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Commercial real estate borrower's guide to approaching your lender about concessions

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Current headlines suggest many commercial real estate borrowers may be talking with their lenders in the next several months about non-renewal of their loans, potential debt service or other covenant defaults, tenant defaults and best laid plans gone awry. Knowing how to approach your lender is half the battle. Following are some thoughts to consider.

1. **Read Your Loan Documents.** Get the binder out. Read it. Know everything about the paper. Know it better than your lender does. Satisfy yourself that it really is recourse to something meaningful (i.e. this is not a walk away situation). Have your lawyer look through the package. Are the documents defective in some manner? Has the lender done something along the way that might give rise to lender liability or defenses against enforcement? Let your lawyer work through the paper with you and make sure you provide the lawyer with all the details and history of the relationship. Lay out the negotiating strategy with your lawyer and make sure he or she is in agreement.
2. **Pull Your Property Information Together.** Survey, current title bring down, current rent rolls, leases, tenant guaranties, tenant financials if you have them, environmental, etc. Have your story ready if there are warts that will surface.
3. **Pull Your Financial Information Together.** Current property, business and personal financial statements are important. Your lender is not interested in taking a hit if you are not going to be taking one with it. If your statements are skinny, great. If they are fat, then you had better have an incredible explanation as to why the lender should be taking a hit while you are sitting on all those assets and cash. Do you have a number of TI obligations around the corner? Do you have significant capital expenditures coming up? Pull together a comprehensive picture and be prepared to link that picture to the solutions you will be presenting.
4. **Bow Tie Package.** Organize your paper; package it up with tabs and index. Not slick. Just organized and professional looking.
5. **Identify the Problem and the Solution.** Prepare your position. Identify what got you into this situation and what steps are required to get you out of it. Determine why you are better suited to work the situation out than the lender. Project out resolution time and cost with a full pro forma on how it is going to work out for the lender. Pull all of that information you compiled above into a thoughtful analysis of the current situation and equally thoughtful and viable solution.

6. Consider the Lender's Options. As the lender is politely listening to your presentation and looking at the clock on the wall, it is asking itself:

(a) The Take Back: (i) how long will it take to foreclose on the property; (ii) what will the carry be during litigation through disposition; (iii) what can I get for it on resale as foreclosed property; (iv) how long until I can dump it; (v) what other assets can I take from my borrower/guarantor to cover some of those costs; (vi) what obstacles must be overcome to dispose of this asset in a profitable manner; and (vii) what will I end up with at the end of the day. Your lender's officer may also be wondering how he or she is going to explain this to the boss. How is it that they did not see this coming when they advocated for the loan before committee.

(b) The Borrower Bankruptcy: if my borrower files for bankruptcy workout protection or liquidation, how long will it take and what will happen to my loan, tenants and collateral. What am I going to walk away with, when and at what cost. Answer the questions in (a) and (b) for yourself before you even think about sitting down with the lender because somehow, you need to come up with something better.

(c) Best Suited to Work It Out: (i) am I the lender better suited to work the property through this stage of problems or is the borrower better suited; (ii) is this borrower motivated to dig both of us out of this mess; and (iii) if I accommodate borrower, can this borrower pull us both out of this mess.

(d) Credibility: (i) do I buy what this borrower is telling me; (ii) is there independent market data supporting these statements; and (iii) is this borrower's solution supportable by solid data.

7. Timing of the Presentation. Do you wait until you are in default? The lines of authority generally become much clearer when a default is declared. The file moves to the workout team and they will be focused on just that task. They may, however, not be as "deal" oriented as the front line officers who have a vested interest in their relationship with you. Logic would dictate that most lenders do not want to be thrust into a crisis without warning. Conversely, what lender is going to take you seriously if you are projecting trouble next year or six months from now. They have better uses of their time. The jury is out on the best time to approach your lender. This author believes that ninety days in advance of the ship starting to sink may be a good time to start the conversation. There is urgency, yet time to think, talk and consider. You are not forcing their hand, but letting them know it is coming and coming soon. The loan is still with those who have a vested interest in their relationship with you and you have time to talk.

8. Consider Your Audience. Give some thought to the best audience at the lender for your presentation, the limits on their authority to act and motivation to work with you. As a general rule, relationship managers and loan originators at the lender may have virtually no authority when it comes to a loan modification. They may, however, be senior enough, or have sufficient credibility and relationships with senior officers, to work with you on a modification plan and then advocate for it with those who have the final authority. Clearly the lines of authority in this regard are much more blurred at the smaller lenders thereby making meaningful access easier. As you move up the ladder of lender size, the officers that you routinely deal with become more removed from the decision

makers and less helpful to you and your cause. Consider the following though: a lower level officer (i.e. assistant vice president) may have absolutely no authority nor any clout and may therefore be the wrong audience for your presentation. That individual will be presenting your case in a setting where he or she has no clout and you have no control over delivery of the message. On the other hand, if that same individual was brought into the lender by a senior officer because of their close relationship or incredible production skills, that same assistant vice president may be the perfect audience for your presentation. That person has a relationship with you, incentive to work the problem out, and sufficient clout and credibility with the actual decision makers to effectively carry your cause forward. When you move into the mortgage backed security type of loan, the face of the lender is its servicer and servicers often have no authority whatsoever to negotiate a single change. Their authority is usually governed by their pooling service agreement which will set forth their power (or the lack thereof) to modify a loan. Therefore, when dealing in the high finance sophisticated Wall Street lending setting, part of your homework will be to find the pooling service agreement or similar document and examine it for scope of servicer authority to modify. You may also need to consider the politics associated with your audience. If you start off by going over the head of your relationship manager/originator because of their perceived lack of clout and authority, will the resulting alienation taint the view of your loan internally? The decision on who you will present to will play a key role in the process.

9. The Presentation. The lender does not view itself as your partner, no matter how much you want them to be. The lender does not want to hear this story and it sure does not want to hear it while you call from your ski chalet or limo looking and sounding slick. This is a sleeves rolled up in the lender's small cramped office presentation. No lunch. Not at your lawyers office. Not at your private club or beach house either. The presentation touches on all of the above. Here is where things stand, lender. This is how we got to this point. This is what is going to happen if we don't act now. Here is what can be done to fix it, why it will work and what I am asking of you lender to get us there. Here are the facts to back it up. This is what I can do financially and why I cannot do more. And, very very gently or maybe not at all yet, this is why my approach is better than the other options available to you. Lender, this can work. I'm going to make it happen and I'm leaving sweat and money on the table to get it done. At this early stage, threats and keys are probably best left elsewhere.

10. The Lender's Response. The lender listens, says no and walks out! The negotiation has started. You call again next week, or stop by. You give the same speech. You do it again the following week. Once the lender realizes this is not going away, that you don't have money to throw at the solution, that your game plan is better than anything the lender can put in place, then serious negotiations may begin. The lender will want more and assume you have more to give, so you may want to have some further concessions in mind. You may have to default if that is what it takes to get their attention and start meaningful dialogue. You are going to be in default soon anyway, right? Timing it to make a point may help (recognizing, of course that once you default, you are in a whole new dangerous world). At the end of the day, lenders generally don't want your property. They just want the loans to do what they are supposed to do. They understand the market is a mess and that adjustments, concessions and modifications may be necessary. Do their work for them, be persistent and work it like any other deal. A rational approach such as that outlined above has a good chance of bringing rational people to a rational solution. Our firm's attorneys are ready to

assist you as you work through this process. Good luck!

*This article does not constitute legal advice. Consult with an attorney.

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