

# **Creative Solutions For Commercial Landlords and Tenants During COVID-19**



Presented by:

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# AGENDA FOR PRESENTATION

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## Part I

### **Background/Overview**

- Commercial Lease Provisions
- COVID-19 Moratorium Laws
- Effect of Bankruptcies

## Part II

### **Looking for Win-Wins**

- General Principles
- Potential Solutions

## Part III

### **Questions**

# Commercial Lease Sectors

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The pandemic is adversely affecting commercial real estate across the board.

- Retail
- Office
- Hospitality
- Restaurants
- Personal Services
- Entertainment
- Construction

# Commercial Lease Provisions

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There is no  
“standard”  
lease

- Many commercial landlords and tenants use forms (e.g., AIR forms)
- BUT the forms often have strikeouts and addenda

Things to look  
for in your  
lease

- Force majeure clauses
  - Right to terminate or right to suspend?
- Early termination clauses
- Tenant improvements
  - Payback requirements?
- Personal guarantees

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# **COVID-19 EVICTION MORATORIUM LAWS**

# CA Executive Orders

## N-28-20, N-71-20, N-37-20

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Provide commercial/residential tenants with relief from evictions due to non-payment of rent due to financial losses related to COVID-19

Ban landlords from filing unlawful detainer actions used to evict tenants for non-payment of rent until September 30, 2020

# Limits to Moratoriums

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Not a statewide moratorium on evictions

Lifts state law restrictions that impede ability of Counties and Cities to enact moratoriums

Moratoriums are in flux to address needs of landlords and tenants and the strained court system

Many local governments have not expanded moratoriums to include commercial tenancies

# Limits to Moratoriums

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Generally not blanket protection from eviction but only apply if the tenant demonstrates inability to pay due to financial impacts related to COVID-19

## Examples:

- employees sick with COVID-19
- reduction or closure of hours of operation due to COVID-19
- compliance with governmental recommendations and stay at home orders



# Qualifying for Relief under State Moratorium

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Tenants must notify landlord in writing **within 7 days** after rent is due of lost income resulting in ability to pay all or some of the rent due to financial impacts of COVID-19.

Notice can be via e-mail or text but best practice to review lease and comply with its notice terms.

Best practice = communicate with the landlord or the property management company before sending written notice.

# Qualifying for Relief under State Moratorium

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Tenants must provide landlord documentation of loss of income related to COVID-19 such as:

- Bank statements showing pre/post COVID-19 deposits (Redact your bank account no.)
- Financial statements showing income, profit and sales pre/post COVID-19
- General ledgers
- Spreadsheets
- Income and expense journals

# Qualifying for Relief under Ventura County Ordinance 4563

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Tenants must provide notice in writing to landlord of inability to pay rent **within 30 days after rent is due** and provide documentation of COVID-19 related income loss.

Tenants are encouraged to make partial payments of rent to the extent that it is possible.

No timeline given in Ordinance 4563 for repayment of past rent.

# Qualifying for Relief under City of Ventura Ordinance Nos. 2020-010/2020-014

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Tenants must provide notice in writing to landlord of inability to pay rent **within 7 days after rent is due** and provide documentation of COVID-19 related income loss within 30 days.

Tenants must pay outstanding rent **within 6 months** of the expiration of the local emergency.

Landlords are prohibited from charging late fees on past due rent due to financial impacts from COVID-19.

# Judicial Council Moratorium Rules

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On April 6, 2020, the Judicial Council of California issued Emergency Rule 1 banning issuance of summons on an unlawful detainer action based on non-payment of rent due until September 30, 2020.

On August 13, 2020, the Judicial Council lifted the freeze on eviction as of September 1, 2020. It appears that where local ordinances banning eviction moratoriums such as those in Ventura County and City of Ventura are in effect, the moratoriums are still in effect and can remain in place until the end of their term.

# Relief for Residential Tenants

CDC issued a nationwide moratorium on evictions which begins on September 4, 2020 and ends on December 31, 2020 – **only applies to residential tenants.**

On August 31, 2020, Governor Newsom signed legislation (COVID -19 Tenant Relief Act of 2020) protecting **residential tenants only** from eviction from non-payment of rent due to the financial effects of COVID-19. The moratorium starts on September 1, 2020 and ends on January 31, 2021.

Local eviction moratoriums previously adopted which have not expired can remain in effect until the end of their term but cannot be extended or renewed with an effective date prior to February 1, 2021.

