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MacDermid Reynolds Glissman offers some solutions for cash strapped tenants

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Rental Reduction Solutions For Cash Strapped Tenants (From the Tenant's Perspective)

Are you or your clients being hammered by the financial crisis? Has business contracted? Do you need to downsize your space or reduce your overhead? One option to consider is reducing your space or restructuring your rental obligation. It is not an easy fix, but if you do your homework and have enough options to work with, it is possible. Consider the following:

1. First, Do Your Homework. Review your lease. You are looking for rights, outs, landlord defaults, anything. This is all about seeing what leverage you have to work with. Experience teaches that a slow read of a complex lease may produce a powerhouse list of options. Also, consider what the market conditions are surrounding your space and how that might impact the negotiation? Is this an easy assignment or sublet situation? If you go under, will the landlord have dead space for a long time to come? Do you have a guaranty sitting out there? Does your company have significant assets at risk under the lease or are you looking more like the Titanic?
2. Hard Ball. If recourse under the lease is to minimal assets, the conversation is short and simple. We are walking or going under if you don't give us this concession - NOW. If the landlord has no other options, you may be signing a rental reduction agreement within moments. This solution, however, does not fit most situations. There are other more landlord attractive solutions to consider if Hard Ball is not an option.
3. Straight Reduction Using Reality Therapy. Landlord, we are in trouble. Here are our books. No hiding here. Give us a reduction with no hooks and we are likely to live on and be a great tenant. Refuse and we are likely to not be around this time next year. Your choice.
4. Extend the Term Now. Landlords are looking for long term stabilized rental streams. Offer it now. Extension for a rent reduction. Show the landlord how this will stabilize your business situation for the long term. Consider offering a covenant providing landlord with future financial information on the company. This makes lenders happy.
5. Reduce Rent Now, Increase Rent Later. Reduce the rental now in exchange for an increased rental rate later, perhaps with an interest accrual component baked into the new increased rent. The rental bump later will put the landlord in the same position as the level rent previously agreed to. This becomes a time value of money issue for the landlord rather than an economic issue, and the timing is mitigated by including interest on the accrual.
6. Accrue Reduction Differential, Balloon it with a Personal Guaranty. Allow the differential between the reduced rent and the stated rent to accrue for a period of time and make it due and payable on a date certain. Offer up a personal guaranty for the accrued and unpaid rent. You can sweeten this offer with collateral to back the personal guaranty and it can be documented with a promissory note from the tenant, a guaranty with some credit behind it, and perhaps a collateral package as further

inducement. You can add in an interest accrual as well to mitigate the time value of money concern. Try burning some or all of the accrual off if you keep up your payments.

7. Offer to Improve the Lease. You had the leverage when you negotiated that lease. Your hot shot attorney extracted all kinds of concessions. Go back to those negotiation notes (the landlord has forgotten about them now) and see what you extracted. Put some of those back on the table.

8. Collateralize or Improve the Credit Behind the Lease. Step up to a full or limited guaranty. Start with a guaranty of collection (collects only if tenant does not pay after suit) and back into a full guaranty (can sue either of you). Consider credit enhancements such as a larger deposit either in cash or by letter of credit, but try to burn all of this down over time if you perform or consider an automatic release of the guaranty if you bump the rent stream back up.

9. Assign or Sublet. A clean exit is the best out. If you have to consider supplementing the assignment or sublet rental, it is still cheaper than eating the entire rent. Regardless of how the lease language is phrased, there is a fair amount of case law on the subject of withholding approval to provide guidance on the viability of this option.

10. Buy Out the Lease. Offer to pay the landlord a one time fee to terminate the lease. Pay it in cash if you can or offer to sign a note, collateralize the note, and pay it back over time or in a balloon down the road.

11. Become Educated on Your Legal Options. Get your attorney to explain the eviction procedures in your jurisdiction. Eviction can take time and may allow you to raise defenses. You can fight and then perhaps settle at a later date. In some cases, landlords may have a duty to mitigate their damages (i.e. try to find a new tenant for you). The lease review may reveal defenses to either the lease or the guaranty.

