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Are the Nine AIR CRE Leasing Forms Better than the One CAR Commercial Lease?

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Nine AIR Commercial Leasing Forms vs. One CAR Commercial Leasing Agreement?

Most California commercial leasing transactions use one of the AIR CRE Commercial Leases ("AIR Forms") or the CAR Commercial Lease form ("CAR Form"). The AIR Forms are very inclusive at 20+ pages, are balanced for the landlord and tenant, but may not be the right choice for every commercial lease. The CAR Form is user friendly at 6 pages, but only covers the basics. The AIR CRE forms have specific leases for office, single, multi-tenant, ground leases and for shopping centers. AIR also offers addendums for arbitration, options to extend, rent adjustments, right of first refusal, etc. The primary difference between the AIR and CAR forms are detailed assignment of responsibility.

Common issues to consider or modify with the leases include the following:

AIR Forms Lease: Condition of the Premises. Paragraph 2.2 of the AIR Forms have a common clause for the landlord's warranty of the premises at the time of leasing. It states that the existing plumbing, electrical, and heating, ventilation and air conditioning ("HVAC") systems are in good working order and the structural condition of the building in which the premises is located is free of material defects. However, this landlord warranty is only thirty (30) days, except for the HVAC system, which carries a six (6) month warranty. Any problems following the expiration of the warranty period are tenant's responsibility to repair. A common modification by interlineation on the form, is to extend the landlord's warranty for all building systems and/or HVAC for at least one year.

CAR Form Lease: Condition of the Premises. Paragraph 11 simply acknowledges tenant has inspected and all is good except as identified in the lease.

11. CONDITION OF PREMISES: Tenant has examined the Premises and acknowledges that Premise is clean and in operative condition, with the following exceptions: _____.
Items listed as exceptions shall be dealt with in the following manner: _____.

CAR is a broker focused organization, so it also provides before the signature page, in a box, a simple statement that the brokers do not guarantee the condition, zoning or provide legal, tax or any; other advice concerning the premises.

> **Landlord and Tenant acknowledge and agree that Brokers: (i) do not guarantee the condition of the Premises; (ii) cannot verify representations made by others; (iii) will not verify zoning and land use restrictions; (iv) cannot provide legal or tax advice; (v) will not provide other advice or information that exceeds the knowledge, education or experience required to obtain a real estate license. Furthermore, if Brokers are not also acting as Landlord in this agreement, Brokers: (vi) do not decide what rental rate a Tenant should pay or Landlord should accept; and (vii) do not decide upon the length or other terms of tenancy. Landlord and Tenant agree that they will seek legal, tax, insurance, and other desired assistance from appropriate professionals.**

AIR Forms Lease: Security Deposit. Paragraph 5 provides that if the base rent increases during the term of the lease, landlord may increase the tenant's security deposit by the same proportionate amount. This term is fair to the landlord, but some tenants ask to strike that provision. Paragraph 5 also modifies the

"default" commercial security deposit law of *Civil Code* § 1950.7 in favor of the landlord as to how the deposit can be used if the tenant vacates before the expiration of the lease term.

CAR Form Lease: Security Deposit. Paragraph 6 also provides that the deposit increases along with the base rent. The CAR Form may also change the application of *Civil Code* § 1950.7. Paragraph 6(B)(iv) provides for the deposit to be used to "cover any other unfulfilled obligation of the Tenant." To me that implies the landlord can keep the deposit to pay for future rent if the tenant breaches and vacates before the end of the lease term. However, the last line of paragraph 6(B) could be read that if only the unpaid rent which was due while the tenant was in possession can be kept by the landlord which is consistent with *Civil Code* § 1950.7.