# Relief for Residential Tenants

Landlord must give tenant a notice containing a warning that the tenant must provide a declaration to the landlord that tenant cannot pay rent due to COVID-19.

Tenant must provide landlord with a "declaration of COVID-19 related financial distress." (C.C.P. § 1179.02(d)).

Tenant must also tender payments equal to but not less than 25% of each transition rental payment demanded in one or more notices served on the tenant. (C.C.P § 1179.03 (2)(B)).

# Relief for Residential Tenants

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Tenants with “an annual household income of 130% of the median income, as published by the Department of Housing and Community Development in the Official State Income Limits for 2020, for the county in which the residential rental property is located” must provide proof of loss of income in addition to the declaration of COVID related financial distress. (C.C.P. § 1179.02.5 1(A)(B)).

Proof of income not required where the tenant makes less than \$100,000. (C.C.P. § 1179.02.5(1)(c)).



# Bottom Line for Commercial Tenants

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Commercial tenants must rely upon the prior moratoriums and negotiating with the landlord to avoid eviction.

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# **EFFECT OF BANKRUPTCIES ON COMMERCIAL TENANCIES**

# Effect of Bankruptcies on Commercial Tenancies

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Clause in lease terminating if bankruptcy is unenforceable



Timing of bankruptcy matters

# Effect of Bankruptcies on Commercial Tenancies

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If bankruptcy filed  
BEFORE judgment obtained

- Landlord cannot terminate or evict
- Landlord must go to federal court and ask judge to lift stay to continue ongoing action (Motion Relief Automatic Stay (“MRAS”))
- Landlord cannot enforce judgment for back rent without applying for relief from stay

# Effect of Bankruptcies on Commercial Tenancies

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Bring  
MRAS if:

- Landlord not receiving post-petition rent payments
- Lease term has not expired, or tenancy is month-to-month
- Landlord is willing to risk having a vacancy
- Trustee/tenant does not provide adequate assurances of performance or assume lease

In MRAS  
include:

- Order possession of property be surrendered and writ of possession issued
- Commencement/continuation of UD (if so, Landlord can regain possession without state court proceedings - federal marshal)

# Effect of Bankruptcies on Commercial Tenancies

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Alternative = motion to compel

- If there is value of lease to 3<sup>rd</sup> party, then the court may not be willing to grant motion for relief of stay
- Landlord may consider bringing motion to compel trustee/tenant in possession
  - Assume/reject by specific date
  - Provide adequate protection – post petition payments

# Effect of Bankruptcies on Commercial Tenancies

If bankruptcy filed AFTER judgment obtained

- Stay generally does not apply
- Landlord can proceed without going to court
- A tenant cannot stop eviction except in FEW circumstances, based strictly on rent nonpayment
  - Unless within 30 days after petition date, tenant certifies can cure entire monetary default and deposits money with the court
- If eviction scheduled, and tenant does not take action to alleviate stay, landlord should notify sheriff of authority to continue with eviction (CCP §715.050, 11 USC 362(b)(22))

# Effect of Bankruptcies on Commercial Tenancies

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## When in doubt if stay applies

- If lease is terminated before expiration of stated term, the landlord must seek relief
- Can file motion for order confirming stay does not apply or annulling stay for post-petition acts

## Landlord cannot use security deposit to offset past rent

- Use of security deposit could subject landlord to liability – actual/punitive damages



# Effect of Bankruptcies on Commercial Tenancies

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## If things stall during bankruptcy

- If tenant does not move, or Landlord loses motion, lease is deemed rejected unless tenant/trustee assumes lease within specified timeframe
- Tenant/trustee must decide whether to assume/reject lease
  - Chapter 7 – within 120 days
  - Chapters 11, 12, 13 – any time before confirmation of reorganization plan
- Business judgment decision – will continuation benefit creditors?

# Effect of Bankruptcies on Commercial Tenancies

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If assumed (almost always is)

- Trustee can assign lease to 3<sup>rd</sup> party even if lease prohibits
- Tenant:
  - Must pay back rent/damages caused by default
  - Must give adequate assurances

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# **LOOKING FOR WIN-WINS**

# General Principle #1:

## Don't Resort to Self-Help

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Self-help = taking matters into your own hands.

Landlords may not resort to self-help – tenants are not “trespassers.”

Until eviction, tenants are entitled to peaceful/quiet possession.

Landlords must choose between negotiating or litigating.

