

# Using Tenant Estoppel Letters to Cut to the Chase

By Brent C. Shaffer



Tenant estoppel letters cut to the chase. These devices, customarily used in commercial real estate transactions, inform lenders and buyers of the tenant's understanding of the lease agreement. An estoppel letter can also elicit information that will determine whether a proposed project is financeable.

A real estate lender's primary concern is not about market value or replacement value of a property but rather the income stream from the property and the continuous receipt of that stream. In a closing with hundreds of pages of documents, the humble estoppel certificate, often being a document of two pages or less, is typically the only independent verification of all of the underwriting assumptions about the loan's repayment source. More importantly, the estoppel certificate comes directly from the tenant, which is the ultimate source of the loan repayment.

Because the tenant estoppel letter verifies the assumptions made in the loan approval process, its significance to the real estate transaction can be greater than the landlord's rent roll. The tenant estoppel letter not only confirms the rent roll figures and certain terms of the leases that have been reviewed and relied upon by the lender, but it also seeks to bring to light any potential conflicts and problems in the future flow of the income stream. In addition, a properly worded tenant estoppel certificate can be used to "smoke out" any liabilities and exposures of the landlord (or a purchaser, foreclosing lender, or purchaser at a foreclosure sale) to the tenants. For this reason, the estoppel letter should be required for both noncredit tenants (i.e., those that are not required for the real estate's self-sufficiency) as well as for credit tenants. The importance of a tenant estoppel certificate diminishes only to the extent that a transaction is underwritten using repayment sources other than real estate rents.

#### Case Law Involving Tenant Estoppel Certificates

A tenant estoppel letter is a representation by a party signing the certifi-

cate to the addressee of the certificate. It is given effect not on the basis of contract law principles but on alternative theories of promissory estoppel and waiver. Although a tenant estoppel certificate is not a contract, it can serve to modify or amend the lease, to cure defects in leases, and to prevent the tenant from raising other affirmative defenses.

#### • Promissory Estoppel.

Promissory estoppel arises if the recipient can demonstrate the existence of a clear and unambiguous promise upon which the recipient reasonably relied and sustained an injury as a result of such reliance. *In re Caldor, Inc.-NY*, 217 B.R. 121, 134 (Bankr. S.D.N.Y. 1998). Thus if a lender or purchaser receives an estoppel certificate that contains a statement that is later contradicted, repudiated, or challenged by the tenant, the lender may be able to defeat the tenant's challenge because of contrary representations in the estoppel certificate. But the language in the estoppel certificate is strictly construed against the drafting party. *Grandnorthern Inc. v. West Mall P'ship*, 359 N.W.2d 41, 45 (Minn. Ct. App. 1984). A statement that a lease "has not been assigned, amended, modified, supplemented, or rescinded since the date of the

estoppel in that it requires different elements of proof. In practice, however, the cases dealing with estoppel certificates tend to ignore the distinctions between the two, with the resulting "estoppel" theory containing elements of both. For example, in applying equitable estoppel to a landlord estoppel certificate under Illinois law, a federal district court required that six elements be met: (1) the signer of the estoppel certificate must have made statements amounting to misrepresentation or concealment of material facts; (2) the signer of the certificate must have had knowledge at the time the representations were made that they were untrue; (3) the truth regarding the representations must be unknown to the recipient of the estoppel certificate when the representations were made and when the representations were acted on by the recipient; (4) the signer of the certificate must intend or reasonably expect that his or her conduct or representations will be acted upon by the recipient of the certificate or the public generally; (5) the recipient of the certificate must have in good faith relied upon the misrepresentation to his or her detriment; and (6) the recipient of the certificate would be prejudiced if the maker of the certificate is permitted to deny the misrepres-

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Lease" did not preclude a tenant's claim that the lease had not been "extended." *Id.* Cases such as *Grandnorthern* have led practitioners to insert strings of seemingly repetitive synonyms in estoppel certificates.

• **Equitable Estoppel.** A recipient of an estoppel certificate can also claim that a tenant is estopped from asserting matters in conflict with the contents of the certificate on the basis of equitable estoppel. Equitable estoppel theoretically differs from promissory

sentation. *Jannotta v. Subway Sandwich Shops, Inc.*, No. 94 C 3834, 1995 WL 337014, at \*5 (N.D. Ill. June 1, 1995).