6. **SECURITY DEPOSIT:**
   A. Tenant agrees to pay Landlord $_____ as a security deposit. Tenant agrees not to hold Broker responsible for its return. (IF CHECKED:) ☐ If Base Rent increases during the term of this agreement, Tenant agrees to increase security deposit by the same proportion as the increase in Base Rent.
   B. All or any portion of the security deposit may be used, as reasonably necessary, to: **(i)** cure Tenant's default in payment of Rent, late charges, non-sufficient funds ("NSF") fees, or other sums due; **(ii)** repair damage, excluding ordinary wear and tear, caused by Tenant or by a guest or licensee of Tenant; **(iii)** broom clean the Premises, if necessary, upon termination of tenancy; and **(iv)** cover any other unfulfilled obligation of Tenant. **SECURITY DEPOSIT SHALL NOT BE USED BY TENANT IN LIEU OF PAYMENT OF LAST MONTH'S RENT**. If all or any portion of the security deposit is used during tenancy, Tenant agrees to reinstate the total security deposit within 5 days after written notice is delivered to Tenant. Within 30 days after Landlord receives possession of the Premises, Landlord shall: **(i)** furnish Tenant an itemized statement indicating the amount of any security deposit received and the basis for its disposition, and **(ii)** return any remaining portion of security deposit to Tenant. However, if the Landlord's only claim upon the security deposit is for unpaid Rent, then the remaining portion of the security deposit, after deduction of unpaid Rent, shall be returned within 14 days after the Landlord receives possession.
   C. No interest will be paid on security deposit, unless required by local ordinance.

AIR Forms Lease: Utility Installations, Trade Fixtures, Tenant Improvements. Paragraph 7.3 of the AIR Forms allow the tenant to make improvements with the landlord's consent, or without landlord's consent, but with notice, if is non-structural or not visible from the outside. Tenant brokers may want to strike the "with notice" part.

CAR Form Lease: Alterations. Paragraph 18 simply requires written consent by the landlord before the tenant makes alterations, which consent cannot be unreasonably withheld.

18. **ALTERATIONS:** Tenant shall not make any alterations in or about the Premises, including installation of trade fixtures and signs, without Landlord's prior written consent, which shall not be unreasonably withheld. Any alterations to the Premises shall be done according to Law and with required permits. Tenant shall give Landlord advance notice of the commencement date of any planned alteration, so that Landlord, at its option, may post a Notice of Non-Responsibility to prevent potential liens against Landlord's interest in the Premises. Landlord may also require Tenant to provide Landlord with lien releases from any contractor performing work on the Premises.

AIR Forms Lease: Ownership, Removal, Surrender of Premises. Paragraph 7.4(b) and (c) allow the landlord to require the tenant to remove its alterations at the end of the lease. However, while the Tenant may have the right to remove its trade fixtures when it vacates, often removing trade fixtures or alterations are an expensive and time consuming hassle. The tenant may want to strike part of the paragraph so that it can just leave its tenant improvements or trade fixtures when it vacates.

CAR Form Lease: Tenant's Obligations Upon Vacating. Paragraph 24 requires the premises to be cleared of the tenant's personal property and "deliver Premises to Landlord in the same condition as referenced in paragraph 11." All improvements revert to the landlord, but the landlord may also require the tenant to remove any improvements. As with the AIR lease, the tenant may want the last sentence stricken as to removal of any improvements and or ownership of installed tenant improvements.

24. **TENANT'S OBLIGATIONS UPON VACATING PREMISES:** Upon termination of agreement, Tenant shall: **(i)** give Landlord all copies of all keys or opening devices to Premises, including any common areas; **(ii)** vacate Premises and surrender it to Landlord empty of all persons and personal property; **(iii)** vacate all parking and storage spaces; **(iv)** deliver Premises to Landlord in the same condition as referenced in paragraph 11; **(v)** clean Premises; **(vi)** give written notice to Landlord of Tenant's forwarding address; and **(vii)** _____. All improvements installed by Tenant, with or without Landlord's consent, become the property of Landlord upon termination. Landlord may nevertheless require Tenant to remove any such improvement that did not exist at the time possession was made available to Tenant.

AIR Forms Lease: Partial Damage -- Insured Loss. Paragraph 9.2 of the AIR Forms provide that if damage occurs that is insured and the cost to repair is $10,000 or less, the landlord has the option to give the tenant the insurance proceeds and have tenant undertake the repairs. I would strike the phrase about the lessor making the proceeds available on a "reasonable basis" to the lessor shall immediately pay those proceeds. Additionally, this can be changed to have the landlord make the repairs even if the cost is less than $10,000. Further, the tenant may be responsible for any gap between the insurance proceeds received by the landlord and the actual cost of the damage repair. More importantly, the landlord may have a loophole to cancel the lease if only partial damage occurs and there is a gap in the insurance payments due to the "unique nature of the improvements". The tenant should modify that provision. That portion of 9.2 where it begins "If such funds or assurance are not received, Lessor may nevertheless elect by written notice to Lessee within 10 days thereafter to modify the provision stating "… or (ii) have this Lease terminate 20 days thereafter." Paragraph 9.2 states:

same, or adequate assurance thereof, within 10 days following receipt of written notice of such shortage and request therefor. If Lessor receives said funds or adequate assurance thereof within said 10 day period, the party responsible for making the repairs shall complete them as soon as reasonably possible and this Lease shall remain in full force and effect. If such funds or assurance are not received, Lessor may nevertheless elect by written notice to Lessee within 10 days thereafter to: (i) make such restoration and repair as is commercially reasonable with Lessor paying any shortage in proceeds, in which case this Lease shall remain in full force and effect, or (ii) have this Lease terminate 30 days thereafter. Lessee shall not be entitled to reimbursement of any funds contributed by Lessee to repair any such damage or destruction. Premises Partial Damage due to flood or earthquake shall be subject to Paragraph 9.3, notwithstanding that there may be some insurance

Paragraph 9.3 also provides the landlord with a way to cancel the lease if the partial damage is uninsured and caused by the tenant.

9.3 **Partial Damage - Uninsured Loss**. If a Premises Partial Damage that is not an Insured Loss occurs, unless caused by a negligent or willful act of Lessee (in which event Lessee shall make the repairs at Lessee's expense), Lessor may either: (i) repair such damage as soon as reasonably possible at Lessor's expense, in which event this Lease shall continue in full force and effect, or (ii) terminate this Lease by giving written notice to Lessee within 30 days after receipt by Lessor of knowledge of the occurrence of such damage. Such termination shall be effective 60 days following the date of such notice. In the event Lessor elects to terminate this Lease, Lessee shall have the right within 10 days after receipt of the termination notice to give written notice to Lessor of Lessee's commitment to pay for the repair of such damage without reimbursement from Lessor. Lessee shall provide Lessor with said funds or satisfactory assurance thereof within 30 days after making such commitment. In such event this Lease shall continue in full force and effect, and Lessor shall proceed to make such repairs as soon as reasonably possible after the required funds are available. If Lessee does not make the required commitment, this Lease shall terminate as of the date specified in the termination notice.

Particular attention should be given to the AIR Form at paragraphs 9.1, and 9.4. Paragraph 9.1(b) defines total destruction as requiring repairs that cannot reasonably be repaired in 6 months or less from the date of the damage or destruction if the Lessor provides written notice of this intent within 30 days from the date of the damage or destruction as to whether or not the damage is partial or total. Paragraph 9.1(b) states:

(b) "**Premises Total Destruction**" shall mean damage or destruction to the Premises, other than Lessee Owned Alterations and Utility Installations and Trade Fixtures, which cannot reasonably be repaired in 6 months or less from the date of the damage or destruction. Lessor shall notify Lessee in writing within 30 days from the date of the damage or destruction as to whether or not the damage is Partial or Total.

The AIR Forms at paragraph 9.4 adds a line that automatically terminates the lease if there is "Total Destruction" as defined in paragraph 9.1(b).

9.4 **Total Destruction**. Notwithstanding any other provision hereof, if a Premises Total Destruction occurs, this Lease shall terminate 60 days following such Destruction. If the damage or destruction was caused by the gross negligence or willful misconduct of Lessee, Lessor shall have the right to recover Lessor's damages from Lessee, except as provided in Paragraph 8.6.

This automatic termination should eliminated, modified or at least require notice from either the landlord or tenant required and the ability for the innocent party to seek damages. Perhaps something along the lines of "if Total Destruction occurs, then either party may provide notice within 30 days of the destruction as to whether or not they intend to terminate this Lease." Commonly, the "reasonably repaired within 6 months or less" is the litigated issue.

CAR Form Lease: Damage to the Premises. Paragraph 26 provides that if the premises cannot be repaired within 90 days, then either the landlord or tenant can terminate the lease. Compare that to the AIR Forms,

at paragraph 9.3, providing only the landlord can terminate the lease if the repairs will take at least six months!

