



California Lawyers Association

*presents*

What's Trending in California Commercial Real Estate – Fall 2023 edition

1.25 Hours MCLE

Thursday, September 21, 2023

1:30 PM - 2:45 PM

Speakers:

**J.J. Sherman**

**Holden Stein**

Conference Reference Materials

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# What's Trending in California Commercial Real Estate – Fall 2023 Edition

J.J. Sherman, Esq., Law Offices of J.J Sherman, P.C.  
Holden Stein, Esq., Fathom Law, PC

Thursday, September 21, 2023

CALIFORNIA LAWYERS ASSOCIATION

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## What's Trending in California Commercial Real Estate – Fall 2023 Edition

Commercial spaces are emptier, interest rates are rising, and news outlets are reporting a “credit crunch”. This panel – prepared for the newly-admitted attorney but helpful to all lawyers – will discuss what these factors might mean for the California commercial real estate market – from the tenant, landlord and lender perspective. In anticipation of more mergers and acquisitions activity, we’ll also discuss what needs to happen to transfer commercial leases when one business acquires another business. We’ll provide a step-by-step playbook for assigning or subleasing a lease or lease portfolio as part of a larger business acquisition.

# What the “Credit Crunch” might mean for commercial real estate lending in California

- In the past decade, many commercial real estate loans have been structured as non-recourse, interest-only loans with balloon payments at the loan maturity date.
- Today, high interest rates combined with empty commercial buildings will make it difficult for borrowers to refinance their existing commercial real estate loans as they become due.
- Borrowers and lenders are likely to engage in loan workouts as commercial real estate loans mature and debts are not repaid at maturity.

## Loan Workout Option 1: Pretend and Extend

- An amendment to the existing commercial real estate loan extending the maturity date.
- This may be a simple amendment extending the maturity date and keeping all of the other terms and conditions “as is”.
- This may be a more complex amendment that both extends the maturity date and adjusts the financial terms.

## Loan Workout Option 1: Pretend and Extend (Cont.)

- Pretend and Extend is an easy option when the property is income-producing and based on the rent roll, is forecasted to be income-producing at similar levels for the extension period, since there will be income to cover the debt service under the loan.
- Pretend and Extend is not an easy option when the property is not income-producing or based on the rent roll, the property's income is forecasted to decrease over the extension period, since there would be insufficient income to cover the debt service under the loan.

## Loan Workout Option 1: Pretend and Extend (Cont.)

- What major factors might contribute to a decrease in income over the extension period?
  - With “return to the office” still uncertain post-COVID, many tenants might not renew their leases at lease expiration, which impacts the borrower’s ability to pay debt service. This is especially true of short term tenants (leases with 5 year terms or less) that pre-COVID would have been more likely to renew.
  - Post-COVID, especially, in the office sector, there is a “flight to quality”. Tenants are seeking less office space but in Class A office buildings filled with amenities. Owners of Class B and Class C buildings may see more vacancies.

## Loan Workout Option 2: **Foreclosures**

- A real property loan is secured by a deed of trust on the real property in California.
- If a Borrower defaults on the real property loan, the lender has the option to foreclose on the deed of trust through judicial or non-judicial foreclosure.
- A foreclosure of the deed of trust will extinguish all junior liens and encumbrances and remove them from the property's title.



## Loan Workout Option 2: Foreclosures (Cont.)

- Foreclosure is an attractive option for a lender when the property is income-producing or when the lender is ready, willing and able to appoint a receiver early in the foreclosure process to take control of the property.
- Foreclosure may not be a good option when the property is not income-producing, the lender has no appetite to appoint a receiver and take control of the property or where the property may have potential successor-liability issues, such as environmental issues.

## Loan Workout Option 3: Deed in Lieu of Foreclosure

- The borrower gives the property subject to the Deed of Trust to the lender via a deed-in-lieu, rather than forcing the lender to conduct a foreclosure.
- This might include a release that extinguishes or reduces the liability of the Borrower and Guarantor under the loan documents.
- When a property is transferred by Deed in Lieu of Foreclosure, it does not extinguish any junior loans and encumbrances on the property, so the lender would be taking ownership of the property subject to junior loans, and a thorough review of title is essential.

