

## CONSENT TO AN ASSIGNMENT AND ASSUMPTION OF LEASE - THE LANDLORD'S PERSPECTIVE

Commercial real estate landlords commonly face scenarios such as the following: One of your tenants sends you a letter indicating that it has sold its business to a third party and has assigned the lease to the third party. Your tenant's letter requests that you countersign and return the letter acknowledging your consent to the assignment of the

assignment of the lease (and, therefore, trigger the assignment provisions of the lease).

Does the lease specify whether the assigning tenant will remain directly and primarily responsible and liable for the payment of the rent and for compliance with all of its other obligations under the lease? Does the lease provide landlord with an option to terminate the lease or otherwise recapture the premises upon a request to assign the lease?

If the landlord does not elect to terminate the lease or recapture the premises, does the lease provide the landlord with any rights to receive any additional rent or other consideration if the assignee is scheduled to pay rent to the original tenant (assignor) in excess of the amount of rent scheduled to be paid by the original tenant to the landlord pursuant to the lease?

Does the lease require the tenant to pay to the landlord an assignment fee and/or require the tenant to reimburse the landlord for the landlord's costs and expenses in investigating and considering any proposed or purported assignment of the lease?

**Step Two:** Verify whether any third parties (such as mortgage holders) have rights with respect to consenting to a prospective assignment of a lease and make sure to comply with such requirements, if any. Occasionally, mortgage loan-related documents (including subordination, non-disturbance and attornment agreements) or certain easements, covenants, conditions or development agreements burdening the subject property will limit rights to assign leases and/or provide to the mortgage holder (or beneficiary of an easement, covenant, condition or development agreement) consent to assignment rights in certain circumstances. Avoid inadvertently triggering a default with any third party by failing to comply with any such requirements.

**Step Three:** Evaluate the proposed form of Assignment and Assumption of Lease and modify as necessary. Assuming the landlord has reviewed and approved the financial reports and other relevant information concerning the proposed assignee and is not planning to exercise any termination or recapture right, under most circumstances, the landlord will be well served to modify the assignor's/assignee's form of Assignment and Assumption of Lease.

Most landlords will want an Assignment of Lease to include the following concepts: (a) the effective date of the assignment; (b) a comprehensive list of the underlying lease agreements (including any amendments) and the parties; (c) an assignment clause describing the parties, what is being assigned and the consideration given; (d) a statement confirming that the

assignor agrees to pay landlord a fee (including the amount) for landlord's review of the proposed assignment to assignee; (e) representations by the assignor to landlord that (i) the landlord is not in default under the lease, (ii) the assignor is receiving no "increased rent" from assignee that exceeds the rent payable to landlord for the premises, (iii) the assignor has no claims against landlord under the lease and (iv) each person signing the assignment on behalf of the assignor has full authority and that the assignment binds the assignor entity; (f) a landlord limitation of liability clause; and (g) an accurate signature block for the assignor entity (including the date of execution).

Most landlords will want an Assumption of Lease to include the following concepts: (a) the assignee's acceptance of the assignor's assignment and assignee's agreement to assume all of the assignor's/tenant's lease obligations (including to pay rent); (b) representations by the assignee to landlord that (i) assignor is receiving no "increased rent" from assignee that exceeds the rent payable to landlord for the premises, (ii) assignee is not a person or entity with whom landlord is restricted from doing business under regulations of the Office of Foreign Asset Control of the Department of the Treasury or under any governmental action and (iii) each person signing the assignment on behalf of assignee has full authority and that the assumption binds the assignee entity; (c) a landlord limitation of liability clause; and (d) an accurate signature block for the assignee entity (including the date of execution).

**Step Four:** Evaluate the proposed form of Consent to Assignment and Assumption of Lease and modify as necessary. The assignor's and assignee's form of Consent to Assignment and Assumption of Lease is routinely deficient in many respects and landlords should expect to modify significantly the consent provisions before agreeing to execute and deliver the same.

