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Law Report

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Pop-Up Leases

Pop-up leases, short-term leases that last anywhere from six weeks to 12 months, are very popular today with both landlords and tenants in the retail sector. Retail landlords like them, because pop-up tenants fill vacant spaces in their shopping centers and provide rental income while landlords secure permanent, long-term tenants. Retail tenants favor them, because they can provide an entrée into highly desirable retail shopping centers or shopping districts, and, at the same time, allow tenants to test locations and generate publicity and good will for their retail brands. Often, landlords and tenants enter into pop-up leases with the great expectation of transitioning their leasing relationship from a temporary relationship into a permanent one, conditioned on positive sales volume, shopper traffic, and, of course, negotiation of mutually agreeable terms to a permanent, long-term lease.

J.J. Sherman

Best Practices for Pop-Up Leases in the Retail Sector

1. Cosmetic Work Only. Pop-up leases, generally, are simple lease agreements. Both landlord and tenant seek to avoid significant lease negotiation and upfront financial commitment, such as construction build-out costs. As the tenant, be sure to specify in your pop-up lease that tenant work will be limited to cosmetic work such as new paint, installation of a storefront sign, and installation of furniture, fixtures, and equipment (FF&E). In addition, if you do not plan to invest in the leasehold improvements, and will take possession of the pop-up space "as is," take time to perform a thorough inspection of the pop-up space and all of the utilities and equipment servicing the pop-up space (such as the HVAC unit) prior to signing the lease to ensure there are no material hidden costs to the lease.

Retail tenants favor pop-up leases, because they can provide an entrée into highly desirable retail shopping centers or shopping districts and, at the same time, allow tenants to test locations and generate publicity and good will for their retail brands.

2. Termination Rights and Relocation Rights. Landlords enter into pop-up leases intending to keep their options open. A standard form pop-up lease will include a right of landlord to terminate the pop-up lease if the landlord needs possession of the space, and a separate right of landlord to relocate the tenant to a different location in the shopping center in the landlord's discretion. Landlords require this flexibility in case a long-term tenant comes their way during the term of the pop-up lease. Tenants will often grant landlords relocation and termination rights because of the temporary nature of the pop-up lease, but they often will ask for at least 60 to 90 days' notice and blackouts on relocation or termination during the high traffic, high volume, holiday shopping season.
3. Protect the Delivery Date. In long-term leases, the landlord usually agrees to deliver possession of the leased premises on or before a certain date. If delivery does not occur on that date (other than due to a force majeure), the landlord often will agree to extend the rent commencement date and tenant's required opening date for each day of delay in delivery of the space, but otherwise, landlord will be reluctant to grant any additional tenant remedies. In a pop-up lease, if a tenant is planning for a very specific start date and end date, a delay in landlord's delivery of possession could be detrimental to the tenant's business plan, especially if the tenant's inventory is seasonal. A concerned tenant can ask for the right to terminate the pop-up lease if possession is not delivered within a certain number of days past the delivery date. ◆

J.J. Sherman counsels clients in the areas of commercial real estate, commercial contracts, social media and entertainment law. In 2012, she negotiated a number of pop-up leases for trendy retailers in Southern California. She can be reached at jj@jjshermanlaw.com.

Dealing with Contract Overflow?
Law Offices of J.J. Sherman, P.C. is available to assist in-house counsel with the creation of standard form agreements as well as the review and negotiation of vendor contracts and sales contracts. We also can provide coverage to an in-house legal team when a lawyer takes a leave of absence.

IN THIS ISSUE:

Pop-Up Leases . . . 1
Tenant Requests to Assign and Sublet . . . 2
Spotlight on the Retail Lease . . . 3
Wall Street and Social Media . . . 3
Copyright Update . . . 4

Tenant Requests to Assign and Sublet

Are you about to sign a commercial real estate lease with a multiyear term? You likely expect that the transfer provisions in the lease will be irrelevant during your tenancy, but keep in mind that business plans change from year to year, and well-drafted transfer provisions can leave your business with flexibility to assign, to sublet, and to be acquired.

Transfer provisions in leases generally restrict the tenant from consummating any type of transfer during the lease term without the landlord's prior consent. They are drafted broadly to prohibit both direct assignments (Party A transferring the lease to Party B) as well as indirect assignments (an equity transfer in Party A constituting a change of control in Party A). The legal standard for approving or disapproving a request to assign or sublet depends on the jurisdiction where your leased property is located.

What is the legal standard for approving a tenant transfer in the state of California? California follows the minority rule. When a California commercial lease reads, "Tenant shall not assign this lease without the prior written consent of landlord," but is silent on the standard for granting or withholding consent, check the execution date of the lease. If the lease was executed before September 23, 1983, the landlord may approve or disapprove the assignment in its sole discretion (and is permitted by statute to act unreasonably). If the lease was executed after September 23, 1983, the landlord's consent may not be unreasonably withheld.