## Loan Workout Option 3: Deed in Lieu of Foreclosure (Cont.)

- Deed in Lieu of Foreclosure is an attractive option for a lender when the property is income-producing or when the lender is ready, willing and able to assume ownership of the property.
- Deed in Lieu of Foreclosure may not be a good option when the property is not income-producing, the lender has no appetite to assume ownership of the property, or where the property may have potential successor-liability issues, such as environmental issues.
- If the property is subject to junior loans, then the Deed in Lieu of Foreclosure process may also involve the junior lenders and be subject to the terms of an Intercreditor Agreement between the mortgage lender and the junior lenders.

## Other trends in Commercial Real Estate Lending

- Payment guarantees
- Cross defaults with other real estate loans

## Other options available to borrowers:

- Sell the property.
- If it's a short sale (sale of the property for less than the outstanding amount of the debt), the sale will require the lender's consent.
- Bankruptcy.
- Non-recourse real estate loans are often secured by a non-recourse carve-out guaranty (also known as a springing recourse guaranty) delivered by a guarantor. Under this guaranty, the guarantor is liable for the entire loan balance upon a bankruptcy filing by the borrower. This serves as a deterrent to bankruptcy filing.

# What the “Credit Crunch” might mean for commercial real estate leases in California

- With “Return to the Office” still uncertain, subleases will continue to be a popular vehicle for office tenants looking to reduce their office footprint for the remainder of their lease term.
- A tenant should not assume that the owner of the leased property at lease execution will remain the owner of the leased property throughout the lease term.
- A subordination, non-disturbance agreement (“SNDA”) becomes more important to tenants to ensure that the tenant’s possession is not disturbed if the landlord’s lender should become the new owner of the property through judicial or non-judicial foreclosure or deed-in-lieu of foreclosure. Without an SNDA in place, if the tenant’s lease is signed after the date the deed of trust was recorded, the tenant’s lease is subordinate to the deed of trust by law and could be terminated by the lender upon foreclosure or deed-in-lieu of foreclosure.

## What the “Credit Crunch” might mean for commercial real estate leases in California (Cont.)

- A tenant negotiating a new lease for new development should negotiate an “outside date” for delivery of the leased premises. There are many factors causing delays in construction these days. If the landlord’s construction lender fails, delivery of the leased premises may be delayed or stalled indefinitely if the FDIC places the construction lender into receivership.
- A tenant negotiating a new lease – especially an office lease – must be aware of Proposition 8 in California.

## Prop 8 in California

- Prop 8 allows the assessor to temporarily reduce the assessed value of property if the market value is lower than the factored base year value.
- In this market, as buildings experience declines in value, Prop 8 will be popular.
- Office leases are often structured to say that the tenant is responsible for the tenant's pro rata share of taxes in excess of a base year.
- The base year is typically the calendar year the lease commences.



## Prop 8 in California (Cont.)

- Leases signed during a year when a building is under Prop 8 should have a base year based on the building's factored base year assessment and not the Prop 8 assessment, since the Prop 8 assessment would make the "base year" artificially low.
- If the parties negotiate a base year based on Prop 8 value, the tenant must be prepared that future increases in taxes above the base year may be in excess of 2% per year.
- Tenants should proactively ask whether the property is currently subject to a Prop 8 assessment.

## **Playbook** for assigning or subleasing a lease or lease portfolio as part of a larger business acquisition.

Why is this important to your business client?

- Due Diligence of real estate leases held by a target is part of the standard due diligence performed by the acquiring company.
- A given target may lease one or more properties, and the viability and/or profitability of the acquisition is linked to whether the target's lease(s) may be assigned to the buyer.
- Nearly all commercial leases contain specific terms regarding the role the Landlord plays in any assignment.

## **Playbook** for assigning or subleasing a lease or lease portfolio as part of a larger business acquisition. (Cont.)

- Certain leases may be assigned without Landlord's consent in the event of a sale of the underlying business.
- Certain leases require the Landlord's written consent in its reasonable discretion.
- Certain leases require the Landlord's written consent in its sole discretion.
- Due diligence review will determine where the lease falls in this transfer continuum.
- Ask your client how important these leases are to their future plans. The relative importance of the leases will affect the strategy going forward.

## If a **transfer of the lease** in the context of an acquisition requires the Landlord's prior written consent and Landlord does not consent

- This could have no effect on the transaction
  - The lease would be an asset excluded from the acquisition. This could occur where the buyer has no interest in the target's locations and will fold up the target's business into buyer's location.
  - The target would continue to hold the lease.
- This could have a significant effect on the transaction.
  - The valuation of the target could be affected.
  - The sales price could be affected.
  - The transaction might not move forward if the transfer of the lease is a condition to the closing.