# Instead Ask These Questions

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If negotiating with your tenant:

- First check tenant's financial condition.
  - Are tenant's financial issues short or long term?
  - Look at the tenant's bank statements, credit reports, tax returns, profit and loss statements.
- Second, figure out your goal.
  - Should the landlord retain a struggling tenant?
  - Should landlord ask for something in return for concession?
  - Will landlord's lender allow a lease modification?
  - Should landlord attempt to replace the tenant?
  - How long will it take to replace the tenant?
  - What rate will a new tenant be willing to pay?
  - What will it cost to replace the existing tenant?

# **General Principle #2: Consider Pros & Cons of Litigation**

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## **What is an Unlawful Detainer (UD) Action?**

- Expedited court procedure allowing landlord to regain possession
- Expedited nature forces tenant to act quickly
- Negotiations can continue during UD
- Procedure should be matter of routine

# General Principle #2:

## Consider Pros & Cons of Litigation

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### Advantages

End negotiations  
and any stall tactics

Negotiation leverage

Start clock on eviction -  
increase likelihood of  
assets to collect

### Disadvantages

Time and Money

Stress

Destruction of Relationship

Finding another tenant  
during COVID-19



# General Principle #3:

## Be Proactive

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### Landlords

- Generally, a landlord's failure to act on a tenant's default is deemed a waiver of right to declare future defaults
- Failure of landlord to enforce right can send dangerous message to tenant

### Tenants

- Keep lines of communication open – silence is not a good option
- Act early to try to prevent worsening of problems

### Both parties

- Goal is to mitigate damages



# General Principle #4:

## Keep It Quiet

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The parties should sign confidentiality agreement.



Prevents other tenants from finding out about any compromise.

# General Principle #5:

## Give and Take

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- Two sides to the negotiating process

If landlord is  
willing to make  
concessions

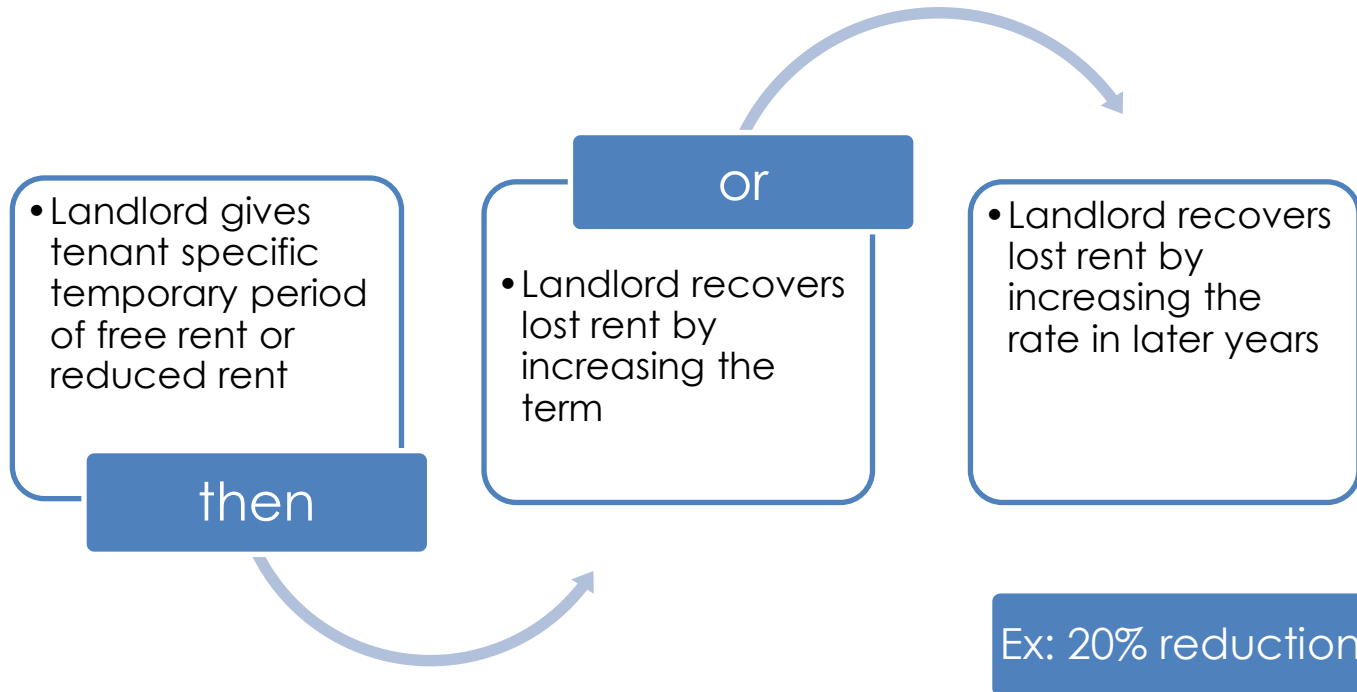


Tenant should be  
willing to  
relinquish some  
rights under lease

# Solution #1:

## Postpone or Restructure Rent

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# Solution #2:

## Cash for Keys

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### Option 1



Landlord TAKES a lump sum from tenant in exchange for tenant surrendering premises and terminating lease early



Parties agree to release any and all claims against each other

### Option 2



Landlord GIVES a lump sum to tenant in exchange for tenant surrendering premises and terminating lease early



Parties agree to release any and all claims against each other

# Solution #3:

## Additional Cash Security

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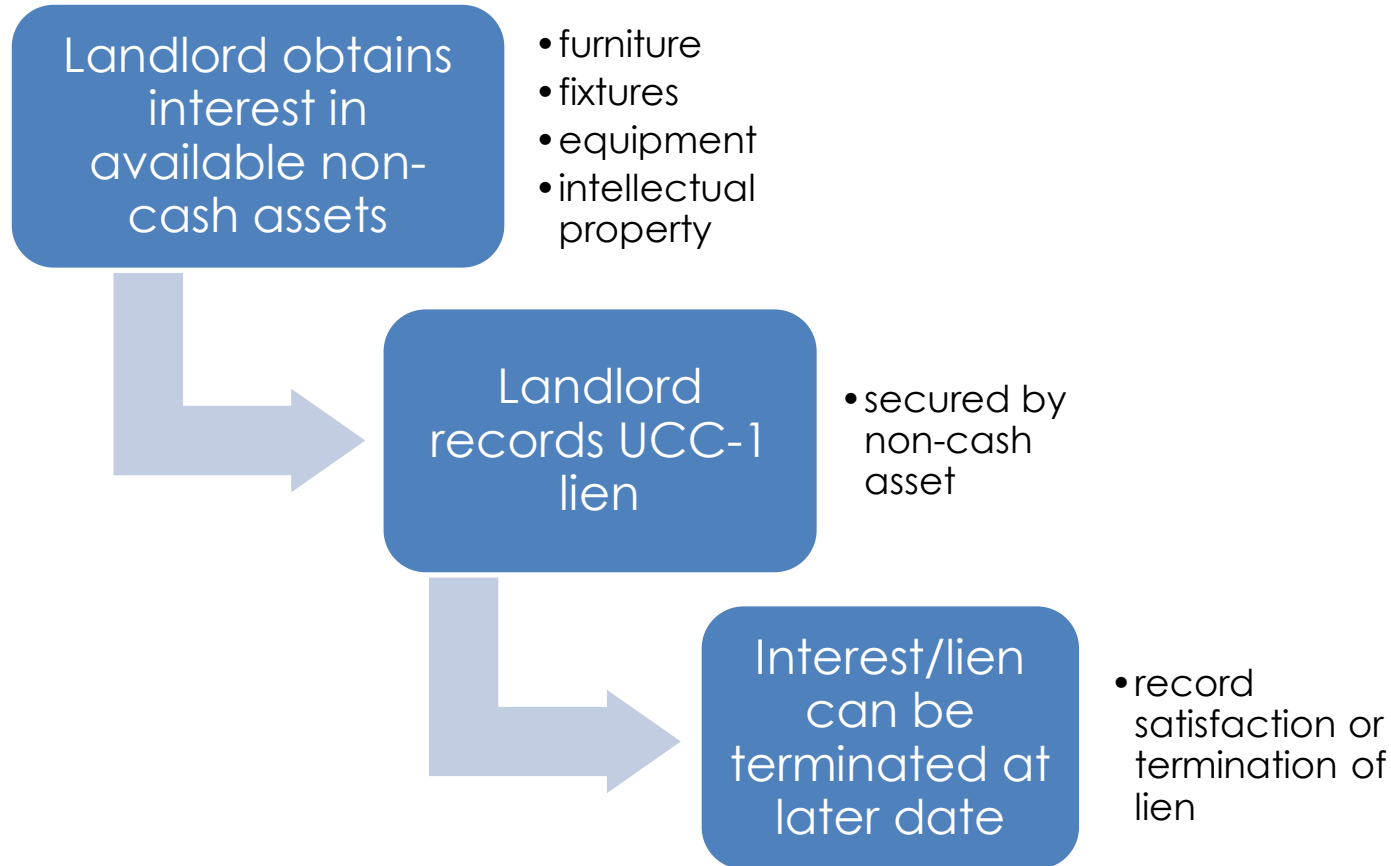
Ask for additional letter of credit, increased security deposit, or surety bond.

