



ACC NCR Evaluate the Real Estate! Real Estate Considerations for Non-Real Estate Companies

October 27, 2020, 12:30-1:30 pm

Presented by:

Diane Shapiro Richer and Jennifer Jones,
Shareholders in the Real Estate group of AmLaw 100 law firm, Polsinelli
and
Marc Sobel,
Executive Vice President and General Counsel of JM Zell Partners, Ltd.

Appendices Set

- Appendix 1: Form of Due Diligence Checklist
- Appendix 2: Form of Letter of Intent
- Appendix 3: Form of Estoppel Certificate
- Appendix 4: SNDA Basics and Sample Provisions
- Appendix 5: Real Estate Alert: DC Covid-19 Laws Protecting Mortgage Borrowers
- Appendix 6: Real Estate Alert: DC Covid-19 Laws Protecting Tenants

Appendix 1



*Prepared by:
Diane Shapiro Richer*

**FORM OF
DUE DILIGENCE CHECKLIST
POTENTIAL ACQUISITION OF
NEWCO
REAL ESTATE ASSETS EXCERPT**

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1. Corporate and Organizational Records
 2. Subsidiaries
 3. Governmental Filings, Compliance, Licenses and Consents
 4. Securities
 5. Financing Documents
 6. Financial Statements and Accounting Matters
 7. Tax Matters
 8. Officers and Directors; Employees; Labor and Related Matters
 9. Employee Benefits Plans
 - 10. REAL ESTATE ASSETS**
 11. Insurance
 12. Intellectual Property
 13. Contracts and Arrangements
 14. Environmental and Related Matters
 15. Litigation and Other Legal Matters
 16. Marketing and Operations
 17. Consents
 18. Miscellaneous
 19. International Trade, Anti-Corruption and Related Matters

Item	Responsible Party	Status
10. REAL ESTATE ASSETS		
A. INVENTORY REAL ESTATE ASSETS		
1. Listing of Real Estate Assets – Owned, Leased, Contract and Easement Rights, Uses, and Locations		
B. TITLE AND SURVEY		
2. Title Commitment (current) and/or Abstract of Title		
3. Copies of all Title Exception Documents and Deed into Newco		
4. Mortgages/Deeds of Trust and other Financing Liens, Monetary Liens – <i>see also Mortgage Section, below</i>		
5. Declarations and Restrictive Covenant or Easement Agreements (REAs)		
6. Copies of existing Owner’s Title Policies		
7. ALTA Survey		
8. Plat of Subdivision		
9. Title-related Estoppels, e.g., under Declarations and REAs		
10. Rights of First Refusal or Offer		
C. LEASES AND SUBLEASES		
11. Rent Roll and Delinquency Report		
12. Ground Leases, if applicable		
13. Space Leases - Newco as Tenant: Leases and Subleases by which Newco leases property <u>from landlords</u> (or sublandlords) – copies of all lease agreements, complete with all exhibits, and all amendments, supplements,		

Item	Responsible Party	Status
assignments, commencement date certificates, letter agreements and other modifications; status of any security deposit, tenant improvement allowances, abatements, and other tenant concessions		
14. Space Leases - Newco as Landlord: Leases and Subleases by which Newco leases (or subleases) property <u>to tenants</u> (or subtenants) – copies of all lease agreements, complete with all exhibits, and all amendments, supplements, assignments, commencement date certificates, letter agreements and other modifications, letters of credit/deposits held, status of any tenant improvement allowances, abatements, and other tenant concessions		
15. Estoppel Certificates – new and historical		
16. Lease Abstracts or Summaries – new and historical		
17. Subordination, Non-Disturbance & Attornment Agreements (SNDAs) with Mortgage Lenders and/or Ground Lessors		
18. Listing Agreements and Lease Commission Agreements		
19. Letters of Intent - Leasing		
20. License Agreements, e.g., with telecom providers		
21. Other Occupancy Agreements		
D. AGREEMENTS OF SALE, MANAGEMENT, CONSTRUCTION; AND SERVICE CONTRACTS		
22. Property Management Agreements		
23. Listing Agreements and Commission Agreements – Purchase and Sale		

Item	Responsible Party	Status
24. Parking Management Agreements		
25. Purchase and Sale Agreements and any Option Agreements – historical and pending		
26. Letters of Intent – Purchase and Sale		
27. Service Contracts – maintenance, landscaping, utilities, security, etc.		
28. Construction Contracts, Architect's and Engineer's Agreements		
E. ZONING AND LAND USE APPROVALS		
29. Zoning and Building Code Compliance Evidence - Zoning Endorsement to Title Policy; PZR Report; County Zoning Compliance Letter		
30. Planned Unit Development (PUD) Agreements, if applicable		
31. Site Plans, Proffers, Development Plans, and other Land Use Approvals and Conditions		
32. Certificates of Occupancy and other Occupancy Licenses or Permits		
33. Architectural Review Board Approval, if applicable		
34. FAR Analysis for Development Potential		
F. THIRD-PARTY REPORTS		
35. Appraisal		
36. Property Condition Report (PCR)		
37. Environmental Report (Phase I and/or Phase II)		
38. Soil Conditions Report (for development or construction projects)		

Item	Responsible Party	Status
G. OTHER PROPERTY DUE DILIGENCE		
39. Fixtures, Equipment and Personal Property used in Operating the Real Estate – identify significant equipment and any financing liens		
40. Insurance: Property and Liability Insurance Policies and Disclosure of any pending Claims and Claims resolved in past 5 years (<i>see also Insurance Due Diligence Section</i>)	Risk Manager	
41. Real Estate Tax Bills, Association Assessments and other Assessments		
42. Governmental and Quasi-Governmental Notices – of Condemnation, Violation, other; and any Correspondence with Governmental Authorities pertaining to the Property		
43. Utility Invoices		
H. MORTGAGES/DEEDS OF TRUST AND OTHER MONETARY LIENS (<i>SEE ALSO FINANCING SECTION</i>)		
44. Mortgage Loan Document Review, if applicable – review Note, Mortgage/Deed of Trust, Loan Agreement, Guaranties, Indemnities, etc., to understand loan term, prepayment rights/restrictions/penalties, rate and payment terms, assignment/assumption rights, guaranty obligations, Due-on-Sale clause, Lender approval rights, financial and other covenants, and other loan terms, conditions and restrictions		
45. Letters of Credit		
46. Interest Rate Swap/Hedge Agreements		
47. Financing Abstracts, if available		
48. Estoppels and SNDAs		