## Step One: Due Diligence.

Review the original lease and all amendments with a focus on the lease clauses governing assignment and sublease.

## Step One: Due Diligence – Review the Assignment and Sublease provisions

- Does this acquisition require the Landlord's consent?
- What is the process for requesting Landlord's consent, if consent is required? What items must be delivered to the Landlord?
- Review the notice provisions. Most assignment clauses include terms that require the target as assignor of the lease to provide notice, a copy of the letter of intent or acquisition agreement, and a series of supporting documents. Buyer's counsel should timely assemble and deliver the assignment documents package to the landlord as soon as practicable. Certain landlords will reject transfer notices which do not mirror the terms of the lease or are not delivered in the manner required by the lease. Landlord's response can delay closing of the acquisition.

## Step One: Due Diligence – Permitted Transfers

- Is there a “Permitted Transfer” clause that permits the assignment of the lease without the Landlord’s consent in the context of a merger, consolidation, sale of corporate assets or sale or other transfer of stock or equity?
- If there is a “Permitted Transfer” clause, are there any conditions that must be met? For example:
  - Is there a net worth test for the acquiring company?
  - With respect to an acquisition of a retail brand, does the clause require the acquiring party to acquire the operation and control of a minimum number of retail locations in the United States?
  - Are there any other limiting factors, which Buyer must satisfy? Buyer must timely fulfill its transfer obligations under the lease or the Landlord may delay or refuse to approve the transfer.

## Step One: Due Diligence – Review the Assignment and Sublease provisions (Cont.)

- Is there a “Recapture” provision that permits the Landlord to terminate the lease upon an assignment or sublease of the premises? Does the “Recapture” provision apply to this acquisition? Recapture and similar provisions should be picked up in due diligence and discussed with Buyer. Where Landlords are not interested in renegotiating terms with Buyer, such clauses can be fatal.
- Is there a provision that automatically increases the rent upon an assignment or sublease? Does this provision apply to this acquisition?



## Step One: Due Diligence – Review the Assignment and Sublease provisions (Cont.)

- Is there a provision that states Landlord is entitled to all “excess rent” in connection with an assignment or sublease? Does this provision apply to this acquisition?
- Are there options to renew? Rights of First Refusal to purchase the property or lease additional space? Are these options and other rights exercisable only by the original tenant, or can they be exercised by the acquiring company, too, as successor-in-interest? Are the options transferrable to the Buyer/Assignee?

## Step Two: Prepare the Assignment of Lease

- This form is often attached as an exhibit to the Acquisition Agreement.
- The target assigns all obligations under the lease as of the closing date.
- The acquiring company assumes all obligations under the lease as of the closing date.
- The parties will typically negotiate the assignment so that any guarantors of the target are released when the lease is assigned, and will limit the target's liability to the actual lease term excluding any option terms. The Assignment must expressly exclude option terms or target's liability may continue during the option terms as well as the lease term.

## Step Three: Prepare and Deliver the Notice to the Landlord

- Notice will differ depending on whether the transfer requires the Landlord's consent or does not require Landlord's consent.
  - Notice + Request for Consent
  - Notice of Permitted Transfer
- Deliver the Notice in the manner provided by the Lease.

## **Step Four:** Landlord signs a written consent prior to closing of the acquisition

- If Landlord's consent is required, and Landlord's consent is not received, this could trigger an Event of Default under the Lease and delay the closing of the acquisition.
- Consider the business implications of failure to obtain Landlord's consent, including financing contingencies in the acquisition agreement, and contingencies regarding the obtaining of third party consents including landlord consents.

## Relevant provisions of the California Civil Code governing Assignment and Sublease

- Cal. Civ. Code § 1995.010 through Cal. Civ. Code § 1995.340
- Cal. Civ. Code Section 1995.310 states:

“If a restriction on transfer of a tenant's interest in a lease requires the landlord's consent for transfer subject to an express or implied standard that the landlord's consent may not be unreasonably withheld, and the landlord unreasonably withholds consent to a transfer in violation of the tenant's rights under the lease, in addition to any other remedies provided by law for breach of a lease, the tenant has all the remedies provided for breach of contract, including, but not limited to, either or both of the following:

## Relevant provisions of the California Civil Code governing Assignment and Sublease (Cont.)

(a) The right to contract damages caused by the landlord's breach.