• **Waiver.** A tenant can waive cer-

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tain rights or remedies by statements made in the estoppel certificate that constitute "the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable." *E.g., In re Caldor*, 217 B.R. at 133. Thus a tenant that knew of a violation of a noncompeti-

ant was not precluded as a matter of law from challenging the landlord's calculation of tax payments due as additional rent. *Id.* at 134-35. Although it is often typical and prudent for a tenant to qualify certain statements in the tenant estoppel certificate by "to its knowledge," the

April, 1992." *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 799 F. Supp. 641, 645 (E.D. La. 1992). In that case, the court found that the estoppel letter confirmed a termination date of April 30, 1992. Similarly, estoppel certificates with terms that vary from the lease have led courts to enforce terms of the lease in accordance with the estoppel certificate. In a New York case, for example, a lease stated that the tenant had to pay its pro rata share of management fees "normal and usual for the market area." *Bed N' Bath of Spring Valley, Inc. v. Spring Valley P'ship*, 586 N.Y.S.2d 416, 417 (N.Y. App. Div. 1992). The tenant had signed a tenant estoppel certificate in which it stated that it had that obligation and in which it acknowledged that management fees were "four (4%) percent of the gross rentals paid to the Landlord under all leases of the Premises." The court held that the tenant was estopped from claiming that normal and usual management fees were some lesser amount. *Id.* at 417-18. On the basis of such cases, a statement in an estoppel certificate that contradicts a provision of the lease may be binding, even if the lease contains an integration clause and a clause providing that it cannot be amended except by an instrument signed by both landlord and tenant.

As a written instrument, an estoppel certificate should trump oral testimony in resolving ambiguities and missing language in leases. Such a result is evidenced by the California appeals court decision in *Plaza Freeway Ltd. P'ship v. First Mountain Bank*, 96 Cal. Rptr. 2d 865 (Cal. Ct. App. 2000). In that case, the landlord and tenant failed to comply with the typical lease provision for space under construction that stated that the parties would execute a memo confirming the commencement date. The court determined that the commencement date was as stated in an estoppel certificate of a successor landlord, so that the tenant failed to exercise a lease extension option in a timely manner. The court applied Section 622 of the California Evidence Code, which states that the "facts recited in a written instrument are conclusively presumed to be true

as between the parties," and thus disregarded the tenant's testimony regarding a later opening and commencement date. *Id.* at 868, 874.

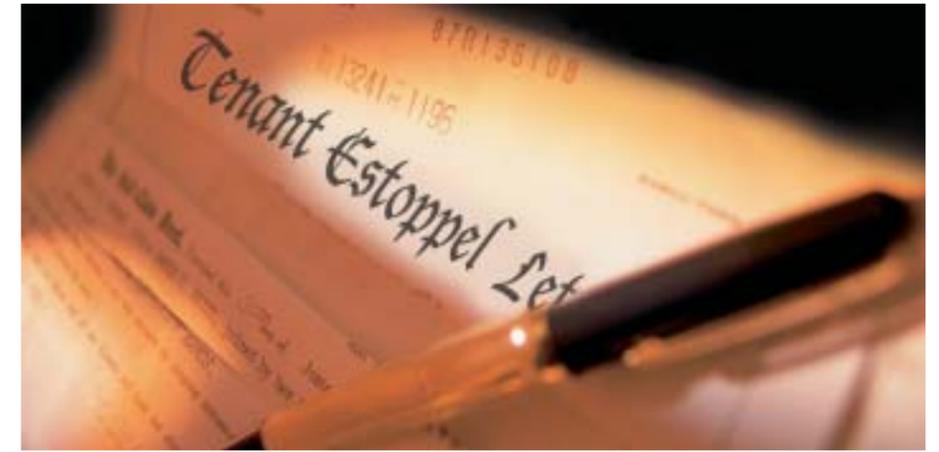
#### Lease Provisions Regarding Tenant Estoppel Certificates

For a project to be financeable, its leases must include a provision requiring the tenant to sign an estoppel certificate when requested by the landlord or the landlord's lender. Such language should be contained in a separate section of the lease, independent from language requiring execution of subordination, nondisturbance and attornment agreements, so that the estoppel certificate requirements can easily be identified and not be inadvertently tied to other lease provisions.