Appendix 2



*Prepared by:
Marc Sobel*

DRAFT LETTER OF INTENT- EXAMPLE ONLY

DATE

Name

Title

Company

Address

Suite

City, ST ZIP

Dear _____:

On behalf of _____ (the "Tenant"), thank you for the proposal to lease space at _____, dated _____ 20__, from _____ (the "Landlord"). In further evaluating the feasibility of a potential transaction at _____ (the "Building") Tenant has authorized _____ to prepare the following letter detailing the terms and conditions which need to be met by the Landlord in order for Tenant to further pursue such a transaction.

If the Landlord can structure a transaction under the following terms and conditions, a revised proposal to lease should be prepared and forwarded to our offices for consideration by Tenant.

This letter is solely an invitation to offer and shall not in any way be construed as an offer to lease, be binding upon Tenant, or impose any duty of good faith bargaining. Tenant retains the right to withdraw this letter at any time. Landlord and Tenant each acknowledge that this letter is in no way intended to be a complete or definitive statement of all the terms and conditions of the proposed transaction, and that the negotiation and execution of a satisfactory lease will be required. Neither Landlord nor Tenant shall have any liability to the other party for damages arising from a termination of negotiations with respect to a lease before execution and delivery of a lease.

PREMISES:

The entire _____ floor consisting of approximately _____ rentable square feet of space as outlined in red on the attached Exhibit A.

The exact measurement shall be in accordance with the [Washington, D.C. Association of Realtors Standard of Measurement (____ version)] and shall exclude all internal and external balconies].

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LEASE COMMENCEMENT DATE:

_____ or the date of substantial completion of the Premises, whichever is later. Substantial completion shall occur when (i) all improvements (excluding long lead time items) have been completed in accordance with approved final construction documents, subject only to minor punch-list items of work which do not substantially interfere with Tenant's intended use of Premises and (ii) all governmental requirements applicable to the construction and occupancy of the Premises are satisfied.

LEASE TERM:

_____ () years.

BASE RENTAL:

Years 1 - 5 \$_____ per rentable square foot, per annum on a full service [fully net] basis.

Years 6 - 10 \$_____ per rentable square foot, per annum on a full service [fully net] basis.

TAXES AND OPERATING CHARGES:

Beginning upon [January 1, 202_] and during each year thereafter during the lease term, Tenant agrees to pay its pro rata share of increases in Annual Operating Charges and Real Estate Taxes above [the actual ____ Base year costs incurred by Landlord] [a base amount equal to \$ ____ per rentable square foot, to be contributed by Landlord]. [Annual increases in Annual Operating Charges and Real Estate Taxes shall not exceed three (3%) percent.]

Real Estate Taxes shall exclude any federal or state tax on income, estate, profits, excess profits, business tax, property transfer taxes or fees, and any penalties and interest on such Real Estate Taxes. In addition, increases in tax assessments due to the sale of the Building shall be the responsibility of the Landlord and shall not be passed onto Tenant as part of Annual Operating Charges or Real Estate Taxes. Operating Charges shall not include depreciation of the Building, payments of principal and interest on any mortgages or other encumbrances on the Building or the land thereunder, ground rent, the cost of tenant improvements, concessions or leasing commissions, costs associated with any violation of law by Landlord, the Building or land thereunder or appurtenant, amounts reimbursed to Landlord through the proceeds of insurance or

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by contractors or other persons, costs of repairs or replacements incurred by reason of fire or other casualty or by any other occurrence for which Landlord is responsible for insuring under the lease, advertising and promotion costs, the cost of repairs or replacements incurred by reason of ground water or other exposure to water whether or not such occurrences can be insured by the Landlord, the cost of work or services performed exclusively for other tenants, the cost of enforcing the leases of other tenants, the cost of complying with applicable law, the costs incurred in connection with the transfer, taking or condemnation of the Building or any land thereunder, any other items of replacement or improvements not expensed under the Internal Revenue Code, and any fees paid to the management company or other contractors in excess of market rates.

Operating Charges and Real Estate Taxes shall be pro rated as though the Building is ninety-five (95%) leased, provided, however, such total Charges and Taxes as calculated, shall not exceed the actual amounts incurred for the specific time period involved. [Notwithstanding anything to the contrary herein, an adjustment to Real Estate Taxes shall be made to reflect such amounts as those for a fully assessed building.]

BASE RENTAL ESCALATIONS:

Beginning on January 1, 202__, and on each anniversary thereafter during the lease term, the Base Rental shall be increased by _____ percent (____%) of the increases in the Consumer Price Index for Urban Wage Earners and Clerical Workers, All Items, Washington, D.C. [FOR FLAT INCREASE USE: _____%]. In no event shall the annual increase exceed _____ percent (____%).

RENT ABATEMENT:

Landlord shall abate the first _____ (____) months of Tenant's Base Rental [, Taxes and Operating Charges] under the lease.

IMPROVEMENTS:

[FOR "AS IS" PREMISES - TENANT HIRES CONTRACTOR -

Landlord shall provide the Premises in its "as is" condition, subject to the terms described below.

Tenant shall choose its own contractor and subcontractors, with the exception of mechanical, sprinklers and structural improvements, which shall be performed by Landlord's contractors, to construct its improvements in the Premises in accordance with Tenant's space plan.