26. **DAMAGE TO PREMISES:** If, by no fault of Tenant, Premises are totally or partially damaged or destroyed by fire, earthquake, accident or other casualty, Landlord shall have the right to restore the Premises by repair or rebuilding. If Landlord elects to repair or rebuild, and is able to complete such restoration within 90 days from the date of damage, subject to the terms of this paragraph, this agreement shall remain in full force and effect.
If Landlord is unable to restore the Premises within this time, or if Landlord elects not to restore, then either Landlord or Tenant may terminate this agreement by giving the other written notice. Rent shall be abated as of the date of damage. The abated amount shall be the current monthly Base Rent prorated on a 30-day basis. If this agreement is not terminated, and the damage is not repaired, then Rent shall be reduced based on the extent to which the damage interferes with Tenant's reasonable use of the Premises. If total or partial destruction or damage occurs as a result of an act of Tenant or Tenant's guests, **(i)** only Landlord shall have the right, at Landlord's sole discretion, within 30 days after such total or partial destruction or damage to treat the lease as terminated by Tenant, and **(ii)** Landlord shall have the right to recover damages from Tenant.

AIR Forms Lease: Real Property Taxes. Paragraph 10 deals with real property taxes that are passed through to the tenant as part of the common area operating expenses. Paragraph 1.6, 4.2 and/or Paragraph 10(a) should be modified to eliminate the tenant's responsibility to pay increased taxes due to a sale or transfer of ownership of the premises causing a real estate tax increase (re-assessment). Related issues, or other clauses, may include a Landlord Proposition Tax 13 Tax Buyback or Proposition Tax 13 Protection clause.

This clause may be used alleviate the potential tax burden upon the tenant:

> "Notwithstanding anything to the contrary, Real Estate Taxes shall not include any increase of Real Estate Taxes and assessments due to any change in ownership including, but not limited to, the sale or any other form of full or partial transfer of title of the Building or any part thereof, or due to the transfer of title of any leases in the Building/Project, or due to any renovation or new construction in the Building or related facilities."

AIR Forms Lease: Default --Time to Cure. Paragraph 13 of the AIR Forms provide for most breaches to be cured counting "business days" as opposed to calendar days. Paragraph 13.1(e) allows for more than 30 days to cure if the tenant has begun the curing process. This is an example of a tenant friendly AIR Forms lease provision and is logical given the time required by certain commercial repairs.

AIR Forms Lease: Jury Trial Waiver. Paragraph 48 waives rights to jury trial. Such a provision is void as against public policy and is unenforceable. See *Code of Civil Procedure* § 631 and *Grafton Partners L.P vs. Superior Court* (2005) 36 Cal.4th 944. Waiver of jury requires a signed arbitration agreement.

AIR Forms Lease: Arbitration Clause. Paragraph 49 requires the parties to check and attach a separate arbitration addendum. The parties and brokers can also choose to all be bound to arbitration.

AIR Forms Lease: ADA Accessibility. AIR Forms Paragraph 50 or 51 require notification if the premises have or have not been inspected by a Certified Access Specialist ("CASp") and states in subsection (b) the landlord does not warranty that the premises are ADA compliant and any ADA modifications required by the tenant's use are the sole responsibility of tenant.

The tenant should never agree to make anything other than its own non-structural tenant improvements ADA compliant. For those unfamiliar with basic ADA requirements check this out https://www.adachecklist.org/doc/fullchecklist/ada-checklist.pdf

CAR Form Lease: ADA Requirements. Paragraph 19 places responsibility for any "alterations required by Law as a result of Tenant's use shall be Tenant's responsibility." That is fair. However, the landlord also has some responsibility for required government alterations. The last line of Paragraph 19 provides that

"Landlord shall be responsible for any other alterations required by law." I believe that would include ADA improvements to the building to be the obligation of the landlord. Paragraph 19 provides:

19. **GOVERNMENT IMPOSED ALTERATIONS:** Any alterations required by Law as a result of Tenant's use shall be Tenant's responsibility. Landlord shall be responsible for any other alterations required by Law.

The CAR Form Lease at paragraph 34 is a little sneaky. It omits the ADA phrase which would highlight the issue, rather, it states that the property has or has not been CASp inspected with checked boxes.