(b) The right to terminate the lease.”

- Landlords as a condition to entering into a new lease, will require the tenant to waive these statutory rights and instead agree the tenant – as tenant’s sole remedy - has the right to seek an injunction to have the proposed transfer declared valid if a court determines the Landlord has acted unreasonably.

## Step Five: Post Acquisition

Assign or Sublease any leases (office, retail, etc.) that are not necessary for ongoing business operations.

## **Lease provisions to negotiate to allow your client to be acquired without Landlord's consent:**

- Permitted Transfer Clause
- Options, Rights of First Refusal Clause
- Notice Clause



## Presenters



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## J.J. Sherman, Esq.

J.J. Sherman, Esq. is an experienced attorney with a diverse practice that covers commercial real estate matters and commercial agreements. She began her legal career at Sullivan & Cromwell LLP in New York City and later joined Latham & Watkins LLP in Los Angeles before opening her own practice, Law Offices of J.J. Sherman, P.C., in 2009. Clients include fashion and lifestyle brands, food and beverage brands, finance, technology and fintech companies, media companies and individuals. J.J. is admitted to practice law in California and New York. She currently serves on the Executive Committee of the Real Property Law Section of the CLA and is a former chair of the CLA's sub-committee on commercial leasing.

J.J. is an Adjunct Professor of Law at St. John's University School of Law and has taught real estate drafting. She also serves as a member of the Advisory Board of the Mattone Family Institute for Real Estate Law at St. John's University School of Law. J.J. obtained her Juris Doctor, magna cum laude, from St. John's University School of Law, where she was a member of St. John's Law Review. She graduated from Marymount Manhattan College, summa cum laude with a B.A. in History and a B.A. in Theater.



## Holden W. Stein

Holden W. Stein has broad experience in business and real property transactions, including mergers and acquisitions, securities offerings, complex commercial transactions, commercial leasing, entity formation and structuring for real property acquisition and business purposes, entity reorganization, and general business matters in a wide range of industries.

Holden first worked for larger firms such as Wendel Rosen in Oakland and in the LA and San Francisco offices of Crosby Heafey Roach & May (now Thelen Reid) before founding and running Stein Law Group in San Francisco for over a decade and then joining his current firm Fathom Law PC as a partner in 2015. Holden works with clients in most industries including technology, retail, hospitality, finance, and others.

Holden earned his J.D. from Howard University School of Law where he served as captain of the International Moot Court Team, obtained a Masters in International Studies at Oxford University (UK), and a BA in Political Science at University of California at San Diego.

Holden is admitted to practice law in California and Michigan. He is currently a member of the California Lawyers Association Real Property Law Section sub-committee on commercial leasing, and is a former chair of the California Lawyers Association Business Law Section sub-committee on Partnerships and Limited Liability Companies.

## Special thanks to:

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**The Commercial Leasing Subcommittee** of the CLA Real Property Law Section

**The Executive Committee** of the CLA Real Property Law Section

# **What's Trending in California Commercial Real Estate – Fall 2023 Edition**

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Holden Stein, Esq., Fathom Law, PC**

Thursday, September 21, 2023

Additional CLE Materials

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**FORM OF NOTICE TO LANDLORD**

[Letterhead of party providing notice]

VIA [Method of Delivery]

[Date of Notice]

[Name of party receiving notice]  
[Address of notice recipient]

Re: [Insert name of Agreement] dated [Insert date of Agreement] (“Lease”) between [Insert Party] (“Landlord”) and [Insert Party] (“Tenant”) relating to approximately \_\_\_\_\_ square feet at [Insert Address of Premises] (“Premises”). Capitalized terms used herein but not defined shall have the meanings given to them in the Lease.

To Whom It May Concern:

Pursuant to Section [Insert section reference to Assignment Clause in Lease] of the above-referenced Lease, please let this serve as a “Transfer Notice” under the Lease. Tenant desires Landlord’s consent to the assignment of the Lease to [Insert Name of Acquiring Party] (“Assignee”), whose address is \_\_\_\_\_, which will occur in connection with [Insert description of acquisition transaction]. The proposed effective date of the assignment is the closing date of [Insert description of acquisition transaction].

A copy of the lease assignment and financial statements of Assignee are included with this request for consent.