The California Civil Code does permit a commercial lease to include express standards or conditions for giving or withholding consent. For instance, a lease may condition landlord's consent on (i) no default or potential default existing under the lease, (ii) tenant paying landlord's costs in connection with the proposed transfer, (iii) tenant delivering an assignment and assumption agreement signed by the transferee, and/or (iv) landlord receiving some or all of any consideration tenant receives from a transferee in excess of the rent under the lease.

What is the legal standard for approving or disapproving a tenant transfer in the state of New York? New York follows the majority rule. When a New York commercial lease restricts transfers without the landlord's consent, but is silent on the standard for granting or withholding consent, the landlord may arbitrarily refuse consent for any reason or for no reason at all.

When does a landlord act "reasonably"? Whether a landlord acts reasonably in withholding consent to a proposed transfer is a question of fact. The legal standard is that of a reasonable, prudent person in the landlord's position. Only factors which relate to the landlord's interest in preserving the property or in having the terms of the lease performed should be considered. The parties can minimize uncertainty by agreeing to a non-exclusive list of reasonable landlord objections at the outset. For example, the parties may designate as "reasonable" any objections (i) to the financial responsibility of the proposed transferee, (ii) to the legality and suitability of the proposed use and nature of the occupancy, (iii) that the proposed transfer may result in a breach of a provision in a lease, deed of trust, or other agreement to which the landlord is bound, or (iv) that the proposed transferee does not have the proper business experience.

How can you further protect your interests as a tenant? Plan for internal restructurings and potential mergers and acquisitions. Carve out specific transfers that do not require the landlord's approval, such as (i) transfers to an affiliate, subsidiary, or parent company, (ii) transfers to an entity with which tenant is merged or consolidated, or (iii) transfers to an entity which purchases all or substantially all of tenant's assets by stock purchase or otherwise. Landlords are often willing to preapprove these types of transfers so long as specific conditions are met. For instance, landlords often require that tenant's net worth following any such transfer must be equal to or better than tenant's net worth as of the date of the lease.

Well-drafted transfer provisions can leave your business with flexibility to assign, to sublet, and to be acquired.

Since it is reasonably foreseeable that a tenant will seek to assign or sublease its lease, or engage in a merger, acquisition, or other strategic transaction that triggers transfer provisions during the term of a multiyear lease, well-represented tenants can protect their business interests through a clear understanding of the local real estate law and through well-crafted transfer provisions. ◆

Supplier Diversity Announcement

As a 100 percent woman-owned business certified by the Women's Business Enterprise National Council (WBENC), we are proud to serve as a diversity supplier and help our clients achieve their commitment to diversity. We recognize that businesses gather strength from difference.

Law Offices of J.J. Sherman, P.C. is on the Minority and Women-Owned Law Firm Outside Counsel List of the FDIC.

Spotlight on the Retail Lease

No Kiosk Zones

Are you negotiating a new lease in a retail shopping center with a common area? Remember to ask for a "No Kiosk Zone" in front of and to the sides of your retail store. The fully negotiated "No Kiosk Zone" clause balances two economic interests – the landlord's desire to lease kiosks and carts in the common area as an additional stream of income versus the tenant's wish to maximize visibility of its storefront and to prevent vendors near its storefront from selling competing merchandise. "No Kiosk Zone" clauses vary. Sometimes, the landlord will agree that no kiosk, cart, or other structure, permanent or temporary, will be located within a delineated "No Kiosk Zone" (generally 10 or 20 feet from the tenant's lease lines). In other cases, the landlord only will agree to restrict the types of merchandise sold at kiosks or carts within 10, 20, or 50 feet of the lease lines of the premises. Expect the landlord to reserve the right to place customary common area amenities such as trash receptacles, benches, and landscaping within the No Kiosk Zone. ◆

Wall Street and Social Media

This spring, *The New York Times* reported that Wall Street firms are "tiptoeing into social media with strict controls and canned messages." On the one hand, firms "tightly monitor communications to ensure that they are in compliance with securities regulations." On the other hand, firms are beginning to view social media as a viable and "largely untapped" marketing opportunity.

Financial firms generally block employees from accessing social media sites like Facebook and Twitter at work and restrict employees from using social media sites for business purposes. Brokers who want to reach out to clients over Twitter or Facebook must seek special permission. If granted, the permission only allows brokers to post messages taken from a library of preapproved content. In special circumstances, the permission allows brokers to post their own scripted messages following approval of the scripted messages by their firm's compliance department.

