) has received a copy of this letter signed by an authorized representative of Tenant, we will continue our discussions regarding the Lease.

In order to assist us in preparing a package to be used in the approval and consent process, please deliver to _____ at the Office of the Building each of the items listed in Attachment A to this letter. If any of the requested items does not exist or is not available, please provide a written explanation to this effect.

Please understand that unless and until a written agreement regarding the terms for any modification of the Lease is fully executed and delivered by Landlord, Tenant and any guarantor of the Lease, no term or condition of the Lease shall be deemed modified in any respect, and Tenant remains fully liable for all obligations thereunder. No actions or statements by Landlord or any of its property managers, representatives or agents shall be deemed to modify or waive any Lease obligations. Until a binding agreement is signed, Tenant acknowledges and agrees that no statements, offers or discussions regarding the Lease shall be admissible under any circumstances in any legal or related proceedings. Further, Landlord may suspend negotiations at any time and may proceed to exercise remedies for any ongoing breach or default under the Lease which may then exist.

Tenant further confirms and agrees that Landlord is under no obligation to amend any term of the Lease, and nothing contained in this letter shall be construed as an agreement to waive or modify any term or condition of the Lease. Each request for a modification of a Lease term or condition requires approval by an authorized officer of Landlord, and may also require the approval and consent of any lender holding a lien on the Building. Further, Tenant shall be obligated to pay all costs and fees incurred by Landlord in connection with processing Tenant's request for an amendment of the Lease, including any reasonable attorneys' fees actually incurred by Landlord in connection therewith.

[Tenant Name]

[Date]

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You have indicated that we should communicate directly with you regarding your Lease obligations. Please let us know if you would like us to speak with any of your representatives regarding the Lease at any time.

Finally, as essential consideration for our willingness to continue discussions regarding the Lease and the possible modification thereof, please sign below to confirm that Tenant understands and agrees that the terms and conditions of any possible modification of the Lease must be kept absolutely privileged and confidential and may not be discussed with or disclosed to any party other than Tenant's accountants and attorneys. Tenant understands that any breach of this confidentiality obligation may at Landlord's option result in a termination of negotiations concerning the Lease and Landlord may also exercise such other remedies as may be available at law or equity by reason of such breach of the obligation of confidentiality and privilege.

Thank you for your cooperation in this matter. Once the requested information is provided, Landlord will promptly arrange for processing of the request for an amendment of the Lease and the obligations of Tenant thereunder. In the meantime, Tenant remains obligated to fully perform all obligations of Tenant under the Lease and all rights and remedies of Landlord are expressly reserved.

Sincerely,

[Authorized Signature of Property Manager]

CONFIRMED AND AGREED:

[Name of Tenant]

By: _____
[Authorized Signature]

Title: _____

Date: _____, 20__

cc: [Appropriate Officers/Managers]
[Landlord's legal counsel]

ATTACHMENT A

INFORMATION TO BE PROVIDED BY TENANT AND ANY GUARANTOR

Please arrange for each of the following items to be completed (as applicable) and delivered to _____ at the Office of the Building:

1. Please complete and have an authorized signatory of Tenant execute and deliver two (2) originals of the Tenant Estoppel Certificate attached hereto as Attachment B.
2. Please complete, sign and return the Credit Check Authorization Form attached hereto as Attachment C. If there is a Guarantor of the obligations of Tenant under the Lease, please also have each Guarantor complete, sign and return a Credit Check Authorization Form.
3. With respect to Tenant and each guarantor, please provide financial statements, including balance sheets and operating statements showing all elements of income and expense, for the current partial year and the last two (2) complete fiscal years, and projections for the remainder of this year and the next two (2) complete fiscal years. All financial statements shall be certified by the issuing party as being true, correct and complete.
4. For Tenant entities that are corporations or partnerships, please provide a statement confirming the number of Tenant's partners and/or shareholders, number of Tenant's outstanding shares, average profit per partner or share, projected profit per partner or share, and dividends and distributions, for the current partial year, the last two (2) complete fiscal years and projections for the remainder of this year and the next two (2) complete fiscal years.
5. Please provide a complete list of creditors of Tenant, including a listing of any other landlords, with itemization of amounts owed, payment schedule, amounts actually paid in the most recent ninety (90) days and one year (with dates of payment), collateral or security interests granted to secure future payment or repayment, and amounts past due or delinquent. For lines of credit, indicate amounts of additional credit available.
6. With respect to Tenant, please provide a schedule of current cash balances and projected disposition of such balances.
7. Please provide an itemization of assets, including furniture, fixtures, equipment, inventory, vehicles, real estate, accounts, and accounts receivable held by Tenant. For all assets, please provide estimates of value, and indicate the extent to which each asset is encumbered to secure repayment of debt. For accounts receivable, indicate aging, collection efforts to date, projected collection efforts, and estimation of the likelihood of collections.
8. Please provide a schedule, including a brief description, of all litigation pending and anticipated, to which Tenant is or will be a party, with an indication of the amount in controversy, the extent of insurance coverage, and the prospects of success.

[CONTINUED ON NEXT PAGE]

9. Please provide a current business plan for Tenant, including a history and explanation of current financial difficulties, and a plan for implementing a recovery.

Once the requested documents and information have been provided, Tenant shall also provide to Landlord such additional information and documents as may be needed to update or supplement the information previously provided to Landlord..

ATTACHMENT B

FORM OF ESTOPPEL CERTIFICATE TO BE EXECUTED BY TENANT

[landlord entity]

Attn: _____
(together with its successors and assigns, "Landlord")

and

any lender making a loan secured (i) in part by the Premises, or
(ii) by a direct or indirect equity interest in Landlord,
and their respective successors, assigns and participants,
and the respective successors and assigns of such persons
(collectively, "Lender")

Re: Lease dated _____ (the "Lease") executed between _____
("Landlord") and _____ ("Tenant"), for those premises located at

(the "Leased Premises").

Ladies and Gentlemen:

The undersigned Tenant does hereby certify to Landlord, Lender and their respective successors and assigns, their potential lenders and their participants, and their respective successors and assigns, as follows:

1. The Lease consists only of the documents specifically listed on Exhibit A attached hereto, and the documents listed on Exhibit A constitute a correct and complete copy of the Lease, and the Lease is the only agreement between Landlord and Tenant relating to the Property. Capitalized terms used but not defined herein have the respective meanings given to such terms in the Lease. **LIST LEASE AND ANY AMENDMENTS IN EXHIBIT A.**

2. The Lease is valid and in full force and effect and is binding upon and enforceable against Tenant in accordance with its terms. Tenant has accepted possession of the Leased Premises pursuant to the Lease and is currently in occupancy thereof. Tenant has not assigned, hypothecated or otherwise transferred its rights under the Lease or sublet any portion of the Leased Premises except as follows: _____

3. The Lease has not been modified, supplemented, or amended except as indicated in the documents listed in Exhibit A.

4. Tenant has made no agreement with Landlord or any agent, representative or employee of Landlord concerning free rent, partial rent, rebate of rental payments or any other type of rental or other concession, except as follows: _____

5. Tenant has not given Landlord written notice of any dispute between Landlord and Tenant. Tenant does not consider Landlord in default under the Lease.

6. Tenant is not the subject of any bankruptcy, insolvency or similar proceeding in any federal, state or other court or jurisdiction.