Please provide Landlord’s decision with respect to approval as soon as possible. Please let us know as soon as possible should Landlord require any additional information in the meantime.

Thank you for your cooperation in this matter.

Sincerely,

[Insert name of party delivering notice]

By: \_\_\_\_\_  
Name:  
Title:

## FORM OF ASSIGNMENT AND ASSUMPTION OF LEASE

### ASSIGNMENT AND ASSUMPTION OF LEASE AGREEMENT

THIS ASSIGNMENT AND ASSUMPTION OF LEASE AGREEMENT (this “Assignment”) is made and entered into as of \_\_\_\_\_ (the “Effective Date”), by and between \_\_\_\_\_ (“Assignor”) and \_\_\_\_\_ (“Assignee”).

WHEREAS, Assignor entered into that certain Lease dated \_\_\_\_\_ (the “Lease”) with \_\_\_\_\_ (“Landlord”), attached hereto as Exhibit A, and incorporated herein by reference.

WHEREAS, in connection with [INSERT DESCRIPTION OF ACQUISITION TRANSACTION], Assignor desires to assign to Assignee, and Assignee desires to accept from Assignor, all of Assignor’s rights, obligations, title, estate and interest in, to and under the Lease, subject to the terms of this Assignment.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, the parties agree as follows:

1. **Assignment.** Assignor hereby assigns, transfers, and conveys to Assignee all of Assignor’s right, title and interest in and to the Lease as of the Effective Date.
2. **Assumption.** Assignee hereby assumes all liabilities and obligations of Assignor under the Lease which arise on or after the Effective Date and agrees to perform all obligations of Assignor under the Lease which are to be performed or which become due on or after the Effective Date.
3. **Indemnity.** Assignee shall indemnify, defend and hold Assignor harmless from any claim, liability, cost or expense (including without limitation reasonable attorneys’ fees) arising out of the Lease from and after the Effective Date. Assignor shall indemnify, defend and hold Assignee harmless from any claim, liability, cost or expense (including without limitation, reasonable attorneys’ fees) arising out of the Lease prior to the Effective Date.
4. **Further Assurances.** Assignor and Assignee each covenant that it will, at any time and from time to time following a written request therefor, execute and deliver any additional or confirmatory instruments and take such further acts as the other party may reasonably request to evidence fully the assignment and assumption contained herein.



5. **Counterparts.** This Assignment may be executed in counterparts (including by means of facsimile, pdf or other electronic signature pages), any one of which need not contain the signatures of more than one party, but all such counterparts taken together shall constitute one and the same agreement.
6. **Binding Effect.** This Assignment shall be binding upon Assignor and Assignee and their respective successors and assigns. No further assignments or assumptions of the Lease shall be valid without the express prior written consent of Landlord. This Assignment shall not confer any rights or remedies upon any third party.
7. **Conditions of Effectiveness:** The assignment and assumption pursuant to Sections 1 and 2 above are subject to and conditioned upon the express written consent of Landlord, which shall be documented in a separate consent document (the "Landlord Consent"), and dated of even date herewith.
8. **Governing Law:** This Assignment shall be construed in accordance with and governed by the laws of the State of \_\_\_\_\_.
9. **Entire Agreement:** This Assignment, the Landlord Consent and the agreements and documents referred to herein or attached hereto, including, without limitation, the Lease, contain the entire agreement and understanding between the parties with respect to the subject matter hereof and supersede all prior agreements and understandings, whether written or oral, related to such subject matter in any way.

[signature page follows]

IN WITNESS WHEREOF, the undersigned have executed this Assignment as of date first above written.

ASSIGNOR:

\_\_\_\_\_

By: \_\_\_\_\_

Name:

Title:

ASSIGNEE:

\_\_\_\_\_

By: \_\_\_\_\_

Name:

Title:

## FORM OF CONSENT OF LANDLORD

### LANDLORD'S CONSENT TO ASSIGNMENT AND ASSUMPTION OF LEASE

THIS LANDLORD'S CONSENT TO ASSIGNMENT AND ASSUMPTION OF LEASE (this "Consent") is made this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, to be effective as of the Effective Date (as defined below), by and between ABC CO. ("Assignor"), and XYZ CO., a California corporation ("Assignee") and [Name of Landlord] ("Landlord").

### RECITALS

A. Assignor and Landlord are parties to a [**Enter Name of Lease**] dated [**Enter Date of Lease**] (the "Lease"), pursuant to which Assignor leases [**Enter Location of Premises**] (the "Premises").