Most landlords will want a Consent to Assignment and Assumption of Lease to include the following concepts: (a) the landlord consents to the assignment of the lease by the assignor to the assignee (and reflect that the same is made in consideration of the payments by the assignor to the landlord as described in the Assignment of Lease, as well as the assumptions, covenants, promises and agreements of the assignee set out in the Assumption of Lease); (b) neither the landlord's consent nor the collection of rent from the assignee shall be (i) deemed a waiver or relinquishment for the future of the covenants against assignment or subletting or (ii) construed as releasing the assignor from

### *SAMPLE CONSENT TO ASSIGNMENT AND ASSUMPTION OF LEASE CLAUSE (LANDLORD-ORIENTED):*

"The undersigned Landlord hereby consents to the Assignment of the above described Lease by Assignor to Assignee in consideration of the payments by Assignor to Landlord as above set out as well as the assumptions, covenants, promises and agreements of Assignee above set out on the express conditions that neither said consent nor the collection of rent from Assignee shall be deemed a waiver or relinquishment for the future of the covenants against assignment or subletting nor be construed as releasing Assignor or any other person or entity claiming by, through, or under Assignor from the full performances of the provisions of the Lease as the same may be amended from time to time. It is understood that Assignor shall remain liable as Tenant for the performance of all of the terms, conditions and covenants to be performed under the Lease. No further assignment of the Lease or subletting of all or any portion of the Premises will be made without the written consent of Landlord. In no event shall anything contained in this Consent be deemed a waiver of any of Landlord's rights under the Lease. Landlord holds a letter of credit in the face amount of \$\_\_\_\_\_ as security for Tenant's obligations under the Lease (the "Tenant Letter of Credit"). Landlord covenants to return the Tenant Letter of Credit to Assignor promptly following Landlord's receipt of a replacement letter of credit in an equivalent face amount issued by \_\_\_\_\_ in form and substance as required by the Lease and otherwise acceptable to Landlord, in Landlord's reasonable discretion. Redress for any claims against Landlord under this Assignment and Assumption (and Landlord's Consent) or under the Lease shall only be made against Landlord to the extent of Landlord's interest in the property to which the Premises is a part. The obligations of Landlord under this Assignment and Assumption (and Landlord's Consent) and the Lease shall not be personally binding on, nor shall any resort be had to the private properties of, any of its trustees or board of directors and officers, as the case may be, the general partners thereof or any beneficiaries, stockholders, employees or agents of Landlord. [Add Landlord's signature block, including date]"



lease to the third party. What should you do in response to the tenant's request? This article will explore, from the landlord's perspective, how to evaluate a request for consent to an assignment and assumption of lease. A landlord-oriented sample Consent to Assignment and Assumption of Lease is also included for your convenience.

**Step One:** Evaluate the lease to determine the landlord's and tenant's rights and obligations concerning an assignment of the lease by the tenant. Most landlord-oriented lease forms provide that the tenant shall not have the right to assign the lease (or to sublet any part of the premises) without the prior written consent of the landlord. Such lease forms also usually provide that the landlord's consent shall not be unreasonably withheld. Although reasonableness standards for consents are frequently subject to differences of opinion, most authorities would not consider a landlord to be acting unreasonably in electing to refuse to consent to an assignment of the lease if: (a) there is any uncured default of tenant; or (b) the proposed assignee (i) is an entity with which the landlord is already in negotiation for other space or (ii) would subject the premises to a use which would (A) involve increased personnel or wear upon the building, (B) violate any exclusive right granted to another tenant, (C) require any addition to or modification of the premises or the building in order to comply with building code or other governmental requirements or (D) involve a violation of the permitted use clause in the lease.

Most leases will require that the tenant notify the landlord prior to the proposed commencement date of such assignment, and identify the name of the proposed assignee, the relevant terms of the assignment and copies of financial reports and other relevant information of the proposed assignee. Additionally, most landlord-oriented leases provide that changes in control (or transfers of voting interests) of the tenant entity are regarded as an

the full performances of the provisions of the lease as the same may be amended from time to time (and the assignor shall remain liable as tenant for the performance of all of the terms, conditions and covenants to be performed under the lease); (c) a limitation on further assignments of the lease or subletting of any portion of the premises without the written consent of the landlord; (d) the landlord's consent shall not be deemed a waiver of any of the landlord's rights under the lease; and (e) a landlord limitation of liability clause. Additionally, landlords may want to address rights to security deposits held by the landlord, if any, and to whom and where notices should be sent on a going-forward basis.

**Conclusion:** Landlords should not be compelled to rush the Consent to Assignment and Assumption of Lease process and are better served by carefully evaluating their rights and obligations, exploring options and following the steps described in this article. Because most forms of Assignment and Assumption of Lease and Consent provided to landlords by tenants do not address many of the issues which could be important to the landlord, armed with this article, landlords now have several tools available to improve the Assignment and Assumption of Lease and Consent.

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