The estoppel certificate section should require the tenant's direct execution of a certificate and set forth what language is to be included in the certificate, the time period within which the certificate is to be delivered, and the consequences for the tenant's failure to deliver the estoppel certificate within the requested time period. There are several approaches commonly used to describe the required contents of the estoppel certificate.

• **Laundry List.** Leases most frequently contain language that sets forth an itemized list of substantive elements that the estoppel certificate should include. From a lender's perspective, the list should include the following statements:

- that the lease is unmodified (either orally or in writing);
- that the lease is in full force and effect;
- the commencement date of the lease;
- the termination date of the lease;
- whether there are any remaining options to extend the lease;
- whether there are any options to lease additional space in the landlord's buildings;
- whether there are any options to purchase the leased premises;
- whether the landlord is in default under the lease;
- whether the tenant is in default under the lease;



- the base rent or minimum rent payable under the lease;
- current percentage rent payable under the lease;
- current common area maintenance charges payable by the tenant under the lease;
- the security deposit posted with the landlord by the tenant;
- whether any rent has been pre-paid;
- the date through which rents have been paid (together with a statement that all previous rents due have been paid in full); and
- that the tenant is in occupancy of the premises and is open for business.

Lenders also seek to add additional items to this list, such as:

- that the landlord has completed all improvements required to be made by the landlord to the leased premises;
- that the tenant has received all tenant improvement allowances or credits under the lease;
- that the tenant has not violated any applicable environmental laws or transported, used, or generated any hazardous substances;
- that the tenant will provide the lender an additional cure period to remedy landlord defaults;
- that the tenant will simultaneously send the lender copies of all notices sent to the landlord;
- that the tenant is solvent;
- that the tenant is not in bankruptcy and has not made an

- assignment for the benefit of creditors;
- that the tenant has not subleased or assigned the lease;
- the tenant's notice address;
- that the tenant has made no agreements regarding free rent;
- that the landlord has performed all maintenance obligations under the lease;
- that the tenant is not a party to any litigation regarding the premises; and
- that the tenant will not modify the lease without the lender's prior written consent.

Many of these "additional items" theoretically are subsumed by the more general statements in the first group above, such as the statement that the tenant is not in default under the lease. But to the extent that estoppel certificates are strictly construed, this further clarification may be prudent.

• **Requested Form.** An alternative to the itemized list of contents is a simple lease requirement that the tenant sign an estoppel certificate requested by the landlord. Obviously, giving an estoppel statement in the form requested by the landlord should be completely unpalatable to a tenant, because such an estoppel certificate could remove substantial leverage of the tenant in dealing with the landlord in future disputes, including disputes about lease problems that have arisen but of which the tenant has no knowledge because of lack of investigation. On the other hand, "reasonably requested" language permits the ten-

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tion provision when it signed an estoppel certificate was found to have waived the right to an injunction against the landlord for that violation. *Piggly Wiggly of Mansfield, Inc. v. Wolpert Assoc.*, 519 So. 2d 371, 373 (La. Ct. App. 1988).

Courts also have held that the existence of a nonwaiver clause in the lease itself (which is almost universal) "does not by itself preclude the waiver of a provision of, or right under, the contract." *In re Caldor*, 217 B.R. at 133. Courts instead will look to the particular facts and circumstances of the situation despite such language. *Id.*

• **Qualification to Knowledge.** Statements in an estoppel certificate may be qualified by language such as "to the best of the tenant's knowledge." In these cases, the recipient of the estoppel certificate must establish such knowledge in order to prevail against the tenant as to waiver; otherwise, the relinquishment of a right may not be intentional. *Id.* Lack of knowledge may negate the reasonable reliance element of equitable estoppel. *Id.* at 134.

Similarly, the "promise" required to establish promissory estoppel cannot be unambiguous. An estoppel certificate stated that "to the best of Tenant's knowledge, there exists no default or state of facts which with notice, the passage of time, or both, could ripen into a default on the part of the Tenant or Landlord." Based on this language, a bankruptcy court held that the ten-

lender and landlord should realize that such qualification makes it unlikely that the statement will have any practical use in future disputes.