This does not exactly allow for speedy communication, but it is a "best practices" procedure adopted by Wall Street firms following guidance from the Financial Industry Regulatory Industry (FINRA). In Regulatory Notice 10-6 "Guidance on Blogs and Social Networking Sites" and Regulatory Notice 11-39 "Guidance on Social Networking Websites and Business Communications" published in January 2010 and August 2011, respectively, FINRA reminds firms of their recordkeeping, suitability, content, and supervision requirements when social media is used for business purposes:

1. **Recordkeeping.** Firms are required to retain records of communications made by the firm or its associated persons related to the firm's business that are made through social media sites. This applies to communications made at an employee's work station as well as those made via an employee's personal communication device, such as a smartphone or a tablet computer.
2. **Suitability and Content.** A broker-dealer must determine that a recommendation is suitable for every investor to whom it is made. If a firm or its personnel recommends a security through a social media site, it triggers suitability requirements. Online communications that recommend a specific investment product may create substantive liability for the firm or its registered representative. As a best practice, FINRA proposes that firms consider prohibiting all interactive electronic communications that recommend a specific investment product and any link to such a recommendation unless a registered principal has previously approved the content. Alternatively, FINRA proposes that firms maintain databases of previously approved communications and provide their personnel with routine access to the templates. The FINRA guidance also states that firms might consider prohibiting communications that recommend a specific investment product unless the communication conforms to a preapproved template and the specific recommendation has been approved by a registered principal.
3. **Supervision.** Firms must adopt policies and procedures reasonably designed to ensure that their associated persons who participate in social media sites for business purposes are appropriately supervised, have the necessary training and background to engage in such activities, and do not present undue risks to investors. Firms must have a general policy prohibiting any associated person from engaging in business communications in a social media site that is not subject to the firm's supervision. Firms also must require that only those associated persons who have received appropriate training on the firm's policies and procedures regarding interactive electronic communications may engage in such communications.

FINRA's guidance (Regulatory Notice 10-6 and Regulatory Notice 11-39) is available on the FINRA website at www.finra.org. ◆

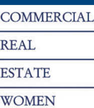
FIRM NEWS

Firm Mention!

J.J. Sherman was mentioned in the Spring 2012 issue of Marymount Manhattan College magazine for her work with Take Wing And Soar Productions, a New York-based theater company dedicated to helping classical actors of color realize their full potential.

Commercial Real Estate Women!

Law Offices of J.J. Sherman, P.C. is proud to serve as a 2012 Sponsor of CREW-LA and a 2012 Sponsor of CREW DC. ◆



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WHAT'S INSIDE: ◆ Pop-Up Leases ◆ Tenant Requests to Assign and Sublet ◆ Spotlight on the Retail Lease ◆ Wall Street and Social Media ◆ Copyright Update

Copyright Update

Lead Singer of Village People Reclaims Copyrights

The April 2012 Law Report discussed how songwriters, composers, and authors may use Section 203 of the U.S. Copyright Act to terminate copyright grants that were signed by them on or after January 1, 1978 after 35 years. On May 7, 2012, in *Scorpio Music S.A., et al. v. Victor Willis*, the Southern District of California held that Victor Willis, songwriter and original lead singer of the Village People, could unilaterally exercise his termination rights under Section 203 of the U.S. Copyright Act and obtain his copyright interests in 33 hit songs including "YMCA" and "In the Navy." The court concluded that "a joint author who separately transfers his copyright interest may unilaterally terminate that grant" without the majority consent of the other joint authors. In the future, publishers are likely to require joint authors to sign one single copyright grant (rather than individual grants) to avoid this outcome.

California Resale Royalties Act Held Unconstitutional

Since 1977, when a work of fine art sold in the secondary market for over $1,000 and either the seller resided in California or the sale took place in California, the seller or the seller's agent has been required, under the California Resale Royalties Act (California Civil Code Section 986) ("CRRA"), to pay the artist a royalty equal to 5 percent of the amount of the sale.

In October 2011, a group of artists and their heirs sued Sotheby's and Christie's claiming the world-renowned art auction houses, acting as the agents for California sellers, sold works of fine art at auction and failed to make resale royalty payments under the CRRA.

In an interesting turn of events, on May 17, 2012, in *Estate of Robert Graham v. Sotheby's, Inc.* and *Sam Francis Foundation v. Christie's, Inc.*, the United States District Court for the Central District of California dismissed the plaintiffs' claims, finding the CRRA violated the Commerce Clause of the United States Constitution by seeking to regulate sales of art that take place wholly outside of California.

This decision is a major defeat for fine artists and a major victory for art auction houses and art galleries. It is expected by many to be appealed to the Ninth Circuit Court of Appeals. ◆

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