Landlord shall provide to Tenant an allowance equal in amount to \$_____ per rentable square foot of the Premises to construct all improvements in the Premises above a Base Building. Any

amount of the allowance that is unused by Tenant for the improvements shall be paid to Tenant by the Landlord or credited as additional rent free period, or otherwise applied in Tenant's sole discretion. Base Building environment to be provided to Tenant for Tenant's own construction shall be delivered by Landlord, at its sole cost and expense, in the condition and level of completion as follows:

Floors: Floor surface ready to receive finishes without filling, leveling, flashing, chipping or other preparation.

Walls: Perimeter walls, core walls, furred solid walls, columns bulkheads, etc. to be sheetrocked, finished, prepped and prime painted ready to receive finish paint or wallcovering.

Windows: Window sills, mullions, trim, or perimeter heating trim complete, installed and finished. Window blinds to be complete, installed and bagged or wrapped for protection.

Elevator Lobby: All lobby features to be complete and installed including but not limited to elevator door frames, thresholds, call buttons, lights, ashtrays, trash receptacles, and code required signage. All lobby alarm systems including but not limited to detectors, annunciators, bells, pull stations, lights, flashers, hose cabinets, extinguishers, etc. to be installed and complete.

Core Area: All core area spaces, including closets, toilet rooms, etc. to be complete and finished and ready for tenant use.

Plumbing: All wetstack plumbing systems to be complete and ready for connection of Tenant-added plumbing work.

Electrical: Electrical system to be entirely complete with the exception of wall outlets and their connection to ceiling mounted power distribution boxes. Lighting circuits to be complete with only the final connection from the ceiling mounted distribution boxes to the fixtures remaining. All main systems to be complete including, but not limited to, breaker panels, disconnects, transformers, etc. requiring no further work for operation or occupancy.

Mechanical Systems: Mechanical system to be entirely complete with only the connection of flex duct between duct taps and building stock ceiling mounted diffusers or light boots to remain. Thermostats to be installed, connected and working, with only mounting of thermostats and finish plates into finished tenant walls remaining. All elements of the base building H.V.A.C. system to be provided by the Landlord to be installed. Supplemental V.A.V. boxes to be available from stock to be added to the existing H.V.A.C. system on this floor when necessary, in the Tenant's sole, but reasonable discretion.

Sprinklers: Sprinkler system to be complete and operational with only simple relocations, supplemental branches, drops and heads to be performed or added to satisfy code and Tenant's plans. In no circumstances may sprinkler piping interfere with the design finished ceiling height.

Alarms, and Life Safety Systems: All building tenant area alarm circuits, emergency circuits, equipment, fixtures and trim to be complete and operational with only the simple mounting of fixtures and trim into Tenant's finished walls and ceilings to remain.

Access: The space must be accessible during all working hours without interference by base building contractors or continuing base building work. Elevators must be operational and protected for use by contractors to bring materials, equipment, tools and personnel to the site. Free parking must be available on-site for a minimum of ten spaces during the period of work, with free access in and out of vehicles, and the parking area. The Tenant's contractor will need to bulk stock the floors with most of the materials during several deliveries and will need to remove one or more sections of perimeter glass and mullions to bring materials in by crane or lift. The Landlord agrees to accommodate such needs in a reasonable manner.

Trash Removal: If Landlord does not provide joint use of construction debris dumpsters, a space will need to be set aside for the Tenant's contractor's use during the period of construction.

If the estimated cost for the Tenant's improvements exceeds the amount of the allowance, Tenant shall pay the deficiency to the contractor after the allowance has been exhausted or in accordance with a mutually agreed to payment schedule, except that the Tenant may withhold an amount equal to ten percent (10%) of the contract price of the improvements, (or if Tenant's responsibility for payment under the contract is less than ten percent (10%), instruct Landlord to withhold an amount which together with Tenant's portion will total ten percent (10%)) until Tenant approves of the completion of all construction and finish work. If the cost of the improvements is less than the allowance, Tenant may instruct the Landlord to withhold ten percent (10%) of the contract price of the improvements until Tenant notifies the Landlord in writing that Tenant approves of the completion of all construction and finish work.

Landlord and the Landlord's mechanical, sprinklers and structural contractors shall not receive fees for supervision of the construction or profit, overhead or general conditions from the Tenant for any work that would be considered building standard, provided, however, that for work that would be considered above building standard, a total fee of no more than ____ percent (____%) for profit, overhead and general conditions will be due to Landlord's contractors for such work performed. Landlord shall in no case receive fees for supervision of the above building standard construction. All records shall be kept by an open-book cost accounting method.

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Landlord certifies that the Building meets Washington, D.C. governmental approval and will be occupiable using the equivalent of building standard materials and assemblies, customary practice and technique.

Landlord will provide a complete set of as-built drawings, specifications and documents for the Tenant's use in the design of the Premises, and will make available the Building engineers, architects, and engineering designers to answer any questions about the existing Building systems and structure.]

[FOR USE OF BUILDING STANDARD WORKLETTER AND ALLOWANCE]

Landlord shall be responsible for demolishing the existing improvements in the Premises. Landlord's contractor shall construct Tenant's improvements in the Premises in accordance with plans agreed to by Landlord and Tenant. However, the mechanical and engineering plans for the Tenant's improvements shall be prepared by Landlord at its expense, subject to Tenant's approval. [An allowance of \$_____ per rentable square foot shall be provided to Tenant to be applied towards the cost of preparing its plans].

Landlord shall provide and install at its sole cost, base building construction and the building standard workletter setting forth building standard items of quality and type acceptable to Tenant, in reasonable but unlimited amounts. Landlord's contractor shall bid each major trade and supplemental air conditioning, if any, to at least three (3) subcontractors (except for mechanical, sprinkler and structural).