• **Certificate as Lease Amendment or Supplement.** Although an estoppel certificate is not a contract, its language can have the effect of a contract amendment or can cure a lease defect on the basis of estoppel and waiver. When a signature on a lease itself was challenged, for example, the tenant's signature on the estoppel certificate was held to preclude the tenant from arguing that the tenant did not sign the lease. *Kitts Lane Assocs. v. Lewandowski*, No. CV9405456285, 1996 WL 240421 at \*1 (Conn. Super. Ct. Apr. 15, 1996). When a tenant claimed that it reached agreement with the landlord to terminate the lease, but the tenant had signed an estoppel certificate stating that the tenant would not terminate the lease without the lender's consent, a Connecticut court rejected the tenant's argument, even though the estoppel certificate was directed to the lender and not the landlord. *Ninety Avon Lane Meadow Lane, Inc. v. Apple Health Care, Inc.*, No. CV95552502, 1996 Conn. Super. LEXIS 3126, at \*3 (Conn. Super. Ct. Nov. 29, 1996).

Estoppel certificates also can be used to interpret contradictory language in a lease, such as a statement that "[t]he term of this Lease shall be Ten (10) years commencing on the 1st day of May, 1987 (Commencement Date) and ending on the 30th day of

ant to contend that any statement requested is not "reasonable." In such a dispute, most practitioners would probably agree that the first portion of the "laundry list" suggested above (at least if qualified) consists entirely of reasonable statements.

• **Attached Form.** A third alternative, which is almost universally found in leases to credit or anchor tenants, is the execution of an estoppel certificate in accordance with an attached form. One cannot underestimate the helpfulness of this approach for a chain store tenant, which, if it has a significant number of locations nationally, will receive at least one estoppel certificate

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request almost every week. The problem with this third approach is that when this form is being negotiated, the lender (construction, permanent, and refinancing) is not usually a participant in the negotiations.

• **Authorization of Landlord to Sign.** To deal with the landlord's dilemma if a recalcitrant tenant does not produce a lender's requested estoppel certificate in time for a loan closing, many leases contain a clause that allows the landlord to sign an estoppel certificate as tenant's attorney-in-fact if the tenant delays beyond a specified number of days. Although not entirely free from doubt, case law validating powers of attorney in loan documents indicates that such provisions naming the landlord as a tenant's attorney-in-fact for this limited purpose are enforceable if they are "coupled with an interest." See *Hunt v. Rousmanier's Adm'r*, 21 U.S. 174, 201-03 (1823) (a power of attorney given as security or coupled with an interest is irrevocable even upon the death of the grantor). Most lenders, however, do not and should not rely on such a certificate. Without the

tenant's verification of the lease terms and status of the lease relationship, the lender is left with no independent verification of the underwriting assumptions.

Some practitioners believe that the power of attorney clause is useful in putting pressure on the tenant to sign the certificate within the required period. But the tenant may believe that project financing is not jeopardized by its failure to deliver the certificate and may reason that it is better off challenging the statements made by the landlord on the tenant's behalf later, rather than providing the estoppel certificate itself. To help the landlord guard against this gamesmanship, lan-

guage should be added in the lease to make clear that the tenant will be in default under the lease for failure to sign the certificate, even if the landlord signs on the tenant's behalf.

#### Negotiation and Wording of Common Provisions

The appropriateness of the statements in a tenant estoppel certificate depends largely on four factors: the estoppel certificate requirements in the lease, as discussed above; the overall bargaining power and leverage of the tenant, especially when viewed in comparison to the other tenants in the project; the nature of the project itself; and the true nature of the financing transaction (i.e., whether it is a true "real estate loan" for which the rent stream is the primary or only source of repayment). Regardless of these four factors, however, there are additional concerns that nearly always apply for estoppel certificate clauses.

• **Effect of Lease Language.** The estoppel certificate clause in a lease usually sets forth only the minimum requirements to be contained in the certificate. Lenders will typically ask

for more. A tenant with significant clout, whose lease is sufficient to make the project viable, often will attempt to limit the certificate to the minimum required under the terms of the lease, thereby preserving the benefit of any language negotiated when the lease is drafted. The assumption in taking such a position is that the loan is based on the strength of the project and the strength of the tenant so that the loan will be made even though the estoppel requirements contained in the lease may not be entirely palatable to the lender. Although the tenant wants to have a financially healthy landlord, the tenant may reason that the landlord likely will be able to find an alternative financing source if a lender will not close because of insufficient or unacceptable language in the estoppel certificate. The landlord, however, will want to protect itself from this squeeze play, because seeking another lender may result in higher financing cost to the landlord. For this reason, the landlord must be extremely vigilant in making sure that the "bottom line" estoppel certificate requirements in the lease are sufficient to satisfy its likely sources of financing.