If tenant unable to post security, consider obtaining personal/parent guarantees.

# Solution #4:

## Additional Collateral

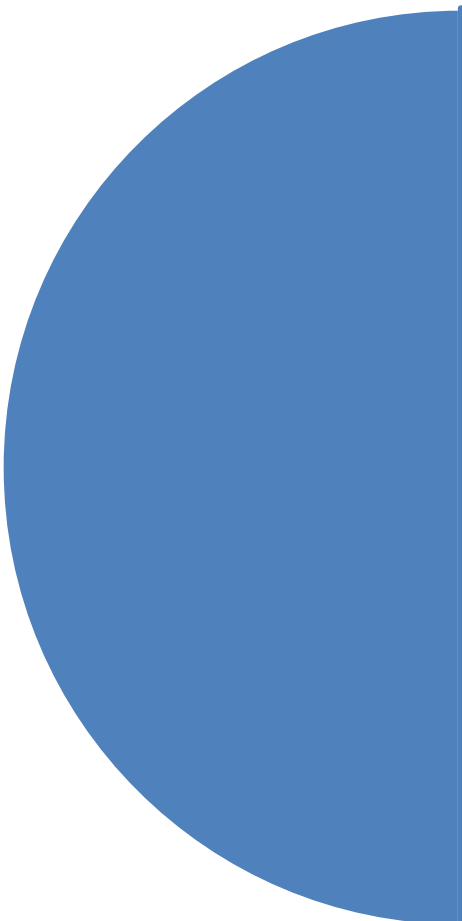
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# Solution #5:

## In-Kind Services in Lieu of Rent

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Examples of  
tenants who  
may be able to  
provide in-lieu  
services

- Printing services
- IT support
- Website design/SEO services
- Legal services
- Accounting services
- Restaurant/catering services
- Graphic design

# Solution #6:

## Promissory Note for Rent

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Unsecured = risky for landlord

Secure = risky for tenant

- By tenant's home
- By other tangible or intangible asset



## **Solution #7:**

### **Obtain interest in tenant's company**

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Stock, membership interest, etc. in exchange for rent

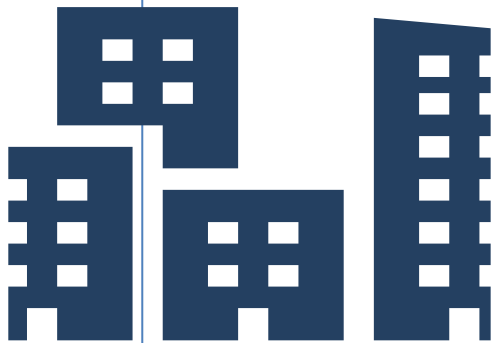


Clear terms for sale back to tenant (e.g., shareholders' agreement, operating agreement, or other agreement specific to this situation)

# Solution #8:

## Reduce Leased Premises

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Relocate tenant to different premises or reduce square footage of existing premises

# Solution #9:

## Third Party Sources of Relief

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### Mortgage modification or forbearance

- Encouraged by Federal Reserve, FDIC, Consumer Financial Protection Bureau for COVID-19 related requests
- Not automatically classified as troubled debt restructuring

### Business interruption insurance

### Emergency/disaster relief loans

- SBA, EDC, WEV, local government, chambers of commerce

### Reduction of other expenses (e.g., utility discounts)

- SCE, Verizon, internet companies, etc.

# AFTER YOU COME TO TERMS

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Memorialize the deal in a confidential amendment to the lease.



Have tenant stipulate to judgment for amount of the default plus interest. Provides an incentive for the tenant to live up to deal.



Landlord can agree that concessions will be withdrawn if tenant defaults.

# IF NEGOTIATIONS FALL APART

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Remember that litigation is expensive and time consuming



Another option is mediation or some form of Alternative Dispute Resolution (ADR)

# QUESTIONS?

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