B. Pursuant to that certain Asset Purchase Agreement dated \_\_\_\_\_, \_\_\_\_\_, by and between Assignor and Assignee (the "Purchase Agreement"), Assignor desires to assign, transfer and convey to Assignee all of Assignor's right, title and interest in and to the Lease, and Assignee agrees to assume all of Assignor's rights and obligations as tenant under the Lease, effective as of the Closing Date (as that term is defined in the Purchase Agreement) (the "**Effective Date**").

C. Assignor has requested Landlord's consent to an assignment of the Lease from Assignor to Assignee (the "Assignment"). Landlord is willing to consent to the Assignment on the terms and conditions contained herein.

### CONSENT

NOW THEREFORE, in consideration of the premises and the mutual agreements, promises and covenants contained herein, the sufficiency of which is hereby acknowledged and intending to be legally bound hereby, the parties hereby agree as follows:

1. Landlord's Consent. Landlord hereby consents to and accepts notice of the Assignment, subject to the terms and conditions of this Consent.
2. Character of Consent. This Consent is not, and will not be deemed or construed as, a consent to any future assignment, a consent to any sublease, subletting, or other transfer, or a renewal or extension of the Lease. This Consent shall not, and will not be deemed or construed to, modify, waive, or affect any of the provisions, covenants, or conditions of the Lease, waive any breach of the Lease or any of the rights of the Landlord, or enlarge or increase Landlord's obligations under the Lease.
3. Assumption of Obligations. For the benefit of Landlord and Assignor, Assignee expressly assumes and agrees to perform and comply with every obligation of Assignor under the Lease applicable to the Premises as of the Effective Date.
4. Continuing Liability of Assignor. Assignor will remain primarily liable for, and will not be released from, the full and faithful performance of all terms and conditions of

the Lease, notwithstanding the existence of (and Landlord's consent to) the Assignment.

5. Obligations of Landlord. Landlord will not be liable for any cost or obligation of any kind arising in connection with the Assignment, including, without limitation, brokerage commissions, improvements to the Premises, or any security deposit required to be made by Assignee under the Assignment.
6. Continuation of Lease. Assignee agrees to attorn to Landlord, and Landlord and Assignee will have the same rights, obligations, and remedies under the Lease as were had by Assignor. However, in no event will Landlord (a) be liable for any act or omission of Assignor, (b) be subject to any offsets or defenses that Assignee had or might have against Assignor, or (c) be liable for the return of any security deposit not actually received by Landlord. Neither Landlord's election under this paragraph nor its acceptance of any rent from Assignee will be deemed a waiver by Landlord of any provisions of the Lease and this Consent.
7. Counterparts. This Consent may be executed in any number of counterparts, each of which shall be deemed an original and all of such counterparts shall constitute one and the same instrument.
8. Execution and Delivery. To facilitate execution and delivery of this instrument, the parties may execute and exchange, by facsimile or otherwise, counterparts of the signature page(s). An original or copy of a party's signature shall be sufficient to bind said party.
9. Notices. All notices required or permitted to be given under the Lease shall be in writing and shall be sent by registered or certified mail, return receipt requested, or by a reputable national overnight courier service, postage prepaid, or by hand delivery at the following addresses:

if to Assignee:

with a copy to:

if to Assignee:

with a copy to:

if to Landlord: \_\_\_\_\_

Any party may by written notice change its address for all subsequent notices. Except where otherwise expressly provided to the contrary, notice shall be deemed given upon delivery.

10. Security Deposit. A security deposit of \$\_\_\_\_\_ is currently being held by Landlord to secure Assignor's obligations under the Lease and Landlord may apply such security deposit in accordance with the terms of the Lease. The parties agree that upon the expiration or sooner termination of the Lease, Landlord shall refund the remaining security deposit, if any, to Assignee, in accordance with the other terms and provisions of the Lease.
11. Controlling Law. The terms and provisions of this Agreement shall be construed in accordance with and governed by the laws of California.
12. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto, their heirs, successors and assigns. As used herein, the singular number includes the plural and the masculine gender includes the feminine and neuter.
13. Captions. The paragraph captions utilized herein are in no way intended to interpret or limit the terms and conditions hereof; rather, they are intended for purposes of convenience only.
14. Partial Invalidity. If any term, provision or condition contained in this Agreement shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such term, provision or condition to persons or circumstances other than those with respect to which it is invalid or unenforceable, shall not be affected thereby, and each and every other term, provision and condition of this Agreement shall be valid and enforceable to the fullest extent possible permitted by law.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, this Consent has been duly executed by the parties hereto as of the date first above written.