Although a tenant may have the legal right to restrict the representations in the certificate to the specific language required in the lease, the tenant should keep in mind the danger of creating ill will in the ongoing tenant-landlord relationship. Often a tenant will be willing to certify in an estoppel certificate not only the statements required by the lease but also some additional statements requested by the landlord that are not significantly prejudicial to the tenant. One exception to this practice is the tendency of large chain tenants to stick to their own form of estoppel certificate because of the overriding need for uniformity and control in legal review costs. This uniformity can be a great help to a large chain tenant if its business is sold or several store locations are assigned.

• **Tenant Bargaining Power.** A tenant with clout can negotiate more favorable lease language in estoppel certificates, even to the point of having the tenant's standard form

attached to the lease. Similarly, when a lender requests an estoppel certificate, a strong tenant has an advantage in being able to negotiate the actual language of the certificate itself, especially if it is a key tenant from which the lender absolutely must have an estoppel certificate. On occasion, some small noncredit tenants may try to withhold estoppel certificates in the belief that the lender may need certificates only from a certain percentage of the small noncredit tenants. In doing so, it takes a chance that others will fulfill the requirement. This approach could backfire, however, because the landlord has less to risk if it seeks to enforce against a small tenant the tenant's failure to comply with the lease requirements to deliver an estoppel certificate.

Some small, unsophisticated tenants view the estoppel certificate request from the landlord as an opportunity to extract additional concessions, even when the lease contains clear language requiring a satisfactory estoppel certificate. In this situation, the landlord should attempt to make the tenant understand its legal exposure while at the same time to convince the lender not to pressure the landlord into having to make concessions to the tenant to obtain the certificates.

• **Nature of Project.** Language that is essential to the lender in the estoppel certificate will depend on the nature of the project and the terms of the particular lease. For example, statements about base rent or common area maintenance charges alone are not sufficient for retail leases with percentage rent provisions. Estoppel certificates obtained for construction loans when the tenant is not yet in occupancy will obviously need to omit statements about the landlord's completion of all construction obligations under the lease, the condition of the premises, statements about the tenant's being in occupancy, and so forth.

• **Nature of Financing Transaction.** The type and source of the financing also affect the level of protection that the lender requires in the estoppel certificate. The most onerous tenant



estoppel certificate forms still come from traditional institutional lenders such as pension funds and life insurance companies. These requirements become less flexible as the dollar amount of the financing exceeds certain thresholds. Life insurance companies and pension funds ask for most of the statements discussed in this article, initially unqualified, and often require other provisions that may more properly be classified as lease amendments. Such provisions may include statements about future compliance with environmental laws, requirements for copies of all notices and correspondence to the landlord, extra-long lender lease cure periods that begin after the final expiration of the cure periods provided in the lease for landlord defaults, statements that the tenant will not seek return of a security deposit from the lender as successor landlord, and statements that the foreclosing lender will not be subject to a prior landlord's lease defaults.

Commercial banks are typically more flexible. They generally require all of the "essentials" described as the most common provisions in the "laundry list" section of this article and are also more likely to allow statements to be qualified or modified. By comparison, loans made for large securitized pools and loans for corporate debt are often closed with fairly simple estoppel certificates when the individual lease is an insignificant part of the total income pool.

• **Approaches to Common Estoppel Provisions.** The lender wants the cer-

tificate to be addressed to the lender (and also its successors and assigns) and to contain statements to the effect that the tenant is aware that the lender is relying on the estoppel certificate as a condition for making the loan.