Conclusion: Do your homework before you make the call. Attend the landlord meeting in person. Step into that meeting with a negotiating strategy backed up with as many solutions such as those mentioned as possible. You need a big bag of solutions when you step into this session. Know before you go in where your walk away point is and what your next best alternative is. You negotiate to that point, and you walk away from the table when you hit that point. The tools above are all that can fit in this article space. You can always package them together to create something attractive to the landlord. A brain storming session can produce a host of other solutions as well. It can work. Good luck.

A landlord's tool kit for dealing with cash strapped tenants (From the Landlord's Perspective)

Are your tenants being hammered by the financial crisis? Are they coming to you requesting concessions? Consider the following:

1. Review Your File. Pull the lease file out. What do you have to work with? Lease, guaranty, security deposit, duty to replenish security deposit, defaults to raise the heat? Consider a credit report and an asset search. Check the file for tenant complaints and other potential defenses and evaluate their viability. The threshold question is do they have sufficient asset strength to enforce the existing lease terms? The second question is, do they have defenses against enforcement? Consider eviction time and impact on your cash flow vs. a workout with them and continued cash flow. Are they threatening bankruptcy? Evaluate impact of same.

2. Do You Have Other Options. Do other tenants need to expand? Are other parties interested in the space? Do you really want to work with this tenant to try and make it happen?

3. Make the Tenant Do Its Homework. If the tenant is asking for concessions, you may want to

demand certified financial reports from the tenant to see for yourself how bad it is. Are there other assets available to cover their obligations? Do the principals have assets? Let the tenant convince you that there are no other assets but that the concessions it is asking for will save the day. You must determine that with your assistance they can in fact survive, and that there really are no other assets to cover their obligations.

4. Just Say No. If the tenant is financially strong or you have other viable options for the space, the tenant is probably out of luck. There is no incentive to a landlord with an equal or better alternative other than the hassle of litigation and then putting new tenants in.

5. Agree to Rent Reduction. A simple lease modification reducing the rent, reducing the space, drawing down the security deposit, reducing the term, etc. This is a simple, permanent fix. Consider limiting it to the named tenant. Consider other lease enhancements in exchange for this concession.

6. Change the Term. Reduce the rent but extend the term or agree to reduce the term and start looking for new tenants.

7. Reduce Rent Now, Increase Rent Later. Reduce the rent now in exchange for an increased rent later. Tack interest on. Extend the term as well. With interest, it is just a time value of money issue.

8. Abate Some Portion of the Rent for a Stated Period. Allow the differential between the reduced rent and the stated rent to accrue for a period of time and make it due and payable on a certain date. Extract a personal guaranty and other collateral for the accrued and unpaid rent. Tack on interest to mitigate the time value of money. Consider financial reporting covenants and trigger a recapture or abatement termination if the business improves or some other relevant event occurs. Consider adding a right to take back the space following notice and start marketing.

9. Rewrite the Lease. Rental concessions in exchange for a tighter lease. Take back all those lease concessions you made when you really wanted them and they had other choices. Financial reporting; guaranties; security deposit; elimination of termination, expansion, contraction, renewal options. Go back to that first draft of the lease you liked so much and see what you gave up.

10. Collateralize or Improve the Credit Behind the Lease. Demand a full or limited guaranty if none is in place. Eliminate the cap or concessions you made in the old guaranty. Consider credit enhancements such as a larger deposit either in cash or by letter of credit (perhaps built up over time or burning down over time).

11. Equity Kicker. If the business stabilizes because of your assistance, perhaps you should share in the profits up to some amount for some period of time.

12. Reduced Rate Sublet or Assignment. Encourage the tenant to assign the lease or sublet a portion of the space at a reduced rate thus allowing the tenant to pick up only a portion of the rent while the sublessee or assignee picks up the rest. But, don't agree to non-disturbance with the new occupant.

13. Consider a Stipulated Judgment. Consider putting the lease into eviction, then settle on terms and incorporate those terms into a judgment of eviction which is stayed and ultimately dismissed if they live up to their bargain. This will permit a quick resolution if they default again shortly after the deal is cut.

14. Your Lender. Don't forget your lender and the covenants in your loan documents prohibiting lease modifications and terminations without lender approval.

These solutions are all that space will allow. There is no limit to creative win win solutions.

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