Landlord shall provide to Tenant an allowance equal in amount to \$_____ per rentable square foot of the Premises to construct above building standard improvements in the Premises. Any amount of the allowance that is unused by Tenant for the above building standard improvements shall be paid to Tenant by the Landlord or credited as additional rent free period, or otherwise applied in Tenant's sole discretion. Tenant shall also receive credit, to be applied to above building standard construction, for any unused portion of the building standard workletter to which it would otherwise be entitled, on a dollar for dollar of unit cost basis.

If the estimated cost for the above building standard improvements exceeds the amount of the allowance, Tenant shall pay the deficiency to the contractor after the allowance has been exhausted or in accordance with a mutually agreed to payment schedule, except that the Tenant may withhold an amount equal to ten percent (10%) of the contract price of the above building standard improvements, (or if Tenant's responsibility for payment under the contract is less than ten percent (10%), instruct Landlord to withhold an amount which together with Tenant's portion will total ten

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percent (10%)) until Tenant approves of the completion of all construction and finish work. If the cost of the above building standard improvements is less than the allowance, Tenant may instruct the Landlord to withhold ten percent (10%) of the contract price of the above building standard improvements until Tenant notifies the Landlord in writing that Tenant approves of the completion of all construction and finish work.

If Landlord's contractors construct the improvements, such contractors shall not receive any profit, overhead or general conditions from the Tenant for any work that is base building or building standard, provided, however, that for work that is above-building standard, a total fee of no more than __ percent (__%) for profit, overhead and general conditions will be due for such work performed. Landlord shall in no case receive fees for supervision of the construction. All records shall be kept by an open-book cost accounting method.

Tenant shall have the right to inspect or have a representative inspect the improvements as the construction proceeds and to require Landlord to cause a correction of any work which is defective or not in compliance with approved plans and specifications.

Landlord will provide cost schedules of typical unit installations that must necessarily be done by Landlord or the Landlord's contractors, and will include specifications and a scope of work for each item (i.e. pumps, sprinklers, breaker panels, or building specific trim and finishes).

Landlord must provide construction permits and obtain inspections approved by applicable local governmental authorities, and the Premises must be legally able to be occupied and used as intended.

Tenant shall have free access (joint possession) to the Premises to install concealed work prior to close-in (i.e. equipment, cable, supports, and piping). Landlord shall be responsible for inspections, and Tenant shall only be liable for expense or delay directly attributable to its own faulty installation.]

Notwithstanding anything to the contrary, if the Premises are not sprinklered and applicable authorities determine before or during the construction process that sprinklers are required to be installed in the Premises, such required installation (consistent with Tenant's space plan) shall be undertaken at Landlord's sole expense, such expense being considered a capital expenditure for the Building.

After Tenant's occupancy of the Premises, no construction shall be undertaken in space contiguous to, immediately above or below the Premises so as to unreasonably interfere with the conduct of

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Tenant's business. In no event shall core drilling or other work of excessive noise or any work emitting noxious or unpleasant odors be conducted in such space during normal working hours.

[FIRST RIGHT TO LEASE:]

Landlord shall grant to Tenant a first right to lease any additional space within the Building which becomes available for leasing, at any time during the lease term, at Tenant's fully escalated rental at the commencement of such first right space term. If the space has been previously built out and does not require reconfiguration, Tenant shall be entitled to occupy such first right space for the purposes and under the conditions stated in the section herein entitled "EARLY POSSESSION" thirty (30) days prior to the lease commencement date for such first right space. If the space has not been previously built out or requires reconfiguration, the lease commencement date for such first right space shall occur three months after the full execution of documentation evidencing the exercise of such right, or substantial completion, whichever is later.

If the Tenant, in its sole discretion, desires, it may hire its own contractor to construct the improvements to the first right space. Any improvements shall be constructed in the manner described above in the section entitled "IMPROVEMENTS". Landlord shall provide Tenant with \$_____ per rentable square foot in allowance for such improvements. If the first right space has been previously improved, Landlord shall demolish at Landlord's sole cost what the Tenant requires to be demolished pursuant to a space plan reasonably approved by Landlord.

In addition, for the first right space, Landlord shall provide [one (1) month] rent abatement for each year remaining in the lease term.

Except for the changes that relate to the rent, definition of Premises and improvements set forth above, all other terms and conditions applicable to the first right space shall remain the same as set forth in the lease between the Landlord and Tenant.]

[EXPANSION OPTION:]

At the beginning of the _____ lease year, Tenant shall have the option to lease approximately _____ rentable square feet of space on the _____ floor of the Building upon ____ () months prior written notice from Tenant. The Base Rental for such expansion space shall be the fully escalated rental at the commencement of such expansion space term. If the space has been previously built out and does not require reconfiguration, Tenant shall be entitled to occupy such expansion space for the purposes and under the conditions stated in the section herein entitled "EARLY POSSESSION" thirty (30) days prior to the lease commencement date for such expansion space. If the space has not been previously built out or requires reconfiguration, the

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lease commencement date for such expansion space shall occur three months after the full execution of documentation evidencing the exercise of such option, or substantial completion, whichever is later.

If the Tenant, in its sole discretion, desires, it may hire its own contractor to construct the improvements to the expansion space. Any improvements shall be constructed in the manner described above in the section entitled "IMPROVEMENTS". Landlord shall provide Tenant with \$_____ per rentable square foot in allowance for such improvements. If the expansion space has been previously improved, Landlord shall demolish at Landlord's sole cost what the Tenant requires to be demolished pursuant to a space plan reasonably approved by Landlord.

In addition, for the expansion space, Landlord shall provide one (1) month rent abatement for each year remaining in the lease term. [In addition a new [Base year] [base amount contributed by Landlord] shall be set.]

Except for the changes that relate to the rent, definition of Premises and improvements set forth above, all other terms and conditions applicable to the option space shall remain the same as set forth in the lease between the Landlord and Tenant.]

