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Shattering Myths for Real Estate Survival

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American Express is offering \$300 to certain cardholders to terminate their credit cards, Hyundai will accept return of a purchased car if the buyer loses his job, Denny's and Jack-in-the-Box offer free food promotions, General Motors is teetering near bankruptcy, and Bank of America may be "nationalized." These recent headlines confirm that "business-as-usual" thinking must be discarded.

Southern Californians receive daily confirmation of the challenging economic dynamics with a new form of blight far more troubling than merely visual: a plethora of "For Lease" signs dotting darkened storefronts of retail and commercial real estate.

There is no forthcoming federal government bailout for this problem, but property owners and small businesses that employ an entrepreneurial spirit can respond more quickly to market forces than troubled corporate behemoths like General Motors.

As increased vacancies place downward pressure on rents, commercial tenants are seeking rent reductions and other concessions while owners are striving to stabilize income and their tenant base. These realities dictate that the owner-tenant relationship no longer be viewed as adversarial, but rather through a new prism: a "strategic partnership."

While certainly not a partnership in legal terms, an owner will financially benefit by creating a strategic partnership with retail or office tenants through properly structured lease modifications for those unable to sustain their rental payments due to decreasing revenues. Rather than immediately evict a defaulting tenant or negotiate a mere rent reduction, owners who employ the principles of successful partnerships can prevent the spreading contagion of vacancies that dampens consumer confidence and weakens other neighboring retailers.

A mutually beneficial Strategic Partnership can benefit both owner and tenant by shattering ten myths of the owner-tenant relationship.

1. Tenants Don't Talk: Any concession should contain a tenant executed Duty of Confidentiality to prevent other tenants from gain-

ing the knowledge of another's modified lease. A breach of the confidentiality clause would result in a specific damage amount from the tenant without the owner dedicating the time and expense of court action to prove the amount of the damages.

2. I'll Never Get My Money Back: The tenant's executed Forbearance of Rent, an executed promise to pay the concession at event benchmarks, a date certain, or upon the sale of the business, may recoup some of the rental concessions in the event of an economic rebound. A lease modification could also include a "Percentage Clause" for the owner to receive a percentage of the tenant's gross sales income if the tenant's revenues increase.

3. Ignore it — It'll Go Away: As commercial rental values soften, the owner should proactively contact tenants to ascertain the state of their business health. A targeted lease modification is more effective the sooner an owner is aware of the nature and scope of the tenant's economic ills.

4. Our Word is Our Bond: An owner's representative who enters into oral or "soft" agreements with a tenant may unwittingly cause an owner to waive their legal rights. Two examples that could provide the tenant with a legal defense if the dispute further deteriorates are managers who accept lower rent payments, or who permit uses that conflict with exclusive use clauses.

5. A Guarantee is a Guarantee: A tenant should be required to execute a personal guarantee for a limited term of the modified lease. However, both personal guarantees and indemnification clauses are only beneficial when the tendering party can perform. Owners should conduct their own due diligence to ensure that the guarantee and indemnity is not tendered by a single asset, corporation, or limited liability company that cannot perform.

6. Both Sides are Reasonable: Litigation often arises from vague or subjective clauses. The often cited word "reasonable," can trigger numerous subjective responses. Owners are best served by leases containing objective language which remove ambiguities.

7. We'll Save Money and Not Call the Lawyer: A review of all lease terms and a tailored addendum addressing each specific situation should be completed. A ready catalogue of alternative lease clauses to modify or substitute for standard lease clauses will reduce time and

legal fees associated with writing specific language for each new situation.

8. The New Kid is King: With increased vacancies, replacement tenants will demand their own tenant improvements. Owners should prudently monitor the resulting construction of improvements for these new tenants to avoid existing tenants' claims of interference with their rights to quiet use and enjoyment, or claims of constructive eviction.

'Southern California has rebounded from earthquakes, civil unrest and previous national economic downturns and disasters. Survival until that recovery requires owners and tenants to adopt the counterintuitive concept of a Strategic Partnership. As Bob Dylan sang, 'You better start swimming or you'll sink like a stone, for the times they are a changing.'

9. We'll Work it Out: Both parties should vigorously negotiate in good faith, but owners must act quickly in the event of a tenant's breach of the lease. Being a "good partner" should not be mistaken for weakness in negotiations.

10. Sign Here, It's Just a "Form" Lease: Contrary to conventional wisdom, savvy tenants understand that there is no single "standard" commercial lease that must be executed. Every lease term can be negotiated at the initial lease inception or at the time of modification.

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A Strategic Partnership is a sophisticated paradigm that provides long-term financial advantages to both owners and tenants so that neither will sink like a stone.

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