



## Silver Law Offices Inc.

A Real Estate Law Practice

9665 Wilshire Blvd. • Suite 810 • Beverly Hills, CA 90212  
888.600.6101 • [www.silverlawla.com](http://www.silverlawla.com) • [scott@silverlawla.com](mailto:scott@silverlawla.com)

### Tenant Rent Concessions: Landlord Opportunities

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For Landlords, receiving each new request for rent relief can be like death by a thousand paper cuts. However, there is a silver lining to be found in this seemingly dark cloud. For every concession which a landlord may "give" to a tenant to help them keep their doors open, there are numerous "takes" which can be reasonably obtained to benefit the landlord over the remaining term of the lease.

There are numerous landlord benefits which should be sought in connection with providing temporary tenant rent relief. Not all of them are appropriate for every situation, but should be considered as a menu of options to use depending on the circumstances. But there is one important condition to obtaining these benefits: they can only be achieved by a written document signed by landlord and tenant at the time of granting any concessions. This is required because most leases have an express provision stating that any future modification must be pursuant to "a writing signed by both parties." This language conforms with most states' statutes embodiment of the common law statute of frauds which provides that certain agreements (e.g. leases of a term exceeding one year) must be signed by the "party to be charged," subject to exceptions for legal theories such as equitable estoppel, justifiable reliance or partial performance – a discussion of these being beyond the scope of this article).

Landlords usually grant rent relief in one of several ways: verbally, in a short letter or email from the landlord, or in a formal lease amendment. Rent concessions provided in a conversation with a tenant typically take the form of an "agreement to forbear" from evicting and suing a tenant following to late and/or short payments. These verbal agreements are often preferable to lease amendments or other writings because (i) they require less time and effort (and if a lawyer is involved, less money) to accomplish than a lease amendment, (ii) may avoid immediate consideration of whether lender consent is required (this issue was addressed in the Legal Issues article in the May 2009 issue of SCB) and (iii) keeps the tenant lease file from containing amendments which provide a negative appearance when reviewed upon sale or refinance (nevertheless, all late payments, credits, deferrals and "charge offs" must still appear in some manner when the financial reporting is provided to any lender or buyer). If the concession is only granted verbally then every other written communication with that tenant, including emails and invoices, should include a written reservation of rights, such as "any partial payments of rent that are or have already been accepted by Landlord shall be without prejudice to any rights or remedies of the Landlord under the Lease; "such partial payments shall be treated as payment on account. You are still liable for all amounts owed under the Lease. Neither this writing, nor any acceptance of partial payment, is intended nor shall be construed as a waiver, release or relinquishment of any right, remedy or defense available, legal or equitable, all of which are expressly reserved;" "Landlord specifically reserves the right to, at any time, declare you in default, evict you from the premises, and collect all amounts due an owing under the Lease and any guaranty agreement."

A verbal agreement to provide rent relief, or simply to forbear from enforcing landlord's lease remedies provided some lower payment is made, may have the desired effect of the tenant keeping their doors open for business and continuing to pay some rent, but the landlord may overlook some of the following opportunities:



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**Percentage Rent Override:** If a tenant provides a detailed business plan indicating how they are going to survive and eventually thrive in the long run, provided the landlord reduce rent, then the tenant should be requested to "put their money where their mouth is" and agree to pay percentage rent based on some mutually agreeable formula, perhaps with a cap of the initially scheduled lease rents. Percentage rent can end once the landlord is eventually made whole, having received all amounts due under the lease (and perhaps with interest, if received later than scheduled). It's not likely that a tenant asking for rent relief will survive and then be a great success (in fact, rent relief usually just prolongs the inevitable, however it provides landlord's with extra time to try and find a replacement tenant); however, no landlord wants to feel like a sucker for having given help when tenant sales were poor and then not being in a position to recoup prior lost rents when they improve. An ancillary benefit is that percentage rent will require regular sales reporting.

**Sales/Financial Reporting:** Whether obtained through a percentage rent provision or independently, reporting of sales, operating statements and financial statements should be sought in connection with any rent relief request both as an initial matter and ongoing. Sales reports should be backed up by sales tax reports, register receipts or other evidence of consistency. Knowing a tenant's sales and financial condition provides for several benefits: (i) avoids tenants seeking rental assistance they don't really need, (ii) provides information to better assess which tenants are likely to fail or survive in the short run, and (iii) identifying recurring liabilities from other creditors such as franchisors and lenders may provide landlord with opportunities to leverage rent relief (e.g. "tell your franchisor that we'll lower the rent if they lower your franchise fees").