PARKING:

Tenant shall be guaranteed the availability of parking contracts on a monthly contract basis in the building garage at a ratio of one space per _____ rentable square feet at prevailing market rates. [If additional space is added to the Premises, pursuant to the section entitled "EXPANSION OPTION", or otherwise, then the parking contracts shall be increased on the basis described in this section, to reflect such expanded Premises.]

EXTENSION OPTION:

Tenant shall have the right to extend the lease term for [one (1)] additional five (5) year term at the lesser of Tenant's fully escalated rental at the end of the original lease term or ninety-five percent (95%) of the then prevailing fair market value, as determined by a "three broker" method. [FOR FULL SERVICE LEASE - In addition a new [Base year] [base amount contributed by Landlord] shall be set.] Tenant shall give Landlord written notice _____ () months prior to the expiration of the original lease term of its exercise of the option to extend the lease term.

Landlord shall provide a construction allowance of \$_____ per rentable square foot for the refurbishment of the Premises and [one (1)] month rent abatement for each year the lease term is extended.

EARLY POSSESSION:

Upon substantial completion of Premises, Tenant shall have access to the Premises thirty (30) days prior to the Lease Commencement Date for purposes of installing special equipment such as telephone systems, computer systems and furniture move-in. This early possession shall in no manner trigger commencement of base rental or taxes and operating expense charges.

SUBLETTING/ASSIGNMENT:

Tenant shall have the right to freely sublease all or a portion of the Premises or assign the lease throughout the term of the lease, subject to Landlord's approval, which approval will not be unreasonably withheld, conditioned or delayed. Tenant shall have the right to sublease all or a portion of the Premises or assign the lease throughout the term of the lease, without Landlord's consent, to an affiliate or to a successor by merger, consolidation or purchase. Any "net" profits realized by the Tenant pursuant to the subletting of the Premises or the assignment of the lease shall be shared fifty-fifty between the Tenant and Landlord.

BUILDING ACCESS:

Tenant shall have access to the Building and Premises seven (7) days a week, twenty-four (24) hours a day with at least one (1) elevator in service at all times.

SECURITY:

Prior to the Lease Commencement Date, the Landlord shall provide an electronic security system installed and monitored by Kastle Systems, Inc. or an equivalent vendor. The basic components of the system include electronic access control points at the main entry lobby, garage ramp door and the elevators. The access control systems on the main lobby doors and elevators operate daily 6:00 pm to 8:00 am Monday through Friday and twenty-four hours a day on Saturdays, Sundays and holidays.

[A security guard/concierge shall be on site from at least 8:00 am to 6:00 pm weekdays monitoring the entrance to the Building and the closed circuit television cameras, if any, and assisting tenants with daily corporate and personal needs.]

BUILDING MAINTENANCE AND CLEANING:

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Building maintenance and cleaning shall be provided daily, Monday through Friday, except holidays, for all office and common areas. Service shall be at a first class office standard. [All building maintenance, cleaning and other contracting services for the Building shall be chosen by mutual agreement of the Tenant and Landlord and shall be subject to a minimum bid process involving three potential contractors.]

HVAC SYSTEM:

Landlord shall provide zoned heating, ventilating and air conditioning Monday through Friday from at least 8:00 am to ____ pm and on Saturday from 9:00 am to ____ pm, except legal holidays. The HVAC system shall regulate the temperature and humidity of the Premises with the following ranges: Between 70 and 76.5 degrees with 50% relative humidity.

COMPLIANCE WITH LAWS AND REGULATIONS:

Landlord represents and covenants that the Building and the land thereunder are and will be in compliance with all applicable federal, state and local government laws, ordinances and regulations, unless a violation arises solely from Tenant's use or occupancy of the Premises.

NON-DISTURBANCE:

All ground lessees and mortgagees, now or hereafter, shall agree not to disturb the occupancy of the Tenant in the Premises, in the event of a foreclosure or default of the Landlord to such ground lessees or mortgagees, so long as the Tenant is not then in default beyond any applicable notice and grace periods. [Obtain SNDA from all current and future mortgagees and ground lessees]

QUIET ENJOYMENT:

Landlord covenants that if the Tenant performs its obligations under the lease, then the Tenant shall quietly enjoy and occupy the full possession of the Premises without molestation or hindrance by Landlord or any party claiming through Landlord.

ENVIRONMENTAL CONDITIONS:

Landlord represents that the Building and land thereunder and any other improvements and land thereunder affecting or related to such Building, are not in violation, nor have they been in violation of any federal, state or local law, ordinance or regulation relating to the environmental conditions, on, under, or about the land or any such buildings or other improvements thereon, including, but not limited to soil and groundwater conditions.

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Landlord shall certify that the Building meets or exceeds all current health standards for fresh air change (current ASHRAE standards) and hazardous materials abatement. Where hazardous materials exist in an encapsulated and maintained state, Landlord shall advise Tenant.

Sincerely,

Approved ____ day of _____, 202__

[Tenant]

Agreed to and accepted this
_____ day of _____, 202__

[Landlord]

Appendix 3



*Prepared by:
Jennifer Jones*

TENANT ESTOPPEL CERTIFICATE

Newco, LLC, a Delaware limited liability company (the “**Tenant**”) is the tenant under that certain lease dated January 15, 2020, (the “**Lease**”) with respect to Tenant's occupancy of approximately 25,000 square feet (the “**Leased Premises**”) of the property located in 100 Main Street, New York, New York (the “**Property**”). Tenant has been informed that **Big Lender** (the “**Lender**”) has made a loan (the “**Loan**”) to the owner of the Property (the “**Landlord**”), which Loan is secured by, among other things, a first mortgage, deed of trust or security deed in respect of the Property and an assignment of leases and rents (collectively, the “**First Mortgage**”).

