

ESTOPPEL CERTIFICATES
&
ASSIGNMENTS AND SUBLETTING

Advanced Commercial Real Estate Leases Conference
LSI Law Seminars International

November 5, 2007

San Diego, California

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I. ESTOPPEL CERTIFICATES

1. Two issues: (1) clause in lease and (2) estoppel certificates.
2. Because third parties can rely on them, estoppel certificates can have the effect of inadvertently amending a lease. Plaza Freeway Ltd. Partnership v. First Mountain Bank (2000) 81 Cal. App. 4th 616.
3. Benefits of estoppel certificate to landlord: financing and sale of property. Usually the only independent verification for lender's and buyer's assumptions regarding (i) cash flow from property, (ii) valuation of the property and (iii) tenants' extraordinary rights and options. Information is often necessary to make the project financeable.
4. Benefits of estoppel certificate to tenant: such a certificate will be required by a sophisticated assignee or subtenant
5. Lease provision: elements
 - 5.1 Deadline to provide certificate
 - 5.2 Additional requested documents; financial (confidentiality of information)
 - 5.3 Reciprocal estoppel certificates
6. Estoppel certificate: elements
 - 6.1 Lease in effect and unmodified (check lease files; letter agreements)
 - 6.2 Other party not in default
 - 6.3 Amount of rent, security deposit, term, options
 - 6.4 Lender-protective provisions (e.g. waiver of rights against lender and lender liability; notices copied to lender; extra long lender lease cure periods beginning after landlord's period has expired; lender approval of lease amendments)
 - 6.5 Environmental representations
 - 6.6 Scope of representations: (1) unqualified (can be problematic with CAM estimates); (2) best actual knowledge of tenant (or undersigned individual); and (3) no duty of inquiry; disclaimer of such duty
7. Estoppel Certificate Form -See Attachment 1 for Negotiated Form

ATTACHMENT 1**NEGOTIATED REVISIONS TO TENANT ESTOPPEL CERTIFICATE**

THIS TENANT ESTOPPEL CERTIFICATE (“Certificate”), dated as of _____, 2007 is entered into by _____ (“Tenant”) in favor of _____ (“Lender”), and its affiliates, in connection with that certain lease dated _____ (the “Lease”), between Tenant and _____ (“Landlord”) for those premises commonly known as _____ (the “Premises”) which is located in _____ (the “Property”).

1. ESTOPPEL. Tenant acknowledges and represents the following, to the best actual knowledge of the undersigned individual solely in his or her capacity as officer of the Tenant, without any duty of inquiry:

1.1 Lease Effective. The Lease, a true and correct copy of which is attached hereto as Exhibit A, has been duly executed and delivered by Tenant and, subject to the terms and conditions thereof, the Lease is in full force and effect, the obligations of Tenant thereunder are valid and binding and there have been no modifications, amendments, terminations or additions to the Lease, written or oral, except the following: [List Amendments Here].

1.2 No Default. As of the date hereof: (i) there exists no breach or default ~~or event or condition which, with the giving of notice or the passage of time or both, would constitute a breach or default~~ under the Lease; (ii) Tenant has no existing claims, defenses or offsets against rental due or to become due under the Lease; and (iii) the Lease is free from default by Landlord, except as follows: [List Landlord Defaults or Tenant Claims Against Landlord Here].

1.3 Entire Agreement. The Lease and those Lease amendments and letter agreements, if any, listed in Paragraph 1.1 above constitutes the entire agreement between Landlord and Tenant with respect to the Premises, and Tenant has no rights or interest with respect to the Property other than as set forth in the Lease.

1.4 Rent. The amount of fixed monthly rent is \$ _____ the monthly common area or other charges are \$ _____. The base year for operating expenses and real estate taxes, as defined in the Lease, is _____. Tenant has paid rent for the Premises up to and including the date of _____. No such rent has been ~~or will be~~ paid more than one (1) month in advance of its due date, except: _____.

