

DOCUMENTATION OF LEASE AMENDMENTS

I. A WAR STORY

- A. Be wary of forms if you represent landlords
- B. There is no such thing as a form lease
 - 1. Restaurant lease is different from gas station lease is different from retail lease is different from industrial lease
 - 2. Many lease provisions depend upon use being made by the tenant
- C. War story
 - 1. Client was developing a retail center
 - 2. Got a lease form from broker
 - 3. Was an office lease form and had a CAM formula used only in office leases which would have resulted in higher CAM for tenants
 - a. Three CAM formulas
 - b. Ratio of tenant's area to leasable area
 - c. Ratio of tenant's area to leased area
 - d. Ratio of tenant's area to 'leasable area plus ratio of tenant's area to entire usable area not including leasable area
 - 4. Had already signed at least 20 leases
 - 5. Suggested that developer ask the tenants to amend the leases
 - 6. Unusual for a landlord to request an amendment
 - 7. Tenants should have agreed because it reduced CAM

II. WHEN DO YOU AMEND

- A. Don't amend and restate the entire lease if the changes can be documented in a paragraph or two
- B. Change of term of the lease
 - 1. Tenant exercises an option to renew
 - 2. Lease term has changed to date of termination of option period

- C. Landlord agrees to extend the term
- D. Lease rent increases when tenant exercises option and agree upon new rent
- E. Landlord constructs additional improvements and tenant's *pro rata* share of CAM changes
- F. Damage or destruction and landlord and tenant agree upon the area damaged and the amount of rent abatement
- G. Use
 - 1. Commercial leases have use limitations
 - 2. Tenant is restricted to specified use and if wants to change requires landlord consent
 - 3. Change of use documented in an amendment of the lease
- H. Expansion
 - 1. Tenant has a right of first refusal to expand into additional space if it becomes vacant
 - 2. Amendment would modify the
 - a. Definition of demised premises
 - b. Base rent
 - c. *Pro rata* share of CAM
- I. Tenant is not able to pay rent
 - 1. Landlord agrees to lower rent and defer payment
 - 2. Tenant agrees to term of payment and interest on deferred rent

III. WHEN IS A NEW LEASE REQUIRED

- A. Out of date lease expires and landlord wants to have a new lease wit contemporary terms
- B. Tenant wants to assign
 - 1. Consent cannot be unreasonably withheld
 - a. Landlord must consent if the new tenant is creditworthy

- b. Even if landlord does not like the use or the tenant is not compatible with the project landlord must consent
 - c. Lease will be assigned on its existing terms
 - 2. Lease requires no unreasonable withholding but permits landlord to refuse to consent if
 - a. The use is not compatible with the project
 - b. The assignee does not have to same financial condition as assigning tenant
 - c. Landlord can condition assignment on amendments to the lease even including rent
 - 3. Tenant wants to assign and landlord has a recapture right
 - a. Landlord could exercise recapture right and demand a revised lease from same tenant
 - b. If landlord recaptures and existing tenant leaves new lease with new tenant
- C. Tenant is a subtenant and sandwich leaseholder defaults
 - 1. Master landlord can refuse to allow the subtenant to attorn (assuming no attornment and non-disturbance agreement) without a new lease)
 - 2. Master landlord can refuse attornment to find a new tenant under a new lease

IV. AMENDMENT ISSUES

- A. Lease guaranty
 - 1. Common law: a guarantor guarantees a lease on its terms
 - 2. If lease is amended the guaranty is extinguished
 - 3. Obtain the consent on the amendment or affirmation that the guaranty is still in effect

V. HOW TO AMEND

A. Tenant exercised option and increased rent. Example:

AMENDMENT OF LEASE

THIS AMENDMENT OF LEASE IS MADE as of this ____ day of _____, 2016 by and between ABC CORP., a Hawaii corporation (“Landlord”) and NATIONAL TENANT LLC, a Delaware limited liability company (“Tenant”).

RECITALS

A. Landlord and Tenant entered into that certain Retail Lease dated March 1, 2010 (the “Lease”) covering demised premises being Suite B-204 located at 808 Center, 808 Sheridan, Honolulu, Hawaii.

B. Tenant exercised an option to renew and Landlord and Tenant wish to amend the Lease to provide for the Extended Term, as defined in the Lease, and the rent during the Extended Term.

AGREEMENT

1. Term. Section 2.6 of the Lease is amended in its entirety to provide as follows:

2.6 Term. The Extended Term of the Lease shall commence on March 1, 2015, and shall end on April 30, 2020.

2. Rent: Section 3.1 of the Lease is amended to provide as follow:

3.1 Rent. Monthly Base Rent shall be as follows:

March 1, 2010 – March 31, 2010	\$00.00
April 1, 2010 – April 30, 2010	\$00.00
May 1, 2010 – May 31, 2010	\$00.00
June 1, 2010 – February 28, 2015	\$3,500
March 1, 2015 – February 29, 2020	\$4,500

3. No Other Amendments. Except as set forth herein the Lease remains unmodified and in full force and effect.