Tenant hereby certifies and represents, to its actual knowledge, to Lender and to Landlord that, as of the date set forth by its signature below (“Execution Date”):

1. The Lease has not been amended, modified, or supplemented by any letter agreement or other written instrument, except as follows: ~~None~~ That certain Commencement Date Memorandum dated as of October 5, 2020 by and between Landlord and Tenant.
2. The Lease is in full force and effect. Tenant is the holder of the lessee's interest under the Lease. The Lease constitutes the only agreement to which Tenant is a party, or for the benefit of Tenant, with respect to the Property. Tenant has not subleased any portion of the Leased Premises.
3. The term of the Lease commenced on October 1, 2020. The current expiration date of the Lease is September 30, 2030. Pursuant to the Lease, Tenant has one (1) option to extend the term of the Lease for a period of five (5) years.
4. Subject to that certain abatement of Base Rent for the second, third, fourth, fifth and sixth months of the first Lease Year, t~~The~~ monthly Base Rent due under the Lease is \$125,000.00 per month, which shall commence on the Rent Commencement Date (as defined in the Lease).
5. Tenant has ~~not~~ accepted and taken possession of the Leased Premises.
6. To the actual knowledge of Tenant and subject to latent defects, if any, n~~Neither~~ Landlord nor Tenant is in breach of, or in default under, the Lease, and Tenant knows of no event or condition which, with the passage of time or the giving of notice or both, would constitute such a breach or default by Tenant or Landlord under the Lease, except: Landlord failed to timely pay that certain tenant improvement allowance due and owing to Tenant pursuant to Section 10.1 of the Lease. Neither Tenant nor, to the actual knowledge of Tenant, Landlord has exercised any option to terminate the Lease, or taken any other action, or received any notice, with respect to the termination of the Lease.
7. The amount of the security deposit retained by Landlord under the Lease is \$750,000.00 in the form of a letter of credit. To Tenant's actual knowledge, n~~No~~ portion of the security deposit has been applied by Landlord against rents under the Lease.
8. Tenant has no option, or right of first refusal, or other preferential right, to purchase all or any part of the Property. Tenant has no option, or right of first refusal, or other preferential right, to lease space (other than the Leased Premises) at the Property, except as follows: None.
9. ~~No commission or other payment is due any real estate broker by Tenant in connection with the leasing of the Leased Premises to Tenant, and there are no agreements, oral or written, under which any real estate broker is entitled to any future payment or commission by Tenant in connection with the leasing of the Leased Premises to Tenant.~~

Or

No commission or other payment is due any real estate broker by Tenant in connection with the leasing of the Leased Premises to Tenant, and to Tenant's actual knowledge, there are no agreements, oral or written, under which any real estate broker is entitled to any future payment or commission by Tenant in connection with the leasing of the Leased Premises to Tenant.

Tenant acknowledges that Lender, in making the Loan, is relying upon the accuracy of the statements of Tenant in this Certificate. This Certificate shall be binding upon Tenant and its successors and assigns, and shall inure to the benefit of and be enforceable by Lender and its successors, and assigns ~~and designees~~, including, but not limited to, any New Owner (which successors, assigns and New Owner shall be deemed to be included within the term "Lender" for purposes of this Certificate). Notwithstanding any provision of this Certificate to the contrary, (i) nothing contained above must constitute or be deemed to constitute an amendment, modification, or waiver of any term or condition of the Lease or any remedy of Tenant thereunder, (ii) in the event of any conflict between the Lease and this certificate, the Lease must control, and (iii) Tenant must not have any liability for inaccuracies in this certificate, provided, however, that Tenant must not be permitted to assert or enforce any claim against Lender (or against its property) which is inconsistent with the statements contained in this Tenant Estoppel Certificate.

IN WITNESS WHEREOF, Tenant has duly executed and delivered this Certificate as of the date set forth below.

Dated: _____, 2020

Newco, LLC

By: _____
Name:
Title:

Appendix 4



*Prepared by:
Diane Shapiro Richer*

SNDA Basics and Sample Provisions

PART 1 - 3 Primary Elements to a Subordination, Non-Disturbance and Attornment Agreement (SNDA), among Mortgage Lender (Lender), Tenant, and Landlord/Borrower (Landlord):

A. Subordination:

Establishes that the Lease is subordinate to the Mortgage, whether the Mortgage or the Lease comes first in time.

“The Lease, as the same may hereafter be modified, amended or extended, shall be, and shall at all times remain, subject and subordinate to the terms, conditions and provisions of the Mortgage, the lien imposed by the Mortgage, and all advances made under the Mortgage.”

B. Non-Disturbance:

In exchange for subordination, the Lender provides the Tenant “non-disturbance,” essentially, agreeing that, so long as the Tenant performs in accordance with its Lease obligations, the Lender, as Successor Landlord following a foreclosure, will not disturb – i.e., will honor – the Tenant’s rights under the Lease.

“So long as Tenant is not in default under this Agreement or under the Lease beyond any applicable grace or cure periods, Lender (i) shall not terminate or disturb Tenant’s possession of the Premises under the Lease, except in accordance with the terms of the Lease and this Agreement and (ii) shall not name or join Tenant as a defendant in any exercise of Lender’s rights and remedies arising upon a default under the Mortgage unless applicable law requires Tenant to be made a party thereto as a condition to proceeding against Landlord or prosecuting such rights and remedies.”

C. Attornment:

Tenant agrees to recognize the Lender or Successor Landlord as its new Landlord under the Lease.

“Tenant agrees that, in the event of a foreclosure of the Mortgage by Lender or the acceptance of a deed in lieu of foreclosure by Lender, Tenant will attorn to and recognize Lender or other Successor Landlord as its landlord under the Lease for the remainder of the term of the Lease (including all extension periods which have been or are hereafter exercised) upon the same terms and conditions as are set forth in the Lease.”