1.5 Security Deposit. Tenant’s security deposit is \$ _____.

1.6 Occupancy. Check one: () Tenant is currently in occupancy.
() Tenant intends to take occupancy on _____

1.7 Term. The Lease commenced on _____, and terminates on _____. Tenant has the following renewal/extension options: [Identify Any Such Options Here].

1.8 Landlord Work. All work to be performed for Tenant under the Lease has been performed as required and has been accepted by Tenant, and any payments, free rent, or other payments, credits, allowances or abatements required to be given by Landlord to Tenant have already been received by Tenant, except _____.

1.9 Prior Notices. Tenant has received no notice of any prior sale, assignment, pledge or other transfer of the said Lease or of the rents received therein, except _____.

1.10 Assignments of Sublease. Tenant has not assigned the Lease or sublet all or any portion of the Premises, nor does anyone except Tenant and its employees occupy the Premises, except as follows: _____. If Tenant is not the party named in the Lease, describe below the chain of assignments into Tenant and attach a copy of each assignment document hereto: _____.

1.11 No Option to Purchase or Expand. Tenant has no right or option to purchase all or any part of the Premises or the Property or to occupy any additional space at the Property, except as follows: _____.

1.12 No Pending Actions. No actions, whether voluntary or otherwise, are pending against Tenant under the bankruptcy laws of the United States or any state, and there are no claims or actions pending against Tenant which, if decided against Tenant, would materially and adversely affect its financial condition or its ability to perform the tenant's obligations under the Lease.

2. ADDITIONAL AGREEMENTS. Tenant covenants and agrees that:

2.1 Modification, Termination and Cancellation. ~~Tenant will not consent to a~~ Any modification, amendment, termination or cancellation of the Lease (in whole or in part) made without Lender's prior written consent will not be binding on Lender. ~~and will not make any payment to Landlord in consideration of any modification, termination or cancellation of the Lease (in whole or in part) without Lender's prior written consent.~~

2.2 Notice of Default. Tenant will notify Lender in writing concurrently with any notice given to Landlord of any default by Landlord under the Lease, and Tenant agrees that Lender has the right (but not the obligation) to cure any breach or default specified in such notice within the time periods set forth ~~below in the Lease~~ and Tenant will not declare a default of the Lease, as to Lender, if Lender timely cures such default. ~~cures such default within fifteen (15) days from and after the expiration of the time period provided in the Lease for the cure thereof by Landlord; provided, however, that if such default cannot with diligence be cured by Lender within such fifteen (15) day period, the commencement of action by Lender within such fifteen (15) day period to~~

~~remedy the same shall be deemed sufficient so long as Lender pursues such cure with diligence.~~

2.3 No Advance Rents. Tenant will make no payments or prepayments of rent more than one (1) month in advance of the time when the same become due under the Lease.

2.4 No Offset. Lender shall not be liable for, nor subject to, any offsets or defenses that Tenant may have by reason of any act or omission of Landlord under the Lease, except that if Lender becomes the Landlord, Lender shall be liable for continuing breaches which are curable by Lender as owner of the Property (e.g.; repairs and maintenance which are the responsibility of Landlord).

3. MISCELLANEOUS.

3.1 Heirs, Successors, Assigns and Transferees. The covenants herein shall be binding upon, and inure to the benefit of the heirs, successors and assigns of the parties hereto.

3.2 Notices. All notices or other communications required or permitted to be given pursuant to the provisions hereof shall be deemed served upon delivery or, if mailed, upon the first to occur of receipt or the expiration of three (3) days after deposit in United States Postal Service, certified mail, postage prepaid and addressed to the address appearing below; provided however, that any party shall have the right to change its address for notice hereunder by the giving of written notice thereof to the other party in the manner set forth in this Certificate: [Addresses].

3.3 Counterparts. This Certificate may be executed in two or more counterparts each of which shall be deemed an original and all of which together shall constitute and be construed as one and the same instrument.

3.4 Paragraph Headings. Paragraph headings in this Certificate are for convenience only and are not to be construed as part of this Certificate or in any way limiting or applying the provisions hereof.