The tenant will want to avoid having an open-ended designation for the addressee in order to preserve its right to assert defenses against successor lenders. A tenant should also be cautious in allowing unqualified statements about the lease terms, even if at first they appear innocuous. For example, the statement that the lease and specified amendments through the date of the estoppel certificate constitute the entire lease should not be made without first checking the file for letters that waive, modify, or clarify provisions of the lease. Brokers and property managers are especially notorious for making lease changes in such letters, with or without countersignatures, rather than having an attorney draft a modification agreement. For leases involving new construction, there will assuredly be a letter issued upon construction completion that confirms the actual lease commencement and termination dates. If the tenant is an assignee of the original tenant and has not obtained the leasing files, it should consider trying to limit "to its actual knowledge" the deceptively simple statement identifying the lease documents.

Tenants almost universally will want to limit "to tenant's knowledge" a statement that the landlord and tenant are not in default under the lease because of the possibility of existing

defaults that have not yet come to light. The lender may reject such a qualified statement on the basis that the tenant could perform requisite due diligence to verify the facts. In practice, however, such due diligence is nearly impossible and certainly not possible in the time frame typically required for delivery of the estoppel certificate. In addition, even if a tenant were comfortable in doing this, such an unqualified statement can remove nearly all of the tenant's leverage in dealing with the landlord in future situations.

One example of rights that a tenant may be relinquishing by stating that there are no defaults under the lease relates to the landlord's calculation and

nance charges by making an unqualified "paid through" statement. For the same reason, it can be unwise for a tenant to state the current amount of additional rent or monthly common area maintenance charges due. Less beneficial to a tenant, but a possible compromise that may preserve the tenant's ability to recover, would be to make cross-references to lease sections containing the formulas for such rents and state that the tenant has paid all such rent "in accordance with the terms of the lease."

Other statements that the tenant will want to avoid making (and, conversely, that the lender will want) are that insurance proceeds will be applied as

the premises is in compliance with all applicable laws.

The tenant should be on guard for provisions in the estoppel certificate that may contradict terms of the lease or terms of separate agreements, provisions about subordination, attornment, nondisturbance, and rights of successor landlords by foreclosure or deed in lieu of foreclosure. Strong tenants may want to put themselves on a more even plane by requiring the party requesting the estoppel to provide a "mirror" estoppel addressed to the tenant.

Finally, both the tenant and the lender will want to make sure that the tenant estoppel certificate is not only dated but that the statements in the estoppel certificate are made as of the referenced date. Most tenant estoppel certificates are not notarized, probably for convenience, but the lender should consider requiring the certificate to be acknowledged in the form in which an oath or affirmation is given to the notary.

#### Conclusion

The importance of estoppel certificates in real estate financing cannot be overemphasized. In drafting a lease, the landlord must make sure that future lenders are satisfied with the estoppel requirements. Tenants, on the other hand, will want to review carefully not only estoppel requests from lenders but also the estoppel certificate clause before the lease is signed. Lenders, landlords, and tenants should consider the issues discussed in this article and the lease and certificate language suggested to address these issues. ■

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billing of common area maintenance charges. An unqualified statement in the estoppel certificate could mean that the tenant is giving up rights to audit the calculation of these charges. This is a particular dilemma in leases in which monthly expense charges are paid based on estimates and then later reconciled when records are available.

The careful lender also should prune budding problems that have not yet ripened into an actual event of default. One way to do this is through a "no default" clause in the estoppel certificate that states that there is no condition existing that, after the giving of notice or the expiration of any applicable cure period or lapse of time, would be a default.

Statements to the effect that all rent has been paid through a certain date or that no rent has been paid in advance also deserve special scrutiny. Although it is probably not prejudicial to a tenant to state the current amount of base rent, the tenant will not want to lose the ability to contest the calculation of additional rents such as percentage rent and common area mainte-

stated in the lender's mortgage or deed of trust, not as negotiated in the lease; that amendments to lease provisions require the prior approval of the lender (although the tenant may accept such a requirement if the lender's consent is not to be unreasonably withheld or delayed); and that the tenant will simultaneously send to the lender all notices sent to the landlord (the tenant may agree to notices sent at about the same time or may want to limit required notices to the lender to notice of conditions that would allow the tenant to terminate the lease or of material defaults of the landlord).

The tenant may wish to limit to the "tenant's actual knowledge" or "knowledge without investigation or inquiry" several other statements that are commonly requested, such as statements about environmental conditions, about the landlord's satisfactory completion of the tenant improvements, confirming no right by law to terminate the lease, that the tenant's use complies with applicable zoning or land-use requirements, and that the tenant's fit-out of