7. Tenant does not claim any defenses, offsets or credits against rents payable under the Lease.

8. Tenant has not paid a security, letter of credit or other deposit with respect to the Lease, except _____.

9. Tenant has fully paid rent through the month of _____, 20____; the current base rent under the Lease is \$_____ per month. Tenant's base year for determining common area maintenance charges, insurance, real estate taxes, and other similar items is _____. Tenant is currently obligated to pay a proportionate share of common area maintenance charges, insurance, real estate taxes, and other similar items equal to \$_____ per month, based on a pro rata share of _____%. Tenant is current in the payment of any taxes, utilities, common area maintenance or other charges required to be paid by Tenant. All reconciliation of actual taxes and operating expenses for calendar year _____ and all previous calendar years with payments made by Tenant therefor have been made and a report thereof has been delivered to Tenant.

10. Tenant has not paid any rentals in advance except for the current month of _____, ____.

11. The term of the Lease commenced on _____ and will terminate on _____. The square footage of the leasehold premises is _____ rentable square feet.

12. Tenant has no right to extend or renew the term of the Lease and has no right of first refusal or option to lease space in addition to the premises demised under the Lease except as follows:

_____. Tenant has no right of first refusal or option to purchase the Property or any part thereof. Further, Tenant has no termination right under the Lease except as follows: _____.

13. The person executing this Tenant Estoppel Certificate on behalf of the Tenant is duly authorized to do so.

14. Notices to Tenant relating to the Lease or the Premises may be addressed as follows:

Attention: _____

Such notices shall be effective if and when delivered in the manner described in the Lease; and shall also be effective upon the earlier of (i) two (2) business days after delivery to an overnight courier

service, such as Express Mail or Federal Express, addressed as indicated above with delivery fees prepaid, or (ii) immediately upon personal delivery during regular business hours to such address.

TENANT ACKNOWLEDGES THAT LANDLORD AND LENDER AND THEIR RESPECTIVE SUCCESSORS AND ASSIGNS MAY RELY UPON THIS ESTOPPEL CERTIFICATE FOR VARIOUS PURPOSES, INCLUDING WITHOUT LIMITATION THE COMMENCEMENT OR COMPLETION OF NEGOTIATIONS WITH TENANT REGARDING POSSIBLE MODIFICATIONS TO THE LEASE. TENANT SHALL BE ESTOPPED FROM MAKING ANY ASSERTIONS, IN ANY PROCEEDING, WHICH CONTRADICT THIS ESTOPPEL CERTIFICATE.

TENANT:

a _____

By: _____

Name: _____

Title: _____

Date: _____

EXHIBIT A TO TENANT ESTOPPEL CERTIFICATE
SCHEDULE OF LEASE DOCUMENTS

[to be provided in connection with each estoppel]

ATTACHMENT C

CREDIT CHECK AUTHORIZATION FORM

BUILDING: _____

LANDLORD: _____

TENANT NAME: _____

The undersigned hereby authorizes Landlord, its affiliates, designees, agents, successors and assigns, to initiate a credit checks and reference checks on the following individuals and entities in connection with a prospective or existing lease of space at the Building, and to complete updated searches during the term of any lease or agreement with respect to the Building, as needed.

CORPORATE INFORMATION

Name: _____

State of Formation: _____

Address: _____

Federal Tax ID Number: _____

INDIVIDUALS:

Name: _____

Address: _____

Social Security Number: _____ Date of Birth: _____

Driver's License # (If other than California-indicate State): _____

Name: _____

Address: _____

Social Security Number: _____ Date of Birth: _____

Driver's License # (if other than California, indicate State): _____

By signing below, each signer confirms that (i) the information provided herein is true and correct, (ii) Landlord, or its designee, is authorized to conduct credit checks, and check references for each person or entity signing this form, and (iii) Landlord, or its designee, is authorized to verify information with various taxing entities, including, but not limited to, the State of California Franchise Tax Board, the State of California Board of Equalization and the Federal Internal Revenue Service for each person or entity signing this form.

A copy of this authorization may be deemed to be the equivalent of the original and may be used as a duplicate original.

CORPORATE SIGNATURE:

By: _____
Printed Name: _____
Title: _____
Date: _____

INDIVIDUAL SIGNATURES:

Name: _____
Date: _____

Name: _____
Date: _____