3.5 Reliance. Tenant is aware that Lender and others will rely upon the statements made in this Estoppel Certificate, and has therefore adjusted the language hereof as necessary to make it an accurate statement of the current facts concerning the Lease. If no such adjustments have been made, said parties may rely upon the statements in this form as printed.

[Signature of Tenant]

II. ASSIGNMENTS AND SUBLETTING

1. General Comments: (1) a tenant's interest in a lease is freely transferable unless the lease states otherwise (Civil Code §§1995.010 and 1995.210(b)); (2) courts respect contractual restraints on alienation, although ambiguities favor lesser restraints (Civil Code §§1995.010-1995.340); (3) prohibition of transfers is enforceable (Civil Code §1995.230), although such prohibition affects Civil Code §1951.4 remedy; and (4) if the lease requires landlord's consent without stating whether the consent must be reasonable then, (1) a reasonableness standard is applied to those leases dated after September 23, 1983 (Civil Code §§1995.260 and 1995.270).

2. Landlord's objectives are to: (1) not be in a worse position after a transfer; (2) protect its ability to assure the tenant's performance and prevent harm to other tenants; (3) retain control over its property and uses thereon; (4) maintain the same flexibility to approve a new tenant as it did for the original tenant; (5) share in any benefits relating to the transfer.

3. Tenant's objectives are to have flexibility if tenant needs to expand or downsize, so that its financial exposure is lessened.

4. Exclusions from consent requirements: (i) tenant affiliates; (ii) family transfers; and (iii) changes in ownership of tenant entity (unless otherwise stated in the lease)

5. Recapture clauses. Dangerous to tenant if tenant is subleasing only a portion of the space for a limited time period.

6. Profit entitlement provisions. If the rent is below market rent at the time of a lease assignment, a landlord can generally require the tenant to remit all or a portion of the sums the assignee pays to the tenant for the below market lease. But see, Ilkhchooyil v. Best (1995) 37 Cal. App. 4th 395, in which the court held that a landlord shall not include consideration unrelated to the bonus value of the lease as part of its profit entitlement right. The court held that it was unreasonable for the commercial landlord to demand that the tenant pay the landlord a portion of the sales price of tenant's business as a condition to approving a lease assignment.

7. Some leases limit tenant's remedy to injunctive relief with a waiver of damages and waiver of right to terminate the lease upon landlord default

8. Negotiated revisions to Landlord-oriented form – See Attachment 2

ATTACHMENT 2

NEGOTIATED REVISIONS TO LANDLORD'S FORM OF ASSIGNMENT AND SUBLETTING PROVISION

1. ASSIGNMENT AND SUBLETTING

1.1 Restrictions. Tenant shall not transfer, assign, sublet, mortgage or otherwise hypothecate this Lease, or Tenant's interest in and to the Premises (or any portion thereof), nor ~~enter into any license or concession agreements with respect thereto, nor~~ permit any third party or parties other than Tenant, its authorized agents, employees, invitees and visitors to occupy the Premises or any portion thereof (hereinafter individually and collectively referred to as a "**Transfer**") without first procuring the written consent of Landlord, in strict accordance with the procedures set forth in this Article. Any such attempted or purported Transfer, without Landlord's prior written consent (1) shall be void and of no force or effect, (2) shall not confer any interest or estate in the purported transferee (the "**Transferee**") and (3) shall constitute a material, ~~incurable~~ default under this Lease and permit Landlord, at its election and ~~immediately upon~~ after written notice to Tenant and the expiration of the applicable cure period, to terminate this Lease. If Tenant or Tenant's managing member or general partner is an entity, each of the following acts also constitute a Transfer that requires Landlord's consent under this Article: the transfer, assignment, hypothecation or conveyance of the legal or beneficial ownership of more than ~~25~~50% (in the aggregate) of the Tenant's (or any of its general partners' or managing members') partnership, stock or membership interests; provided, however, the following are not Transfers and do not require Landlord's consent: any transfer (i) of an equity interest in Tenant to a trust in which the transferor is a beneficiary of the trust, (ii) of shares of stock or voting control of a Tenant which is a publicly traded company, (iii) of shares of stock of a corporate tenant to immediate family members by reason of gift or death, or (iv) to an "Affiliate" of Tenant. An "Affiliate" means any entity that controls, is controlled by, or is under common Control with Tenant. "Control" means the direct or indirect ownership of more than 50% of the voting securities of an entity or possession of the right to vote more than 50% of the voting interest in the ordinary direction of the entity's affairs. The consent of Landlord required hereunder shall not be unreasonably withheld; provided, however, it shall not be unreasonable for Landlord to withhold its consent to any proposed Transfer for any of the following reasons, which are not exclusive:

1.1.1 The Transferee is not a reputable party of reasonable financial worth and/or financial stability in light of the responsibilities involved on the date Landlord's consent is requested, taking into consideration the value to Landlord of Tenant's continuing financial responsibility under the Lease;

1.1.2 In the ~~sole~~ reasonable judgment of Landlord, the Transferee is of a character or engaged in a business which is not in keeping with the standards of Landlord for the Building;

1.1.3 In the ~~sole discretion~~ reasonable judgment of Landlord, the Transferee would (i) create materially increased burdens upon the facilities within the Building, such as elevators or the parking structure, (ii) cause ~~potential~~ security problems ~~or additional security concerns~~ in the Building, or (iii) result in a material increase in pedestrian usage or traffic in the Building Common Area or Project Common Area in relation to uses of tenants then occupying space in the Building;

1.1.4 The Transferee's proposed use of the Premises will violate the use restrictions of this Lease or will materially increase the risk of possible contamination by Hazardous Materials;

1.1.5 ~~With respect to a sublease only, the terms of the proposed Transfer will allow the Transferee to exercise or require Tenant to exercise a right of renewal, right of expansion, right of first offer, or other similar right held by Tenant~~ [Deleted];

1.1.6 ~~The Transferee occupies space in the Building or Project at the time of the request for consent~~ [Deleted];

1.1.7 ~~The Transferee is a person or entity (or an affiliate thereof) with whom Landlord is then negotiating (or has negotiated) for the lease or occupancy of space within the Building~~ [Deleted];

1.1.8 The Transferee is a governmental agency or instrumentality thereof, but only if Transferee has the power of eminent domain, creates a security risk, or would place a disproportionate burden on Building services;

1.1.9 ~~The Building has not yet reached the level of ninety five percent (95%) occupancy of Usable Area~~ [Deleted];

1.1.10 ~~The rent proposed to be payable by such Transferee will be less (on a per square foot of Rentable Area basis) than the Rent then currently charged by Landlord for comparable space within the Building~~ [Deleted]; or

1.1.11 ~~Tenant is in default under this Lease at the time of the request for consent or on the proposed effective date of the Transfer~~ [Deleted].

1.2 Procedure for Transfer. Should Tenant desire to make a Transfer hereunder, Tenant shall, in each instance, give written notice of its intention to do so to Landlord at least ~~60~~ 15 days prior to the effective date of any such proposed Transfer, specifying in such notice the nature of such proposed Transfer and the proposed date thereof and specifically identifying the proposed Transferee. Such notice shall be accompanied, in the case of a subletting, ~~license or concession agreement~~, by a copy of the proposed sublease, ~~license or concession agreement~~, any other documents or financial information (including, without limitation, three year's audited financial statements or if audited financial statements are not available, financial statements certified by the proposed Transferee) Landlord may reasonably request in order to make a determination as to the suitability of the Transferee based upon the criteria set forth in Section 1.1.

Landlord shall, within ~~30~~15 days after its receipt of such notice of a proposed Transfer from Tenant, by mailing written notice to Tenant of its intention to do so pursuant to Section 1.1, either (i) withhold consent to the Transfer, stating all the reasons for Landlord's decision in a detailed written explanation or (ii) consent to such Transfer upon the terms and subject to the conditions provided for in this Article 1. ~~or (iii) elect to recapture or terminate the Lease pursuant to Section 1.3 below~~ Tenant agrees that the imposition of the conditions described in this Article 1 as a condition to Landlord's consent is reasonable. If Landlord fails to respond within the required time, Landlord shall be deemed to have consented to the Transfer. If Landlord withholds consent and Tenant disputes that Landlord's denial of consent is reasonable, either party may initiate arbitration of the dispute in accordance with Section of this Lease. The arbitration shall conclude within 30 days after it is initiated.