PART II - Other Common Elements of an SNDA:

- Tenant acknowledges Collateral Assignment of Lease
- Limits Successor Landlord's Liability to its interest in the Property
- Notices: Lender's Right to Receive Notices, Cure Landlord Defaults, and approve Lease Amendments
- Tenant Estoppel or Confirmation of Facts
- Excluded Liabilities of Successor Landlord

PART III - Excluded Liabilities – Commonly Subject to Negotiation:

Lenders do not want to be owner/developers or to take on risk, so they limit, by way of the SNDA, the Landlord obligations by which they agree to be bound post-foreclosure. Common exclusions (blue) and changes that might be negotiated on behalf of the tenant (*red italics*) include:

- a. Rent Paid more than 1 Month in Advance, *e.g.:*

“Successor Landlord shall not be bound by any payment of rent or additional rent which Tenant might have paid for more than one month in advance of the due date under the Lease to any prior Landlord [*it being understood and agreed that payment of monthly installments of Tenant's share of anticipated operating expenses and real estate taxes shall not be deemed sums paid more than one month in advance.*]”

- b. Return of Security Deposits not Actually Transferred/Received, *e.g.:*

“Successor Landlord shall not be accountable for any monies deposited with any prior Landlord (including security deposits), except to the extent such monies are actually received by Successor Landlord.”

- c. Lease Amendments entered into without Lender's Consent, *e.g.:*

“Successor Landlord shall not be bound by any amendment or modification of the Lease made without the written consent of Lender [*if and to the extent Lender's consent is required pursuant to the terms of the Mortgage*] [*in the case of any amendment that would reduce the rent or other monetary obligations of Tenant under the Lease, decrease the term of the Lease, impose additional material obligations upon the Landlord under the Lease, or reduce any material obligations of the Tenant under the Lease.*]”

d. Construction Obligations of Prior Landlord, e.g.:

“Successor Landlord shall not be liable for performing any construction-related obligations of the Landlord, including any obligation to construct, restore, pay for, or reimburse Tenant for, the building of which the Premises are a part, the Premises, or any alterations or improvements thereto, including payment of tenant allowances, *but excluding day-to-day maintenance and repair obligations arising after Successor Landlord succeeds to the interest of the Landlord* [; *provided that, if Lender or Successor Landlord does not agree in writing to assume such construction obligations within [x] days after Tenant’s demand following attornment, then [Tenant shall have the right to terminate the Lease by notice given to Lender/Successor Landlord within sixty days after receipt of such notice][Tenant shall have the right to exercise the set-off option provided pursuant to the Lease].*”

e. Tenant Purchase Options and other Rights pertaining to Property not part of Collateral, e.g.:

“Successor Landlord shall not be bound by any purchase option Tenant may have pursuant to the Lease or any option to lease space or use amenities in any other building (other than the building or shopping center of which the Premises are a part and that is encumbered by the Mortgage)”

f. Tenant Offset Rights, e.g.:

“Successor Landlord shall not be liable for or bound by any offset right that Tenant may have against any prior Landlord pertaining to events predating the date of attornment, including any claim for damages of any kind as a result of a breach by the prior Landlord occurring before the date of attornment[, *unless Lender has been provided notice and the opportunity to cure as set forth in Section ___ hereof*]. *[The foregoing shall not limit either (a) Tenant’s right to exercise against Successor Landlord any offset right otherwise available to Tenant due to events arising after the date of attornment or (b) Successor Landlord’s obligation to correct any conditions that existed on the date of attornment that violate Successor Landlord’s obligations as Landlord under the Lease.]*”

g. Defaults of the Prior Landlord, e.g.:

“Successor Landlord shall not be liable for any default, act or omission of any prior Landlord or damages accruing prior to the Successor Landlord’s succeeding to the interest of the Landlord under the Lease with respect to a default of Landlord [*; provided that, Successor Landlord shall be liable (subject to the limitation on personal liability set forth in the Lease or herein) for damages with respect to any Landlord default [that is of a continuing nature] of which Lender has been provided notice and the opportunity to cure as set forth in Section ___ hereof*][*provided nothing herein shall excuse Successor Landlord from performance of the Landlord’s obligations arising after Successor Landlord succeeds to the interest of Landlord under the Lease.*”

Real Estate Alert

District of Columbia Coronavirus Support Congressional Review Emergency Amendment Act of 2020: Commercial/Residential Mortgage Loan Deferment Program Mandated

July 23, 2020

Among other elements of the sweeping *Coronavirus Support Congressional Review Emergency Amendment Act of 2020* (the “**Act**”)¹, is a requirement that certain mortgage lenders develop a mortgage loan deferment program and make it available to their borrowers during the period of the District of Columbia’s public health emergency declared by Mayor Bowser and for 60 days thereafter. As of this writing, the emergency is in effect through October 9, 2020. The law applies to both residential and commercial mortgages in the District of Columbia, but does not apply to national banks or federally chartered credit unions or to mortgages that are federally backed or that were accelerated or in foreclosure proceedings before the March 11, 2020 effective date of the declaration of public health emergency. All other lenders holding mortgages in the District of Columbia must establish a mortgage loan deferment program that includes these minimum elements:

1. grant at least a 90-day deferment of the monthly payment of principal and interest;
2. waive any late fee, processing fee, or any other fee accrued during the emergency period; and
3. the lender must not report to a credit reporting agency as delinquent the amounts subject to the deferral.

Mortgage lenders must establish application criteria and procedures for borrowers to apply for the deferment program, and an application or summary of procedures must be made available online or by telephone. Mortgage lenders must approve each applicant that: (A) demonstrates evidence of a financial hardship resulting directly or indirectly from the public health emergency, including an existing delinquency or future inability to make payments; and (B) agrees in writing to pay the deferred payments within: (i) a reasonable time agreed to in writing by the applicant and the lender; or (ii) if no reasonable time can be agreed to, then 3 years from the end of the deferment period, or the end of the original term of the mortgage loan, whichever is earlier.

The law includes lender reporting requirements and penalties and provides borrower remedies for lender non-compliance. Lenders are prohibited from requesting or requiring a lump sum payment from any borrower making payments under a deferred payment program.

The complete text of the mortgage loan deferment program law can be found in [DC Code Section 42-3191.1](#), representing Section 401 of the Act.