**Credit Enhancement:** Condition granting rent relief upon obtaining new additional lease guarantors. More "warm bodies," hopefully with equity in their homes, will greater ensure lease performance and increase the likelihood of recovery upon exercise of remedies.

**Promissory Note:** In circumstances where the principal(s) of an entity tenant is unwilling to extend or increase its personal liability, if any, under the lease, then a promissory note should be sought to evidence the tenant's obligation to repay deferred rent or recaptured rental abatement owed conditioned upon tenant default. Be careful not to require interest at rates in violation of your state's usury laws.

**FF&E Bill of Sale:** For premises containing businesses which could be re-tenanted faster, easier and less expensively with all furniture, fixtures and equipment ("FF&E") in place, require a conditional Bill of Sale whereby the landlord will obtain legal title to all FF&E upon any tenant default. Search for UCC financing statements filed against the FF&E as any such Bill of Sale will be held subject to the lien rights of the creditors there under. Recite that prior to a tenant default the FF&E will be subject to a landlord's lien and record a UCC financing statement to retain priority as a lien holder. Restaurants, hair salons, nail salons, tanning salons, laundry mats and yogurt shops are good examples of businesses where leasing as a turn-key store should result in expedited re-tenanting with minimal re-letting expenses. Any new tenant should be given a license to use said equipment but no bill of sale until at least two or three years of performance has been achieved.

**Termination Right:** Upon any rent relief request, that tenant's space should be added to the available list for your leasing broker to market. Accordingly, the landlord must obtain the right to terminate the lease upon finding a replacement tenant, subject to the existing tenant having the right to nullify the termination and redeem the lease upon becoming immediately current on all lease rent, as originally scheduled, and in some cases, providing additional credit enhancement.

**Use/Exclusives:** If the requesting tenant's use provision was too broad so as to permit a change of use which may conflict with other tenants, then take the opportunity to narrow it. If their exclusive as granted



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was so broad as to be limiting with regard to leasing other spaces (e.g. no "no other tenants may offer sandwiches") then work with the tenant to narrow it appropriately to provide sufficient protections but not hinder your efforts to lease other space.

Relocation: Flexibility to meet prospective tenants' size requirements can better be obtained if you have the ability to move tenants to achieve larger, or smaller, aggregate spaces. Better to have the flexibility to join two 1,500 sq. ft. spaces to lease to a new tenant who need 3,000 sq. ft. than to no be able to offer space to them because you have two such vacant spaces but they are not adjacent.

Co-tenancy Provisions: These provisions, which usually provide that upon the closure of certain key/anchor tenants and/or a certain level of overall vacancy the tenant is provided the dual remedies of extremely reduced rent and, eventually, lease termination rights, are very concerning to landlords (for obvious reasons) and are being policed and enforced by tenants with ever greater vigilance. Their removal should be sought as a condition to any tenant favorable lease modification. Short of removal, a landlord should at least obtain "end of the pain" protection (if non-existent) whereby the tenant has to decide to either end the lease or go back to full scheduled rent after operating in their space when the co-tenant vacancy conditions exist for more that a certain period, usually a year.

Options/Extend Term: If desirable, obtaining an extension to the lease term, either through early exercise of an option to extend, or otherwise, is a common condition to "lease restructuring." If not having this tenancy exist beyond its initial term is more desirable then removal/deletion of the tenant's option to extend the term should be sought.

NNN Rent Caps: If a lease contains limits on overall NNN rent, or any specific line item, such as taxes triggered on sale (e.g. "Prop. 13 protection" in CA), try to secure an increase in the limit amounts/percentages or removal altogether.

Continuous Operation Clauses: More than anything, the exponentially negative effect of dark stores on a shopping center is the motivating force (read "fear") driving landlords to even consider evaluating rent relief requests. Accordingly, if a lease permits a tenant to go dark and pay rent without being in default then it should be removed and replaced with a continuous operations clause which will require a tenant to keep its doors open for business during some minimal days and hours to avoid being in default under the lease.

Landlords should negotiate conservatively to avoid the appearance of having taken unfair advantage of tenants in dire circumstances. They should seek only the most important modifications which equitably address their reasonable concerns and ultimately place them in a position which is not materially different from the essential economic arrangement made upon lease signing. If not, then the surviving tenants will likely feel abused and exploited, and will seek the first opportunity to move and take advantage of the large tenant improvement allowances and free rent being offered by other landlords in this tenant favorable leasing market.