1.3 ~~Recapture Right. In lieu of giving or withholding consent pursuant to Section 1.2, Landlord may at its option and subject to the subsequent provisions of this Section, elect to (a) construe such proposed Transfer as an offer to Landlord on the same terms and conditions as with the third party, which offer may be accepted by Landlord at any time within 30 days after receipt thereof, and if so accepted, such Transfer shall automatically be deemed consummated on all the terms and provisions set forth in such proposed Transfer (except that Landlord may further assign or otherwise transfer such interest without Tenant's review or consent) or (b) terminate this Lease (or in the case of a proposed subletting or assignment of a portion of the Premises, elect to terminate this Lease with respect to that portion) upon 30 days' prior notice and release Tenant from any liability under this Lease for rent (as to that portion of the Premises involved) accruing after the effective date of such termination. In consideration for Landlord's right and election to construe the proposed Transfer as an offer to Landlord and/or terminate this Lease as set forth above, Landlord will release Tenant from liability under this Lease for future rent with respect to the Premises (or the portion of the Premises subject to the proposed Transfer) in connection with the exercise of such right by Landlord. Landlord and Tenant agree and acknowledge that Landlord's right to recapture as set forth above is intended to permit Landlord to maintain control over the leasing of space in the Building, to protect its interest in the Building and the interest of any lenders and to prevent such interest from being impaired. Tenant understands the nature of this right and has approved the recapture provisions in consideration for Landlord's agreement to release Tenant from liability for future rent due with respect to the recaptured portion of the Premises pursuant to the provisions of this Section 1.2. If Landlord shall exercise any right to terminate or acquire the Premises (or subject portion) hereunder, Landlord shall have the right to enter into a lease or other occupancy agreement directly with Tenant's proposed assignee or subtenant or any other party in Landlord's sole and absolute discretion, and Tenant shall have no right to any of the rents or other consideration payable by such party under such other lease or occupancy agreement, even if such rents and other consideration exceed the rent payable under this Lease by Tenant. Landlord shall have the right to lease the Premises to any other tenant, or not lease the Premises, in its sole discretion. Landlord and Tenant specifically agree that Landlord's rights to terminate this Lease or acquire the Premises (or subject portion) under this Section is a material consideration for Landlord's agreement to enter into this~~

~~Lease and such right may be exercised in Landlord's sole and absolute discretion and no test of reasonableness shall be applicable thereto.~~ [Deleted]

1.4 Effect of a Transfer. The Transferee shall agree, pursuant to a written agreement acceptable to Landlord, to comply with and be bound by all of the terms, covenants, conditions, provisions and agreements of this Lease subsequent to the date of the Transfer, to the extent of the space transferred, assigned or sublet; and Tenant shall deliver to Landlord immediately after execution an executed copy of each such Transfer document between Tenant and the Transferee. No Transfer of this Lease or agreement entered into with respect thereto, whether with or without Landlord's consent, shall relieve Tenant or any guarantor of the Lease from liability under this Lease; provided, however, if this Lease is assigned, Landlord shall release Tenant from liability under the Lease for obligations accruing after the Transfer, but only if Transferee has a tangible net worth at the time of the Transfer of more than \$ _____, as evidenced by financial statements delivered to Landlord and certified by an independent certified public accountant in accordance with generally accepted accounting principles that are consistently applied. If the Transfer is a Lease assignment, no future Lease amendment between Landlord and Transferee shall relieve Tenant or any guarantor of the Lease from liability under this Lease, unless such amendment (i) extends the Lease term, (ii) increases any rent or (iii) otherwise expands the scope of Transferee's obligations under this Lease. In connection with and as a condition to Landlord's consent to any sublease, such sublease shall provide that it shall be subject and subordinate to this Lease and to all current and future mortgages; that Landlord may enforce the provisions of the sublease, including collection of rents; and that in the event of termination of this Lease for any reason, including without limitation a voluntary surrender by Tenant, or in the event of any reentry or repossession of the Premises by Landlord, Landlord may, at its option, either (i) terminate the sublease (but only if the Lease terminated as a result of Tenant's breach of the Lease) or (ii) take over all of the right, title and interest of Tenant, as sublessor, under such sublease, in which case such sublessee shall attorn to Landlord but in such event Landlord shall not (a) be liable for any previous act or omission of Tenant under such sublease, (b) be subject to any defense or offset previously accrued in favor of the sublessee against Tenant, or (c) be bound by any previous modification of any sublease made without Landlord's written consent, or by any previous prepayment by sublessee of more than one month's rent.