For more information on the mortgage loan deferment program, tenant protection provisions of the Act, or other aspects of the Act impacting the commercial real estate industry, please contact Diane Shapiro Richer at dricher@polsinelli.com.

¹ The Act became effective June 9, 2020. It was preceded by the Coronavirus Support Emergency Amendment Act of 2020, which was effective from May 27, 2020 through June 8, 2020 (now expired), which, in turn, consolidated and repealed several prior emergency amendment acts passed earlier in the emergency period.



Author

Diane Shapiro Richer
202.626.8355
dricher@polsinelli.com

Real Estate Alert

District of Columbia Coronavirus Support Congressional Review Emergency Amendment Act of 2020, as amended by Coronavirus Support Clarification Emergency Amendment Act of 2020: Rent Relief and Tenant Protection Provisions

July 23, 2020

Among other elements of the sweeping *Coronavirus Support Congressional Review Emergency Amendment Act of 2020*, as amended by the *Coronavirus Support Clarification Emergency Amendment Act of 2020* (collectively, the “**Act**”)¹, is a requirement, in Section 402 of the Act, that certain landlords (including sublandlords) develop a payment plan program pursuant to which rent becoming due during the program period is deferred and payable in equal monthly installments. The program must be made available to tenants (or subtenants) who demonstrate that they have suffered financial hardship due to the COVID-19 public health emergency declared by Mayor Bowser.

The “**program period**” under the Act is the period of time that the public health emergency has been declared and for one year thereafter. As of this writing, the emergency is in effect from March 11, 2020 through October 9, 2020, thus resulting in a program period from March 11, 2020 through October 9, 2021 (subject to extension from time to time, as the emergency period is extended). The law applies to leases of residential space, leases of commercial retail space, and leases of commercial space of less than 6,500 sq. ft., but to no other commercial leases. Other elements of the Act apply more broadly to commercial leases and are discussed at the end of this summary.

For applicable leases, landlords must establish a rent payment plan program meeting these requirements:

1. Notice of Payment Plan Program. Landlords are to notify tenants of the availability, terms and application process for the rent payment plan program and make a payment plan available to “eligible tenants,” being those who have notified the landlord of an inability to pay rent, and have demonstrated a financial hardship, resulting directly or indirectly from the public health emergency (regardless of whether the tenant was in default or encountering independent hardships prior to the declared emergency). There is an exception for franchisees (i.e., they are not eligible for the payment plan program) unless the franchise is owned by a District resident. Landlords are to set forth procedures by which eligible tenants may apply for a payment plan, which may include submission of supporting documentation. Landlords must permit applications to be submitted online and by telephone. There is some ambiguity in the law as to whether notice must be given to all tenants or only those who have notified the landlord of an inability to pay; some observers have taken the position that the notice must be given only to “eligible tenants.”

2. Rent Deferral and Repayment Terms. The payment plan must be made available with respect to rent becoming due during the program period (or such shorter period as may be requested by the tenant). The deferred rent is to be payable in equal monthly installments over the duration of the payment plan. The Act is unclear as to the commencement and duration of the repayment period or whether it overlaps with the program period or commences only after the period of the health emergency ends. The landlord cannot require, or request, a lump-sum payment.

District of Columbia Coronavirus Support Congressional Review Emergency Amendment Act of 2020, as amended by Coronavirus Support Clarification Emergency Amendment Act of 2020: Rent Relief and Tenant Protection Provisions



3. **Approval.** Landlords must approve applications in which the tenant demonstrates the requisite financial hardship and agrees in writing to the payment plan terms. The payment plan is to be set forth in a writing executed by the parties.

4. **Terms.** In addition to the deferral repayment terms, the payment plan must include the following terms:

- (a) waiver of fees, interest and penalties arising out of entering into the payment plan;
- (b) no reporting to credit reporting agencies of rent delinquencies that are subject to the payment plan; and
- (c) assurances that eligible tenants do not lose any rights under the lease by entering into the payment plan.

5. **Reporting and Redress.** The Act includes certain record retention and reporting requirements and procedures for tenant redress.

6. **Enforcement.** Landlords may not file collection lawsuits or eviction proceedings during the program period unless the tenant defaults on the terms of the payment plan.

The complete text of the tenant payment plan law can be found in [DC Code Section 42-3192.01](#), representing Section 402 of the Act.

Rent Increases. In other tenant protection measures implemented pursuant to the Act, rent increases are prohibited during the period of the public health emergency for certain residential and commercial properties. In the case of commercial, the prohibition applies to commercial *retail* leases and commercial leases *under 6,500 square feet*. Any rent increases made by a landlord during the public health emergency period is null and void and any excess rent paid is to be credited to the tenant. *See Section 406(b) of the Act, as amended, and DC Code Section 42-3194.01*

Evictions. The existing tenant eviction law is amended by the Act to prohibit landlords from filing a complaint for eviction of a tenant during the period of the public health emergency and for 60 days thereafter. This applies to commercial and residential and is not limited to retail or smaller commercial spaces. *See Section 404 of the Act and amended DC Code Section 16-1501*

Residential Protections. These are beyond the scope of this summary, but we note that the new law includes: Section 405, Residential Protections (tolling of tenant deadlines, amenity charges, late fees, tolling of evictions commenced before the emergency); Section 407, Condo/Coop Associations; Section 408, Residential Foreclosure Moratorium.

For more information on the tenant payment plan program, other tenant protection provisions of the Act, mortgage loan deferment programs, or other aspects of the Act impacting the commercial real estate industry, please contact Diane Shapiro Richer at dricher@polsinelli.com.

¹ The Act became effective June 9, 2020. It was preceded by the Coronavirus Support Emergency Amendment Act of 2020, which was effective from May 27, 2020 through June 8, 2020 (now expired), which, in turn, consolidated and repealed several prior emergency amendment acts passed earlier in the emergency period.



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202.626.8355

dricher@polsinelli.com