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July 27, 2021

### Potential Rent Relief for San Francisco Small Businesses Forced to Shut Down



On July 20, 2021, the San Francisco Board of Supervisors unanimously approved an amendment to the San Francisco Commercial Eviction Moratorium Ordinance (Moratorium Amendment) codifying a legal presumption to potentially provide rent relief to small businesses forced to shut down due to the COVID-19 pandemic.

The Moratorium Amendment establishes a rebuttable presumption that the purpose of a retail lease is frustrated and that the payment of rent is excused if a "Covered Commercial Tenant" was legally prohibited from operating due to a COVID-19 public health order. (A Covered Commercial Tenant is a retail tenant with less than \$25,000,000 in gross receipts in 2019 that can demonstrate a decline in more than 25% of gross revenues.)

Small businesses such as gyms, bars, theaters, and beauty salons may benefit from this amendment. However, the Moratorium Amendment findings state that the amendment only applies to a Covered Commercial Tenant "that was required to shut down under a health order, not where a tenant would have been allowed to stay open but had to close due to a COVID-19 outbreak, or where the tenant closed due to the economic impacts of COVID-19." These findings are not actually incorporated into the section establishing the rebuttable presumption. Will this create confusion as to who is entitled to claim this rebuttable presumption? Can a retail tenant in a shopping center claim the benefits under this Moratorium Amendment?

This presumption can be rebutted if, notwithstanding the public health order, "the purpose of the lease was not frustrated, and performance remained possible." The Moratorium Amendment does not elaborate on how this presumption can be rebutted or what is the standard of proof to rebut the presumption. The Moratorium Amendment also states that it "does not alter the burden of proof under state law"; instead, the Moratorium Amendment "seeks to simplify the burden of presenting evidence so that landlords and tenants ... may resolve their disputes more easily and more economically." When can this rebuttable presumption be asserted and what is the legal framework to adjudicate this presumption?

This rebuttable presumption does not apply to "executed written agreements" entered into between landlords and tenants where such agreement provides for rental relief. The only qualification is that the "agreement is otherwise legal and valid." Is an agreement without a waiver of the Commercial Eviction Moratorium Ordinance legal or valid?

The Commercial Eviction Moratorium does provide for an exemption of the ordinance to small landlords (buildings with less than 25,000 square feet). Presumably, this exemption will also apply to the Moratorium Amendment.

The Moratorium Amendment is consistent with a California statute. Section 1511 of the California Civil Code does establish a doctrine of frustration of purpose and excuses performance under a contract. To date, courts have yet to provide relief under Section 1511 for unpaid rent under commercial leases due to the COVID-19 pandemic.

The Moratorium Amendment adds more guardrails to a tenant and landlord in its negotiations on retail lease disputes and hopefully guides parties to reach a resolution.

*The authors wish to acknowledge the contributions of summer associates Joanne Chua and Winnie Li.*

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