1.5 Transfer Rent Adjustment.

1.5.1 Payment of Profit. If Landlord consents to the Transfer, the following shall apply to that portion of the Premises transferred to Transferee: Tenant shall pay Landlord monthly, as additional rent, at the same time as the monthly installment of Base Monthly Rent required hereunder, fifty percent (50%) of the "Profit" payable by the Transferee pursuant to the terms in the Transfer agreement, assignment or sublease. For purposes of this Section 1.5.1, "Profit" means all rent and other amounts actually paid ~~or payable~~ by the Transferee to Tenant pursuant to the terms of the Transfer which are in excess of (i) the applicable Base Monthly Rent and Additional Rent under this Lease and (ii) ~~reasonable~~ broker's commissions to unrelated third parties, ~~reasonable~~ tenant improvement costs, advertising and marketing costs and other amounts actually

paid by Tenant in connection with such ~~transfer to the extent reasonable and customary in the market in which the Building is located~~ Transfer, amortized ~~without interest~~ with interest at _____ percent per annum over the remaining term of this Lease (or sublease, as applicable). Notwithstanding the foregoing, any sums paid by Transferee to Tenant for any purpose other than the fair rental value of the Premises shall belong exclusively to Tenant (e.g., payments for assets, trade fixtures, inventory, accounts, goodwill, equipment, furniture, general intangibles, capital stock or equity ownership).

1.5.2 ~~Payment of Transfer Consideration. In addition to the foregoing, in the event Tenant shall make a permitted Transfer hereunder, fifty percent (50%) of the dollar amount of the funds or property, other than Base Monthly Rent and additional rent (the "Transfer Consideration"), transferred from Transferee to Tenant as consideration for the Transfer, exclusive of any reimbursements for tenant improvements which have been paid for by Tenant, shall be deemed additional rent owed to Landlord by Tenant under this Lease. Transfer Consideration shall include, but not be limited to, key money, bonus money and payments for services rendered by Tenant, its constituent partners or affiliates to Transferee or payments for assets, fixtures, inventory, accounts, goodwill, equipment, furniture, general intangibles, capital stock or equity ownership.~~ [Deleted]

1.5.3 ~~Rent Increase. In the event of a Transfer hereunder, at Landlord's election, the Monthly Base Rent under this Lease shall be increased to the then prevailing amount charged for comparable space within the Building.~~ [Deleted]

1.6 Required Documents. Each Transfer (whether or not Landlord has consented to such Transfer) shall be evidenced by a written instrument in form satisfactory to Landlord, executed by Tenant and the Transferee, under which the Transferee shall agree in writing for the benefit of Landlord to assume, to perform and to abide by all of the terms, covenants and conditions of this Lease to be done, kept and performed by Tenant subsequent to the date of Transfer, including the payment of all amounts due or to become due under this Lease directly to Landlord and the obligation to use the Premises only for the purpose expressly specified in this Lease. Tenant agrees to reimburse Landlord for Landlord's reasonable attorneys' fees and ~~administrative other out of pocket~~ fees, but not in excess of \$ _____, reasonably incurred in conjunction with the processing of, and documentation for, each such requested Transfer, whether or not the Transfer is consummated.