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Lessons Learned During the Pandemic – the Importance of Commercial Lease Management and Review Systems

OVERVIEW

When a national or global emergency like the COVID-19 pandemic strikes, a number of critical questions arise for companies with large portfolios of complex commercial leases in various jurisdictions, including:

- Do we have to keep paying rent and other expenses?
- If not, how long can we withhold payment?
- Can the landlord terminate the lease if we don't pay?
- Can we terminate the lease?
- When and how do we have to give notice of a dispute to the landlord?

To help answer these difficult questions, counsel and management must be able to quickly and correctly assess the company's rights and obligations under the specific terms of each affected lease. *See e.g., Gap Inc. v. Ponte Gadea New York LLC*, No. 20 CV 4541-LTS-KHP, 2021 WL 861121, at *7-9 (S.D.N.Y. Mar. 8, 2021) (ruling that, based on the specific terms of the lease, the commercial tenant could not invoke the frustration of purpose doctrine to avoid paying rent); *UMNV 205-207 Newberry, LLC v. Caffè Nero Americas Inc.*, No. 2084CV01493-BLS2, 2021 WL 956069, at *5-8 (Mass. Super. Feb. 8, 2021) (ruling that commercial tenant's obligation to pay rent was discharged during government-ordered shutdown because the lease provided that the tenant could use the leased premises only to operate a café with a sit-down restaurant menu and for no other purpose).

However, too often companies are unprepared and scrambling—after a crisis hits or otherwise—to complete the necessary legal review and analysis of their commercial lease portfolio, which often consists of dozens, hundreds, or even thousands of different leases across various jurisdictions. Having a useful lease management system and review process in place will allow a company to

quickly implement effective negotiation and litigation strategies and also potentially save millions of dollars in rent and/or legal fees. This article offers several tips to in-house counsel for implementing a useful lease management and review system to ensure your company is better prepared for the next major crisis, dispute, and/or lease re-negotiation period.

Step 1 – Put Your Current System to the Test

The first step in this process is to assess your company’s current lease management system/software (if any) to determine if it provides you with the right information and in an easy-to-use format. Be sure to include your company’s IT personnel early and often in this process for technical support. And fear not, there is still hope even if your current “system” consists of a gray file cabinet in the corner of your office or a folder on your computer filled with pdf lease files.

The following rubric should help determine whether it is time to upgrade your current lease management system:

100% Digital

- Your system should be entirely digital and text-searchable with some form of optical character recognition (OCR) run on leases that have been imaged from hard-copy originals.

Provides a Dashboard View

- Your system should include a customizable dashboard-level view to provide up front the most pertinent information about your lease (such as term expiration, previous renewals or extensions, number of amendments, etc.).

Remotely Accessible

- Credentialed personnel should be able to access the system, including the .pdf versions of the leases, from anywhere using secure log-in information.

Dynamic Search / Filtering Capability

- Your system should allow you to search your entire portfolio for keywords, phrases, or particular lease provisions and display the results in a way that allows you to filter and organize the information for easy presentation and review.

Some companies use customized databases through Microsoft SharePoint or Access for managing their leases and inputting relevant data, and these platforms may provide a workable solution that meets your needs. However, there are also now many AI-powered management solutions in the market that can potentially save your company significant time and money by streamlining the review process. The following is a list of just some of the AI-powered solutions currently available:

Cortical.io

- AI powered lease review: <https://www.cortical.io/solutions/contract-intelligence/contract-intelligence-case-study/>
- Extracts precise, key data, such as amounts, dates, and addresses; extracts defined types of clauses and classifies agreements accordingly; feeds all extracted information into the firm's lease-management tool; and much more

MRI Software

- Lease management software designed to meet new FASB lease accounting standards: <https://www.mrisoftware.com/products/cre-occupier/>
- Provides dashboard visibility and additional features like automated lease analysis and management

Tango Lease Analytics

- Comprehensive lease management software combining a number of the same features as Cortical.io and MRI

Step 2 – Reviewing Your Leases

After choosing the right management system for your company, the next step is populating that new system (or supplementing your current system) with accurate and useful information from all of your leases. Even if using an AI-powered system for first-level review, it is still important for in-house and possibly outside counsel to be closely involved to make sure the process is running smoothly and the final product includes accurate information.

In addition to capturing basic information like the party names and lease term, we recommend that each lease review project highlight at least the following provisions (if applicable) that often arise in disputes between commercial tenants and landlords:

- Permitted Uses
- Undue Delay
- Co-tenancy
- Abatement
- Force Majeure
- Tenant's Default
- Landlord's Default
- Disputed Sums
- Notice
- Governing Law/Venue Selection
- Dispute Resolution

For each of these clauses, the review platform should include sections to input: (1) the language of the provision; (2) a redline comparing the language in the executed agreement to the language in your company's standard lease form; and (3) analysis from counsel on how each key provision differs from the company's standard language and the degree to which the modified language favors the tenant or landlord. Factors like breadth, restrictiveness, and ability to enforce should all be considered in counsel's analysis.

CONCLUSION

Implementing the comprehensive lease management system and review process described herein will no doubt require a significant investment of your company's time and resources. However, based on lessons learned during the COVID-19 pandemic, having all relevant lease information available at your fingertips and in a usable format will be invaluable when the next crisis or dispute affecting your business inevitably arises.



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