ASSIGNOR:

ABC CO.

By: \_\_\_\_\_

ASSIGNEE:

XYZ CO.

By: \_\_\_\_\_

LANDLORD:

By: \_\_\_\_\_

## SAMPLE PERMITTED TRANSFER CLAUSE

(a) Permitted Transfers. Notwithstanding Section [INSERT REFERENCE TO LEASE CLAUSE THAT DOES NOT PERMIT ASSIGNMENTS WITHOUT LANDLORD'S CONSENT], Tenant may Transfer all or part of its interest in this Lease or all or part of the Premises (a "Permitted Transfer") to the following types of entities (a "Permitted Transferee") **without the written consent of Landlord:**

(1) any person or entity which, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with Tenant (an "Affiliate");

(2) any corporation, limited partnership, limited liability partnership, limited liability company or other business entity in which or with which Tenant, or its corporate successors or assigns, is merged or consolidated, in accordance with applicable statutory provisions governing merger and consolidation of business entities, so long as (A) Tenant's obligations hereunder are assumed by the entity surviving such merger or created by such consolidation; and (B) the Tangible Net Worth of the surviving or created entity is not less than [the Tangible Net Worth of Tenant and Guarantor as of the date hereof][\$Insert dollar amount]; or

(3) any corporation, limited partnership, limited liability partnership, limited liability company or other business entity acquiring all or substantially all of Tenant's assets, so long as (A) Tenant's obligations hereunder are assumed by the entity acquiring all or substantially all of Tenant's assets; and (B) such entity's Tangible Net Worth after such acquisition is not less than [**the Tangible Net Worth of Tenant and Guarantor as of the date hereof**][\$Insert dollar amount].

Tenant shall promptly notify Landlord of any such Permitted Transfer. Tenant shall remain liable for the performance of all of the obligations of Tenant hereunder, or if Tenant no longer exists because of a merger, consolidation, or acquisition, the surviving or acquiring entity shall expressly assume in writing the obligations of Tenant hereunder. Additionally, the Permitted Transferee shall comply with all of the terms and conditions of this Lease, including the Permitted Use, and the use of the Premises by the Permitted Transferee may not violate any other agreements affecting the Premises, the Building, Landlord or other tenants of the Building. No later than thirty (30) days after the effective date of any Permitted Transfer, Tenant agrees to furnish Landlord with (i) copies of the instrument effecting any of the foregoing Transfers, (ii) documentation establishing Tenant's satisfaction of the requirements set forth above applicable to any such Transfer, and (iii) evidence of insurance as required under this Lease with respect to the Permitted Transferee. The occurrence of a Permitted Transfer shall not waive Landlord's rights as to any subsequent Transfers. "Tangible Net Worth" means the excess of total assets over total liabilities, in each case as determined in accordance with generally accepted accounting principles consistently applied ("GAAP"), excluding, however, from the determination of total assets all assets which would be classified as intangible assets under GAAP including goodwill, licenses, patents, trademarks, trade names, copyrights, and franchises.

## **Samples of Assignment Clause**

### **SAMPLE 1:**

Tenant shall not voluntarily or by operation of law assign, transfer, mortgage or encumber (collectively, "assign or assignment") or sublet all or any part of Tenant's interest in this Lease or in the Premises without Landlord's prior written consent, not to be unreasonably withheld, conditioned or delayed.

### **SAMPLE 2:**

Tenant shall not voluntarily or by operation of law assign, transfer, mortgage or encumber (collectively, "assign or assignment") or sublet all or any part of Tenant's interest in this Lease or in the Premises without Landlord's prior written consent, to be given or withheld in Landlord's sole and absolute discretion.



## Samples of Option Clause

### SAMPLE 1:

The Option(s) shall be personal to the original Tenant hereunder and shall terminate and be of no further force or effect following any Transfer under Article \_\_\_\_ below.

### SAMPLE 2:

The Option(s) shall be personal to the original Tenant hereunder **and any Permitted Transferee** and shall terminate and be of no further force or effect following any Transfer under Article \_\_\_\_ below (**other than a Permitted Transfer**).