34. **CONSTRUCTION-RELATED ACCESSIBILITY STANDARDS:** Landlord states that the Premises ☐ has, or ☐ has not been inspected by a Certified Access Specialist. If so, Landlord states that the Premises ☐ has, or ☐ has not been determined to meet all applicable construction-related accessibility standards pursuant to Civil Code Section 55.53.

However, CAR provides an ADA Notice form called the Commercial Lease Construction Accessibility Addendum that should be attached providing similar information as the AIR Forms paragraphs 50/51. This addendum should be used as it clearly satisfies the Lessor's disclosure requirements.

CALIFORNIA ASSOCIATION OF REALTORS®

COMMERCIAL LEASE CONSTRUCTION ACCESSIBILITY ADDENDUM
(C.A.R. Form CLCA, 11/16)

This is an addendum to the Commercial Lease Agreement (lease) dated _____ in which _____ is referred to as "Landlord" and _____ is referred to as "Tenant". Paragraph 34 of the lease is deleted in its entirety and replaced by the following;

Paragraph 34. CONSTRUCTION-RELATED ACCESSIBILITY STANDARDS:
A. Landlord states that the Premises ☐ have, or ☐ have not been inspected by a Certified Access Specialist (CASp).
B. **If** the Premises have been inspected by a CASp,
(1) Landlord states that the Premises ☐ have, or ☐ have not been determined to meet all applicable construction-related accessibility standards pursuant to Civil Code Section 55.53. Landlord shall provide Tenant a copy of the report prepared by the CASp (and, if applicable a copy of the disability access inspection certificate) as specified below.
(2) ☐ (i) Tenant has received a copy of the report at least 48 hours before executing this lease. Tenant has no right to rescind the lease based upon information contained in the report.
OR ☐ (ii) Tenant has received a copy of the report prior to, but no more than, 48 hours before, executing this lease. Based upon information contained in the report, Tenant has 72 hours after execution of this lease to rescind it.
OR ☐ (iii) Tenant has not received a copy of the report prepared by the CASp prior to execution of this lease. Landlord shall provide a copy of the report prepared by the CASp (and, if applicable a copy of the disability access inspection certificate) within 7 days after execution of this lease. Tenant shall have up to 3 days thereafter to rescind the lease based upon information in the report.

CAR Form Lease Anti-Fraud Provision. Paragraph 33 is unique because it provides that if the tenant lied on its application, then at any time, the landlord can "cancel this agreement"! My feeling is a court will not permit a forfeiture or eviction based upon that type of fraud, but it provides a negotiation point.

33. **TENANT REPRESENTATIONS; CREDIT:** Tenant warrants that all statements in Tenant's financial documents and rental application are accurate. Tenant authorizes Landlord and Broker(s) to obtain Tenant's credit report at time of application and periodically during tenancy in connection with approval, modification, or enforcement of this agreement. Landlord may cancel this agreement: **(i)** before occupancy begins, upon disapproval of the credit report(s); or **(ii)** at any time, upon discovering that information in Tenant's application is false. A negative credit report reflecting on Tenant's record may be submitted to a credit reporting agency, if Tenant fails to pay Rent or comply with any other obligation under this agreement.

AIR Forms exclude many matters from arbitration. While the AIR Forms Arbitration Addendum allow the parties (and their brokers) to choose to arbitrate any disputes, the AIR arbitration clause excludes more than it includes! For example, it excludes torts, bad faith, punitive damage actions, unlawful detainer and small claims actions. It even excludes disputes about "options" to extend the lease (paragraph 39 of the leases). The AIR Forms arbitration addendum significantly differs from paragraph 22 of its AIR Forms Commercial Purchase and Sale Agreement. I prefer the AIR Addendum and suggest adding that the arbitrator follow *Code of Civil Procedure §* 1280, et seq. Take care reading the AIR Forms arbitration

addendum provides as to exclusions to make sure you are comfortable with a limited arbitration clause. E.g., a limited arbitration clause may benefit a tenant who wants to sue a landlord. The AIR Forms arbitration addendum at section B of the Addendum provides as to exclusions:

B. **DISPUTES EXCLUDED FROM ARBITRATION:**

The following claims, disputes or disagreements under this Lease are expressly excluded from the arbitration procedures set forth herein: 1. Disputes for which a different resolution determination is specifically set forth in this Lease, 2. All claims by either party which (a) seek anything other than enforcement or determination of rights under this Lease, or (b) are primarily founded upon matters of fraud, willful misconduct, bad faith or any other allegations of tortious action, and seek the award of punitive or exemplary damages, 3. Claims relating to (a) Lessor's exercise of any unlawful detainer rights pursuant to applicable law or (b) rights or remedies used by Lessor to gain possession of the Premises or terminate Lessee's right of possession to the Premises, all of which disputes shall be resolved by suit filed in the applicable court of jurisdiction, the decision of which court shall be subject to appeal pursuant to applicable law 4. Any claim or dispute that is within the jurisdiction of the Small Claims Court and 5. All claims arising under Paragraph 39 of this Lease.

CAR Form Lease uniquely requires mandatory mediation. CAR at Paragraph 35A requires mediation even if the arbitration clause is not signed but also has many exceptions to mediation before filing a lawsuit. You may want to enlarge which disputes require early mediation. The penalty for not mediating is severe, the party refusing to mediate may lose its right to recover attorney fees even if ultimately prevailing in the dispute. Paragraph 35A provides as to mediation:

35. DISPUTE RESOLUTION:
A. **MEDIATION:** Tenant and Landlord agree to mediate any dispute or claim arising between them out of this agreement, or any resulting transaction, before resorting to arbitration or court action, subject to paragraph 35B(2) below. Paragraphs 35B(2) and (3) apply whether or not the arbitration provision is initialed. Mediation fees, if any, shall be divided equally among the parties involved. If for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action. THIS MEDIATION PROVISION APPLIES WHETHER OR NOT THE ARBITRATION PROVISION IS INITIALED.

CAR Form also has many arbitration (and mediation) exceptions. Paragraph 35. B of the CAR Form carves out exceptions to arbitration. These include foreclosures, unlawful detainer actions, bodily injury, wrongful death and latent defect lawsuits. However, a lis pendens or writ of attachment can also be filed as part of a Superior Court action without invoking the no mediation attorney fee penalty.

CAR paragraph 35. B. provides:

B. **ARBITRATION OF DISPUTES: (1) Tenant and Landlord agree that any dispute or claim in Law or equity arising between them out of this agreement or any resulting transaction, which is not settled through mediation, shall be decided by neutral, binding arbitration, including and subject to paragraphs 35B(2) and (3) below. The arbitrator shall be a retired judge or justice, or an attorney with at least 5 years of real estate transactional law experience, unless the parties mutually agree to a different arbitrator, who shall render an award in accordance with substantive California Law. In all other respects, the arbitration shall be conducted in accordance with Part III, Title 9 of the California Code of Civil Procedure. Judgment upon the award of the arbitrator(s) may be entered in any court having jurisdiction. The parties shall have the right to discovery in accordance with Code of Civil Procedure §1283.05.**
(2) EXCLUSIONS FROM MEDIATION AND ARBITRATION: The following matters are excluded from Mediation and Arbitration hereunder: **(i)** a judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage, or installment land sale contract as defined in Civil Code §2985; **(ii)** an unlawful detainer action; **(iii)** the filing or enforcement of a mechanic's lien; **(iv)** any matter that is within the jurisdiction of a probate, small claims, or bankruptcy court; and **(v)** an action for bodily injury or wrongful death, or for latent or patent defects to which Code of Civil Procedure §337.1 or §337.15 applies. The filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a violation of the mediation and arbitration provisions.
(3) BROKERS: Tenant and Landlord agree to mediate and arbitrate disputes or claims involving either or both Brokers, provided either or both Brokers shall have agreed to such mediation or arbitration, prior to, or within a reasonable time after the dispute or claim is presented to Brokers. Any election by either or both Brokers to participate in mediation or arbitration shall not result in Brokers being deemed parties to the agreement.

Which form should I use?

Both sets of forms work for almost every leasing situation and modified as needed. For example, neither provide for payment of Key money to avoid the consequences of *Civil Code* § 1950.8(b) The AIR and CAR forms should handle 95% of your real estate transactional needs. Both AIR CRE and CAR offer excellent courses and guidance as to how to use their forms